

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
(617) 727-2293

PATRICK LECORPS,
Appellant

v.

G1-12-207

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Patrick Lecorps
Pro Se

Appearance for Respondent:

Earl Wilson
Director of Employee Relations
Department of Correction
Industries Drive
P.O. Box 946
Norfolk, MA 02056

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Patrick Lecorps (hereinafter “Mr. Lecorps” or “the Appellant”), filed an appeal on July 3, 2012, regarding the decision of the Department of Correction (hereinafter “DOC” or “Appointing Authority”) to bypass him for original appointment to the position of Correction Officer I. The Appellant filed a timely appeal. A pre-hearing conference was held on July 31, 2012 and a full hearing was held on September 28, 2012 at the offices of the Civil Service Commission (hereinafter

¹ The Commission acknowledges the assistance of Law Clerk Amanda Belanger in the drafting of this decision.

“Commission”). The hearing was digitally recorded. The DOC submitted a post-hearing brief and the Appellant submitted a brief electronic mail message in this regard.

FINDINGS OF FACT

Seven (7) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of²:

For the Appointing Authority:

- James O’Gara, Personnel Officer II, Human Resources, Department of Correction;

For the Appellant:

- Patrick Lecorps, Appellant;

and taking administrative notice of all matters filed in the case as well as pertinent statutes, case law, regulations and policies³; and drawing reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

1. The Appellant is a thirty-three (33) year old resident of Brockton, Massachusetts.
2. The Appellant’s name appeared on Certification No. 4012004 to the DOC for the position of Correction Officer I. After receiving notification from the DOC, the Appellant signed the list indicating his willingness to accept appointment. The Appellant completed the background waiver. (*Exhibit 3*)
3. The Appellant passed a “CORI” background review. He also passed the required Physical Abilities Test and the in-person interview. As part of the DOC’s standard procedures, a full-background investigation was conducted on the Appellant. After passing the full-background investigation, DOC extended an offer of employment to the

² There were no witnesses at the Commission hearing who testified about how the Appellant’s hair sample was taken, how the test is performed, and the validity of the hair drug test.

³ The Commission ordered the DOC to produce 103 DOC 201, its Selection and Hiring policy, which it did. Therefore, Administrative Notice includes this policy.

Appellant conditioned on his passing a physical examination, a Physical Abilities Test (“PAT”), as well as drug and psychological screenings. (*Testimony of O’Gara, Exhibit 4, and 103 DOC 201 (at 201.05(8)(5))*)

4. The Appellant was instructed to report to AllOne Health Resources (“AOHR”) for the drug screening on May 1, 2012. Psychemedics is the company that performs hair drug tests for AOHR. (*Exhibit 4⁴*)
5. The Appellant provided a urine and hair sample for the May 1, 2012 drug examination. DOC has used this two-test method for pre-employment purposes at pertinent times. DOC includes a hair sample drug test, in addition to a urine test, because it believes that the hair sample will detect drugs that have been in the body for a longer period of time than the urine test. (*Testimony of O’Gara*)
6. The Appellant’s urine test result was negative and did not reflect the use of unlawful drugs. The Appellant’s hair drug test result stated only that it was positive for marijuana. Dr. Brian Morris signed the AOHR Drug Screen Results form as Medical Review Officer. (*Exhibits 5 and 6*)
7. The Appellant passed the psychological screening. (*Testimony of Patrick Lecorps*)
8. On or about May 14, 2012, AOHR contacted DOC by telephone and electronic mail, providing the Appellant’s positive drug test results. The Appellant received telephone notification from AOHR about his positive hair drug test result but the date AOHR called him is unknown. (*Testimony of O’Gara and Appellant*)

⁴ Exhibit 4 states that a health questionnaire for the candidate and his/her physician to complete is attached to the letter but it was not included with the document submitted at the hearing.

9. DOC's practice is to disqualify candidates who have a positive drug test result⁵. There is no re-test for drug testing for pre-employment, although there is for DOC employees.

(Testimony of O'Gara)

10. On or about June 21, 2012, DOC sent the Appellant a letter stating that he had not been selected for employment due to his failed drug test. *(Exhibit 2)*

11. Through AOHR, the Appellant arranged for another hair drug test, which was also performed at Psychemedics. The Appellant's hair sample was collected on or about July 16, 2012. On July 20, 2012, AOHR indicated that the Appellant's hair sample tested negative for unlawful drugs. Dr. Jerry Berke signed the AOHR Drug Screen Results form as Medical Review Officer. *(Exhibit 7)*

DISCUSSION

Applicable Law

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the

⁵ DOC does not have specific standards or cut-off levels for their drugs tests. DOC does not consider the amount of drugs that were in a candidate's system and solely bases their decision to disqualify a candidate on a "positive" or "negative" drug test.

evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315 (1991). G.L. c. 31, § 43.

Appointing authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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, 43 Mass.App.Ct. at 304.

The Respondent’s Argument

DOC argues that the Appellant’s hair sample tested positive for marijuana and therefore he is disqualified from further consideration for employment as a Correction Officer. Further, DOC argues that its established policy explicitly states that candidates will be bypassed for appointment if they fail the drug screening.

The Appellant’s Argument

The Appellant argues that he did not willingly use marijuana and that he innocently ingested pastries that contained marijuana at a party in February or March of 2012. Furthermore,

his urine sample tested negative. The Appellant also avers that he does not consume alcohol or take drugs, although he acknowledged using marijuana in high school. In addition, after receiving the DOC disqualification letter on or about June 21, 2012, the Appellant took another hair drug test and the results were negative. (*Exhibit 7*)

Analysis

A preponderance of the evidence indicates that DOC had reasonable justification to bypass the Appellant for appointment to the position of Correction Officer I. The Appellant contends that he innocently ingested marijuana when he ate pastries at a party in February or March 2012. Although the Appellant disputed the positive marijuana test results at the Commission hearing, it is simply not credible that he ingested marijuana without knowing it. In addition, he testified that he found out about the marijuana in the pastries a few days after the party. Therefore, at the time the Appellant tested at AOHR in May, 2012, he was well aware that he had reportedly ingested marijuana previously. If he had sincere concerns about having innocently ingested marijuana he would have disclosed it at the time of the test. Instead, he did not report it until he received the drug test results. One of the reasons DOC gave for using both a urine test and a hair test to determine if candidates have ingested illegal drugs is that the latter can detect illegal drugs longer than the former. Thus, there is no inherent inconsistency between a negative urine test and a positive hair trust. Rather, it appears that the hair test was able to measure drug ingestion further back in time than the urine test.

The Appellant subsequently tested himself for drugs (using the same drug-testing company as DOC) and the test results were negative. However, the Appellant did not take the repeat test until nearly one month after he was disqualified from DOC employment, which was approximately four months after he ingested marijuana at the party and possibly too late to detect

the drug. Moreover, the point in time at issue here is the time that the Appointing Authority required the Appellant to take the test, not when the Appellant wanted to take the test. For these reasons, the Appellant's assertions are not credible and a preponderance of the evidence supports the Appointing Authority's decision to bypass him.

Although the Commission finds that DOC had reasonable justification for bypassing the Appellant in this case, going forward there are a number of issues regarding DOC's continued use of the hair drug test for pre-employment purposes that need to be addressed in view of the Commission's ruling in the Boston Police Department Drug Testing Appeals (Docket No. D-01-1409, *et al*, February 28, 2013)(“BPD Drug Test Appeals”), which was decided after the full hearing in the instant case. In the BPD Drug Test Appeals, the appellants challenged hair drug test results indicating that they used cocaine, based upon which the appointing authority disciplined the appellants. In deciding those appeals, a variety of factors were determined to affect the hair test's accuracy and levels of the drugs found in an individual's system, including, without limitation, the type, length, and location of the hair sampled for testing, the reliability of the testing process itself, and the standard used to determine the existence of illegal drugs. In those discipline cases, the positive drug test results were presumed accurate unless the Appellant presented credible evidence to refute a positive test result. It has been established that public employers have greater discretion in hiring decisions than they do in disciplinary matters generally speaking. However, if appointing authorities are to base bypass decisions on hair drug test results, they need to address the applicable factors identified in the BPD Drug Test Appeals and provide appropriate evidence in support thereof. Upon establishing such proof, appointing authorities will have established reasonable justification for their bypass decisions.

Bypass appellants may challenge the veracity of hair drug testing generally or with regard to the testing of their hair sample specifically but, as in the ruling in the BPD Drug Test Appeals, a “brownie defense” will not undermine the appointing authority’s reasonable justification based on an adequately supported hair drug test result.

The DOC’s written Selection and Hiring Policy clearly states that a candidate’s failure of any of several screenings, including the drug test, will result in a candidate’s bypass for appointment. However, the DOC has not addressed the factors found in the Ruling in the BPD Drug Test Appeals to affect the accuracy of the test. For example, DOC has not established a standard for the amount of a drug detected in a drug test that constitutes a positive test result in either a urine or hair sample. Neither does DOC utilize a re-test or “safety-net” test when a pre-employment test result is positive. Moreover, the Ruling states that marijuana is not absorbed into hair similarly to cocaine and, therefore, a hair drug test for marijuana may be ineffective, or at least less effective, at detection than a hair drug test for cocaine. Thus, DOC’s use of “positive” and “negative” drug test results, without more, are not wholly adequate indicators of drug use.

CONCLUSION

For the above reasons, the Appellant’s appeal under Docket No. G1-12-207 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners on December 19, 2013.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:

Patrick Lecorps (Appellant)
Earl Wilson, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)