

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ABHISHEK KUMAR,
Appellant

CASE NO. G1-19-184

v.

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Abhishek Kumar, pro se

Appearance for Respondent:

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

Commissioner:

Paul M. Stein

DECISION

The Appellant, Abhishek Kumar, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from his bypass by the Massachusetts Department of Correction (DOC) for appointment as Correction Officer (CO-I).¹ A pre-hearing conference was held at the Commission's Boston office on September 24, 2019 and a full hearing was held at the same location on November 13, 2019, which was digitally recorded.² Eleven (11) exhibits (*Exhs 1 through 11*) were received in evidence. A Proposed Decision was received from the DOC on December 19, 2019 but none from the Appellant. For the reasons stated below, Mr. Kumar's appeal is denied.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Jill Lococo, DOC Background Investigator
- Eugene Jalette, Supervising Identification Agent

Called by the Appellant:

- Abhishek Kumar, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Abhishek Kumar, was born in Bihar, India and immigrated to the United States as a young adult, after finishing high school. (*Exh.3; Testimony of Appellant*)

2. After arriving in the United States, Mr. Kumar worked as an Uber driver and as a salesman for three auto dealers. He was terminated from the last dealership in June 2014 after three months of employment for a misunderstanding with a customer. (*Exh.3; Testimony of Appellant*)

3. From January 2015 until the company's local office shut down in August 2018, Mr. Kumar worked as a site surveyor. (*Exh.3*)

4. In September 2018, Mr. Kumar was employed as a parking attendant for a valet parking company assigned to Massachusetts General Hospital. He was terminated from that job in March 2019 after causing a minor accident with a patron's vehicle. (*Exh.3; Testimony of Appellant*)

5. Since March 2019, Mr. Kumar has worked as a construction/maintenance technician for a facility repair company. (*Exh.3; Testimony of Appellant*)

6. Mr. Kumar has served as a water treatment specialist with the U.S. Army National Guard since August 2016. (*Exh.3; Testimony of Appellant*)

7. In July 2014, according to the police report obtained by the DOC, Mr. Kumar called the police to report “having a problem with an unruly child”. According Mr. Kumar and the police report, when police arrived, Mr. Kumar reported that his stepson was being disrespectful and asked the responding officer to speak to his stepson. The officer noticed that Mr. Kumar’s wife was crying, and she told him she “wished that the police had not responded because of a minor argument.” The officer spoke to the stepson who said his mother had left for the weekend and left him with “more responsibilities” and he got into a verbal argument with Mr. Kumar about not doing enough around the house. After noticing that the stepson had a small abrasion on his wrist, the officer arrested Mr. Kumar and initiated criminal proceedings against him. (*Exh.7 [Police Report]; Testimony of Appellant*)

8. The criminal proceedings were dismissed in February 2015, at the request of the Commonwealth, after Mrs. Kumar invoked marital privilege and refused to testify (*Exh.7; Testimony of Appellant*)³

9. On August 30, 2019, on Petition by Mr. Kumar, the Plymouth District Court (Smith, J) entered Findings and Order of Court on Petition to Seal Records under G.L.c.276, §100C. The specific factors found by the court to establish “just cause” to seal the record of Mr. Kumar’s dismissed criminal case, included:

- “The Court takes judicial notice that the existence of a criminal record can present barriers to housing and employment opportunities.”
- “The petitioner has shown meaningful efforts towards rehabilitation, namely . . . lack of further contact with the criminal justice system”
- “The petitioner’s circumstances at the time of the offenses(s) . . .support . . . a likelihood of success in not reoffending”
- “The passage of time since the date of the offense(s) . . . supports . . . good cause for sealing”

³ Although not clearly required to do so by law, the Commission chooses not to disclose the specific nature of the criminal charges against Mr. Kumar as an exercise of prudence.

- “The nature and reason for the disposition of the case . . . supports . . . good cause for sealing”

(Exh.11; Testimony of Appellant)

10. On February 27, 2019 (at 3:22 pm), Mr. Kumar’s wife obtained an ex-parte C.209A restraining order against Mr. Kumar, which required him to vacate and stay away from the marital home. *(Exh.9)*

11. That same day, Mr. Kumar’s wife also filed a Complaint for Divorce in the Plymouth Probate & Family Court. *(Exh.10)*

12. At approximately 5:30 p.m. on February 27, 2019, a Plymouth Police Department officer responded to the Kumar residence to serve the 209A restraining order. After delivering the order in hand and explaining he was required to vacate the residence, Mr. Kumar complied with the order without incident. *(Exh.8)*⁴

13. On March 13, 2019, after hearing, the Plymouth District Court (Stanton, J.) entered the following order: “The Court’s prior Order is terminated. Law enforcement agencies shall destroy all records of such Order.” *(Exh.9)*

14. On September 9, 2019, at the request of Mr. Kumar’s wife, the Complaint for Divorce was dismissed. *(Exh.10)*

15. On October 20, 2018, Mr. Kumar took and passed the civil service examination for Correction Officer and his name was placed on the eligible list established by the Massachusetts Human Resources Division on February 1, 2019. *(Stipulated Facts; HRD Pre-Hearing Submission)*

⁴ After Mr. Kumar’s departure, as stated in his incident report, the police officer spoke to Mr. Kumar’s wife. She recanted the statements she made in her 209A affidavit about Mr. Kumar’s use of force and said “she did not feel that she was assaulted by him” She said she “got a restraining order against Abhishek because she felt they ‘needed a break’.” The incident report was filed with the Notation: “No Crime Committed.” *(Exh.8)*

16. On February 8, 2019, HRD issued Certification #06084 to the DOC for the appointment of 150 Correction Officers. Mr. Kumar's name appeared ranked 61st on the Certification. DOC eventually appointed 147 candidates from the Certification, of which 46 were ranked below Mr. Kumar. (*Stipulated Facts; HRD Pre-Hearing Submission*)

17. Mr. Kumar signed the Certification willing to accept appointment and submitted his standard DOC employment application on or about February 20, 2019. He disclosed on his application his two employment terminations in 2014 and 2019. (*Exhs.3 & 4*)

18. Mr. Kumar's application was assigned to DOC CO-I Lococo to conduct a background investigation. CO Lococo obtained a CJIS report containing a complete record of Mr. Kumar's criminal and driving history which disclosed the 2014 criminal case and zero driving infractions. She attempted to contact all seven of his past employers but was unable to obtain more than dates of employment for most of them. She did not contact his current employer because Mr. Kumar had just started working there in March 2019, they did not know he was looking for another job and he did not want them to be contacted. (*Exh.3; Testimony of Appellant & Lococo*)

19. On April 29, 2019, CO Lococo conducted a home visit and spoke to Mr. Kumar and his wife. They both had concerns about where Mr. Kumar would be assigned, and CO Lococo stated that the DOC tries to place officers close to home, but he could be assigned anywhere in the state. She also discussed the recent Abuse Prevention Order and "they both reported it was just normal family stuff" and "everyone has their issues." CO Lococo found Mr. Kumar's wife "apprehensive" but "supportive of her husband's career choice." (*Exh.3; Testimony of Lococo*)

20. On May 2, 2019, CO Lococo spoke with a squad leader in the Army National Guard unit who knew Mr. Kumar and recommended him for appointment. The squad leader did mention that during the first week of a training exercise, Mr. Kumar did not sleep with the unit on the

base but in his car and had to be counseled about it, but there was never any discipline or other issues with his performance. (*Exh.3; Testimony of Appellant & Lococo*)

21. On May 14, 2019, CO Lococo submitted her background investigative report, noting as “POSITIVE EMPLOYMENT ASPECTS: Applicant is fluent in Hindu, English and Urdu; Applicant is currently in the Army National Guard; Zero negative entries on driving record;” and as “NEGATIVE EMPLOYMENT ASPECTS: Short term Employments.” (*Exh.3*)

22. Mr. Kumar’s application and the background investigation report were presented to a panel consisting of the DOC Commissioner and other senior Command Staff. After review, the panel decided that Mr. Kumar would be bypassed for appointment. (*Testimony of Jalette*)

23. Mr. Jalette could not recall the panel’s specific discussion about Mr. Kumar and he did not know what influenced the Commissioner and staff to give more weight to Mrs. Kumar’s restraining order affidavit than the conflicting reports she provided to the responding police officer. Nor did he recall whether the panel knew that, when the ex-parte order was terminated after hearing two weeks later, the court had specifically ordered: “Law enforcement agencies shall destroy all records of such Order.”. He hypothesized that the fact that the restraining order was so recent, and his criminal record and employment history were within the DOC’s standard five-year look-back period, were probably the most substantial factors in the decision. (*Testimony of Jalette*)

24. By letter dated August 7, 2019 from DOC Deputy Commissioner Preston, Mr. Kumar was informed that he was not selected for appointment for the following reasons:

“Background investigation: Failed background due to your Criminal History Offender Record Information and poor employment history; specifically you were a defendant on a civil restraining order, you were charged with [a crime], you have had 9 jobs (including military) since 2013 and in three of those jobs there were instances of breaking policy.”

(*Exh.1*)

25. This appeal duly ensued. (*Exh.2*)

APPLICABLE CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L.c.31, §1. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259, (2001); MacHenry v. Civil Serv. Comm'n, 40 Mass. App. Ct. 632, 635 (1995), rev.den.,423 Mass.1106 (1996)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates on the applicable civil service eligible list, using what is called the 2n+1 formula. G.L.c. 31, §§6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. In order to deviate from that formula, an appointing authority must provide specific, written reasons – positive or negative, or both, consistent with basic merit principles, to affirmatively justify bypassing a higher ranked candidate in favor of a lower ranked one. G.L.c.31, §27; PAR.08(4)

A person may appeal a bypass decision under G.L.c.31, §2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority had shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position.

Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 474-78 (2019); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003).

“Reasonable justification . . . means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law’ ”. Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211,214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”)

Appointing authorities are vested with discretion in selecting public employees of skill and integrity. The commission “cannot substitute its judgment about a *valid* exercise of *discretion based on merit or policy considerations* by an appointing authority” but, when there are “*overtones of political control or objectives unrelated to merit standards or neutrally applied public policy*,” then the occasion is appropriate for intervention by the commission.” City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (*emphasis added*) However, the governing statute, G.L.c.31,§2(b), also gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action”; it is not necessary for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” Id.

ANALYSIS

The DOC has established that it conducted a reasonably thorough review of Mr. Kumar’s qualifications for appointment as a DOC Correction Officer and that his spotty employment

record and a possible pattern of aggressive behavior over the past five year period provides reasonable justification for the decision to bypass him at this time.

Mr. Kumar has many positive attributes to his credit. He has served for over four years in the Army National Guard, experience that would provide a good measure of his ability to work within a para-military organization as the DOC. He has done a plausible job of explaining most of the troubling episodes in his past. That record, however, contains sufficient evidence to question his present suitability to assume the challenging job of a Correction Officer. Although there seem to be a few bright spots in his employment history, the short term nature of his employment in many of his jobs, the fact that he had just started a new job and had no track record that DOC could verify, and the two disciplinary actions that he has accumulated (most recently in 2019 when he was just starting the DOC application process) are of legitimate concern. Similarly, the DOC was justified to take account of a sufficiently recent history of aggressive behavior that is clearly inappropriate behavior in a Correction Officer..

I am not convinced, however, that the 2019 restraining order, standing alone, provides reasonable justification to support the conclusion that Mr. Kumar is a risk for domestic violence – which, if true, is clearly within the DOC’s purview as a domestic violence “zero tolerance” agency. DOC was unable to explain how it relied on the affidavit from Mr. Kumar’s wife without taking account of the conflicting information she reported to the responding police officer. I also find that the DOC did not consider that the ex-parte restraining order was terminated “after hearing” and with an explicit court order that “Law enforcement agencies shall destroy all records of such Order.”⁵ I do not need to address whether this Order must be

⁵ Although the c.209A restraining order is a civil record, the judicial disposition requiring destruction of all records of the order, seems analogous to the process of “expungement” of a criminal record, now applicable to most juvenile records and certain other matters (e.g., cases of mistaken identity and offenses that are no longer criminal) which mandates “the permanent erasure or destruction” of judicial and all other related records as well, including police

interpreted to bar any consideration of the restraining order, as I have concluded that the 2014 criminal incident and his 2014 through 2019 employment records are sufficient to justify this bypass, but it would need to be addressed explicitly were the restraining order be used by the DOC in any future bypass of Mr. Kumar.

Similarly, I do not expect that the flaws in his criminal and employment history that have blocked Mr. Kumar from appointment in 2019, are necessarily permanent impediments to his successful pursuit of a career as a correction officer in the future. The DOC correctly points out that the criminal record was not sealed at the time of the bypass, and even if it had been sealed, that would not preclude DOC “as a criminal justice agency” from considering that record and the underlying misconduct established through independent means in making its employment decisions; nor would it preclude the DOC from offering that evidence (including the record of a 100C dismissed case) in this proceeding. E.g., Golden v. Department of Correction, 33 MCSR 194 (2020) and Kodhimaj v. Department of Correction, 32 MCSR 377 (2019). The fact that a sealed record may be accessed by the DOC, however, still requires DOC to provide a candidate with advance notice and opportunity to explain the criminal history and to justify why the criminal record is disqualifying. Id. See also, St. Germain v. MBTA, 33 MCSR 187 (2020); St. Germain v. Brockton, 33 MCSR 211 (2020). In the future, I would urge DOC to heed these requirements and to take a closer look at the underlying circumstances of any sealed record, as well the finding of the Court in deciding that the case should be sealed, specifically, here, judicial findings about the circumstances of the case, the disposition (dismissal at the request of the Commonwealth) and that Mr. Kumar is not at risk for future similar offending behavior.

logs, “so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency. If the record contains information on a person other than the petitioner, it may be maintained with all identifying information of the petitioner permanently obliterated or erased.” See G.L.c.276, §100E et. seq., added by St.2018 c 69, §195, eff. Oct. 13, 2018.

In sum, at the time DOC decided to bypass Mr. Kumar, his past criminal history and spotty employment record falls within the traditional five-year look back period that DOC has applied to most candidates. Should Mr. Kumar seek appointment as a Correction Officer in the future, after establishing a suitable record of steady current employment, a continued unblemished criminal record and a stable family life, he may be in a better position to be offered appointment.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Abhishek Kumar, CSC No. G1-19-184, is ***denied***.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 5, 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:

Abhishek Kumar (Appellant)

Norman Chalupka, Esq. (for Respondent)

Patrick Butler, Esq. (HRD)

Regina Caggiano (HRD)