

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**ROSS LaPOINTE,**  
*Appellant*

v.

**Case No.: G1-13-180**

**DEPARTMENT OF  
CORRECTION,**  
*Respondent*

**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).

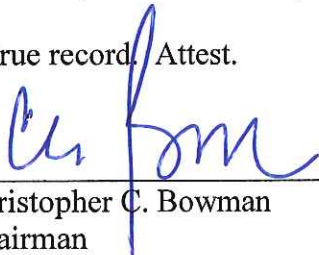
Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

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. LaPointe for appointment as a Correction Officer I is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on February 6, 2014.

A true record. Attest.

  
\_\_\_\_\_  
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)(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.

Notice to:

David A. LaPointe, Esq. (for Appellant)

Jeffery S. Bolger (for Respondent)

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



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

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December 19, 2013

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108

**Re: Ross LaPointe v. Department of Correction**  
**DALA Docket No. CS-13-526**  
**CSC Docket No. G1-13-180**

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CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections.

Sincerely,

  
Richard C. Heidlage  
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: David A. LaPointe, Esq.  
Jeffrey S. Bolger

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

**Division of Administrative Law Appeals**

**Ross LaPointe,**  
Appellant  
v.

Docket No. G1-13-180  
DALA Number CS-13-526

**Department of Correction,**  
Appointing Authority

**Appearance for Appellant:**

David A. LaPointe, Esq.  
49 Central Street  
Winchendon, MA 01475

**Appearance for Appointing Authority:**

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

**Administrative Magistrate:**

James P. Rooney

**Summary of Decision**

The Department of Correction had reasonable justification to bypass appellant for appointment to the position of Correction Officer I because he had recently been placed on probation for negligent operation of a motor vehicle.

**RECOMMENDED FINAL DECISION**

**Introduction**

The Petitioner, Ross LaPointe, timely appealed under M.G.L. c. 31, § 2(b) the July 1, 2013 decision of the Department of Correction to bypass him for appointment as a Correction Officer I based on his criminal history and poor driving record. I held a hearing on October 25, 2013 at the Division of Administrative Law Appeals and recorded the hearing digitally.

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I accepted thirteen documents into evidence, nine from the Department and four from Mr. LaPointe. James O'Gara, a personnel officer with the Department of Correction, testified for the Department; Mr. LaPointe testified for himself.

### **Findings of Fact**

Based on the testimony, exhibits, and reasonable inferences from them, I make the following findings of fact:

1. Ross LaPointe, who is 23 years old, applied in February 2013 for a position as a Correction Officer I with the Department of Correction. (LaPointe and O'Gara Testimony; Dept. Ex. 8). He signed the Certification No. 00415 on February 12, 2013 stating his willingness to accept employment as a correction officer. (Stipulation). His Civil Service Test score was 90, ranking him 50th among those willing to accept employment as a correction officer. (Stipulation).
2. The Department performed a background check on the Mr. LaPointe and other applicants. (O'Gara testimony, Dept. Exs. 5-7, 9). This background check, called a Criminal Justice Information System (CJIS) check, encompasses any criminal history an applicant may have, as well as his driving record. (O'Gara testimony).
3. On July 1, 2013, the Department informed Mr. LaPointe that he would not be considered for appointment to the June 2013 Department of Correction Academy because he had a:

Negative Criminal History – Failed CJIS – Possession of a class A substance NH 11/18/09, operating motor vehicle negligently 10/26/10.

(Dept. Ex. 2).

4. The Department bypassed Mr. LaPointe based solely on information it gathered from the background check. It provided no opportunity for Mr. LaPointe to explain his criminal history or driving record. (O'Gara Testimony).
5. The Department looks at the last five years of an applicant's history, but also looks at the applicant's total record for a complete picture to determine if there is a pattern of poor judgment or behavior. The Department does not hire applicants who have been on supervised probation in the previous five years because it regards a recent probation as evidence of a lack of good judgment. (O'Gara testimony).
6. The Department's background check of Mr. La Pointe revealed the following criminal history, which the Department considered in bypassing him:
  - a. In 2009, he was arrested in New Hampshire for misdemeanor possession of a Class A Substance (marijuana). The charge resulted in a nolle prosequi. (Dept. Ex. 7).
  - b. In August 2010, he was arraigned on charges of operating a motor vehicle under the influence of alcohol and operating a vehicle negligently. On October 26, 2010, he was found not guilty of operating under the influence of alcohol. The charge of operating a vehicle negligently was continued without a finding, Mr. LaPointe was ordered to pay a \$250 fine, and he was placed on supervised probation. The Department understood this to be administrative probation and assumed this disposition was part of a plea bargain. (O'Gara Testimony, Dept. Ex. 5.)
7. The background check also revealed several speeding and other traffic violations in 2007, 2008, 2010, 2011, and 2012. The Department considered the 2011 and 2012



speeding tickets in its decision to bypass Mr. LaPointe. (O'Gara Testimony; Dept. Ex. 9).

8. After reviewing Mr. LaPointe's criminal history and driving history, the Department's major concern was the probation within one year and six months of the potential appointment. (O'Gara Testimony).

9. Mr. LaPointe offered the following explanations of his criminal and driving history:

a. In 2009, Mr. LaPointe, who had recently graduating from high school, was one of 60 people attending a party on a beach in New Hampshire. The local police broke up the party and towed twelve cars. The police searched the trunk of Mr. LaPointe's car and found eleven Budweiser cans, which his friends had stored in the trunk, and a marijuana pipe inside a tackle box. The pipe was Mr. LaPointe's. He had previously stopped smoking marijuana, but had never removed the pipe from his car. Marijuana residue in the pipe was the basis for the drug possession charge. He paid a fine for the beer cans; local authorities dropped the drug possession charge. (LaPointe testimony; LaPointe Exs. 1 and 2).

b. In 2010, Mr. La Pointe lost control of his car while going around a corner. The car skidded off the road and rolled over. He was charged with operating under the influence of alcohol, negligent operation of a motor vehicle, a marked lanes violation, and speeding. After a bench trial, he was found not guilty of drunk driving. The prosecution dismissed the speeding and lanes violation charges. He admitted to sufficient facts as to the charge of negligently operating a motor vehicle, was placed on probation, and was

required to take a safe driving class. He was never actually required to report to the Probation Department. (LaPointe Testimony; LaPointe Exs. 3 and 4).

### Discussion

An appointing authority has broad discretion in “selecting public employees of skill and integrity” and, as a result, the Civil Service Commission cannot “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by the appointing authority.” *City of Cambridge v. Civ. Serv. Comm’n*, 43 Mass. App. Ct. 300, 304-305, 682 N.E.2d 923, 926 (1997). If a bypass decision shows “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the [Civil Service] commission” or DALA. 43 Mass. App. Ct. at 304, 682 N.E.2d at 926. But “[t]he 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....” *Town of Falmouth v. Civ. Serv. Comm’n*, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735, 738-39 (2004) (internal citations and quotations omitted).

When an applicant appeals an appointing authority’s decision to bypass him for a position, the appointing authority must show a “reasonable justification” for its decision. *City of Cambridge*, 43 Mass. App. Ct. at 303, 682 N.E.2d at 925. “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 by correct rules of law.” 43 Mass. App. Ct. at 304, 682 N.E.2d at 926 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482, 160 N.E. 427, 430 (1928)). If an appointing authority presents purported justifications for the bypass, the 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).

The Department of Correction may consider an applicant's arrest and driving record as a basis for determining whether the applicant should be bypassed. *Manca v. Dep't of Correction*, 25 MCSR 525, 527 (2012) (bypassed applicant had a recent probation for operating under the influence and had recently had his driving license suspended because of multiple arrests for speeding); *see also Anderson v. Dep't of Correction*, 21 MCSR 647 (2008) (Commission rejected bypass of candidate based on criminal history report when Department did not explain of what aspect of the report made the candidate unsuitable), *rev'd, Dept. of Correction v. Anderson*, Civil Action No. 09-0290, Suff. Sup. Ct. (Feb. 5, 2010) (Superior Court ruled that Department had the discretion to bypass a candidate based solely on her criminal record, particularly if it showed reckless behavior or a lack of self-control, without the need to examine the underlying circumstances of each offense). The Department may bypass a candidate based on his criminal record, even if he was never convicted. *Preece v. Dep't of Correction*, 20 MCSR 152 (2007) (applicant had been acquitted of second degree murder, but bypass was justified based on a police report showing he had a propensity for violence and use of racial epithets).

The Department based its decision to bypass Mr. LaPointe on his one arrest for drug possession and his probation for negligent operation of a motor vehicle.<sup>1</sup> Mr. LaPointe's

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<sup>1</sup> At the hearing, the Department also asserted that it considered Mr. LaPointe's most recent speeding tickets – those occurring after his car accident – in making its decision. In defending its decisions, an appointing authority may rely only on the "reasons specified" when it took an action. *Murray v. Justices of Second Dist. Court*, 389 Mass. 508, 516, 451 N.E.2d 408, 412 (1983). I reject the Department's contention that the references in its letter to Mr. LaPointe that it was bypassing him because of his "negative criminal history" adequately informed him

explanation of these incidents reveals that the drug possession was a matter of teenage hijinks rather than a more serious offense and that negligent operation of a vehicle was a single-car accident. However, Mr. LaPointe was placed on probation in connection with the driving accident. The Department's policy is to reject candidates if their background check reveals recent instances of probation. It is not unreasonable for the Department to believe that a recent probation may demonstrate poor judgment on the part of a candidate. Mr. LaPointe has not shown that the reasons offered by the Department were untrue, apply equally to any of the candidates selected, or were a pretext for other, impermissible reasons.<sup>2</sup>

I therefore conclude that the Department of Correction has demonstrated that it was justified in bypassing Ross LaPointe for the position of Correction Officer I, based on his criminal history and poor driving history. I recommend that the Civil Service Commission

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that his speeding tickets were one of the grounds for his bypass.

The Civil Service Commission has urged the Department of Correction, as recently as last year, to eschew such broad statements of reasons for bypass. It declared that the Department:

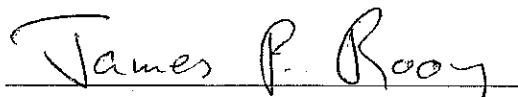
should provide the more detailed explanation for the bypass as part of the bypass letter, as opposed to waiting until an Appellant files an appeal with the Commission. This would provide all candidates with a clear, understandable explanation of the reasons for bypass, and better inform their decision about whether to file an appeal with the Commission.

*Manca*, 25 MCSR at 526. Here, the Department's letter to Mr. LaPointe did not rely solely on the vague statement that he had a "negative criminal history." It spelled out two charges that his criminal history revealed (drug possession and negligent operation of a motor vehicle). Read together, the reasonable reading of the Department's explanation was that the negative criminal history on which it relied was limited to those two charges. If it had wanted to rely on the speeding tickets as well, it should have listed them.

<sup>2</sup> I note that the Department did not assert that Mr. Lapointe's driving record or criminal history would necessarily be a permanent bar to his being considered for appointment as a correction officer. Because the Department looks primarily at the last five years of a criminal history, and the last arrest it considered in evaluating Mr. LaPointe was in 2010, he may, in the near future, have a better opportunity to be considered for a position as a correction officer, particularly if he refrains from actions that lead to more speeding tickets.

affirm the Department of Correction's decision to bypass Mr. LaPointe for the position of  
Correction Officer.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script that reads "James P. Rooney". The signature is written in dark ink and is positioned above a horizontal line.

James P. Rooney

First Administrative Magistrate

Dated:

**DEC 19 2013**