

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503

Boston, MA 02108

(617) 979-1900

JOSEPH M¹.,
Appellant

v.

G1-19-068

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Joseph M.

Appearance for Respondent:

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

Commissioner:

Cynthia A. Ittleman
Christopher C. Bowman²

SUMMARY OF DECISION

DOC had reasonable justification to bypass the Appellant for appointment as a Correction

Officer I (CO I) based on: two poor references, including one from a longtime family friend; and

¹ Although this Decision does not turn entirely on criminal offender record information (CORI), because a judge ordered some of the CORI mentioned herein to be sealed, the Commission elects not to use the Appellant's full last name in publishing this Decision.

² Commissioner Ittleman conducted the hearing in this matter, but she subsequently retired from the Commission prior to finalizing this decision. The case was subsequently re-assigned to Commissioner Bowman who reviewed the entire record, including a written transcript of the hearing; all exhibits; briefs and all other relevant documents before authoring the decision.

prior alleged misconduct which, at a minimum, calls into question whether the Appellant has the maturity and good judgement at this time to serve as a CO I.

DECISION

On March 21, 2019, the Appellant, Joseph M. (Appellant), pursuant to G.L. c. 31, § 2(b), appealed to the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to bypass him for original appointment to the position of permanent, full-time Correction Officer I (CO I). On April 16, 2019, I held a pre-hearing conference at the offices of the Commission. A full hearing was held at the same location by Commissioner Ittleman on May 21, 2019.³ The full hearing was digitally recorded and both parties received a copy of the recording.⁴

FINDINGS OF FACT

DOC submitted nine (9) exhibits at the hearing and five (5) exhibits post-hearing. The Appellant submitted two (2) post-hearing exhibits at the request of the Commission. Based upon the evidence and the testimony of the following witnesses:

For DOC:

- Eugene Jalette, Supervising Investigatory Agent; DOC;

For the Appellant:

- Joseph M., Appellant;

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

⁴The Commission subsequently had a written transcript of the hearing prepared.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. The Appellant graduated from high school in 2014. At the time of the full hearing, he had worked in loss prevention at a department store from October 2013 to January 2015; at a landscaping company for four (4) months from April 2016 to August 2016; as a security guard at a security company from October 2016 to October 2017; and was currently working at a food establishment since August 2017. (Resp. Ex 5).
2. On April 14, 2018, the Appellant took the civil service examination for CO I. (Stipulated Fact).
3. On or about June 8, 2018, the state's Human Resource Division (HRD) established a list of eligible candidates for CO I. (Stipulated Fact).
4. On October 22, 2018, HRD sent Certification No. 05868 to DOC, from which DOC appointed 160 candidates to CO I, five of whom were ranked below the Appellant. (Stipulated Facts).
5. All candidates are required to complete an application and undergo a background investigation conducted by an investigator from DOC. (Testimony of Jalette).
6. Before the investigation into his background began, DOC mailed a *Background Information Request and Waiver* to the Appellant, which he completed, signed, and submitted on or about November 1, 2018. The Appellant's signature acknowledged that he understood that DOC "will conduct a background investigation which will include a check with any past employers, a criminal records' check with the local police department, the State Police... the

Massachusetts Board of Probation, Registry of Motor Vehicles and interviews with any character references...”. (Resp. Ex. 7).

7. On or about November 27, 2018, DOC sent the Appellant a *CORI Notification Letter*, advising him that DOC had reviewed his criminal offender record information (“CORI”) from the Massachusetts Department of Criminal Justice Information Services (“CJIS”). Within the two-page document, DOC informed the Appellant that, based on their review, DOC may be inclined to make an adverse decision regarding his application for employment. DOC enclosed copies of the Appellant’s specific CORI report and information concerning the process for correcting a CORI. DOC also advised the Appellant that he had the right to dispute the accuracy of his CORI and advised him to contact Mr. Eugene Jalette at DOC within five (5) days should he wish to do so. (Resp. Ex. 6; Testimony of Jalette).
8. There is no indication that DOC received any communication from the Appellant after receipt of this *CORI Notification Letter* to contest the contents of his CORI. (Testimony of Jalette; Resp. Ex. 6).
9. Investigator Danny Ortiz was assigned to undertake DOC’s background investigation of the Appellant. (Testimony of Jalette; Resp. Ex. 4).
10. The process undertaken by all DOC background investigators includes such tasks as running the applicant’s criminal history, interviewing personal references, interviewing past employers, conducting a home visit, etc. A criminal history check is often utilized to determine if a particular candidate has the requisite suitability and character required of a correction officer. (Testimony of Jalette).

11. When an applicant's criminal history reveals evidence of past alleged criminal behavior, DOC obtains and reviews relevant documents, including any police reports or court dockets. (Testimony of Jalette).
12. The Appellant submitted his completed *Department of Correction Application for Employment* to DOC on or about November 29, 2018. (Testimony of Jalette; Resp. Ex. 5).
13. On January 2, 2019, Investigator Ortiz conducted a home visit/interview with the Appellant at his home where he lived with his mother, stepfather, siblings and grandparents. During the interview, the Appellant discussed his former employment with the security company and his reasons for leaving. He appeared enthusiastic to Investigator Ortiz about the prospects of a job with DOC. (Resp. Ex. 4).
14. On January 9, 2019, Investigator Ortiz reported the findings of his background investigation to his supervisor, Eugene Jalette ("Mr. Jalette"). (Testimony of Jalette; Resp. Ex. 4).
15. For the past seven (7) years, Mr. Jalette has been the Supervising Investigative Agent for DOC. His responsibilities include overseeing and completing background investigations for all potential employees. There are typically nine or ten background investigators at a time and all report to Mr. Jalette. (Testimony of Jalette).
16. Mr. Jalette began his law enforcement career in 1990 as a police officer with the Woonsocket Police Department, where he ultimately earned the rank of lieutenant detective. Upon leaving the Woonsocket Police Department, Mr. Jalette took a position with DOC and has been employed by DOC since 2013. (Testimony of Jalette).
17. Mr. Jalette and Mr. Ortiz discussed the Appellant's background, following Mr. Ortiz's investigation. Mr. Ortiz presented his investigative report to Mr. Jalette for his review and they discussed certain aspects of his history which were "red flags", including two (2)

negative references and his sealed criminal history, which is outlined in two (2) 2016 Fitchburg Police reports obtained by Mr. Ortiz and referenced in the Appellant's CORI. (Testimony of Jalette).

Negative References

18. Mr. Ortiz interviewed the president of the security company (Mr. S) where the Appellant had been employed. During his conversation with Mr. S, who is a former correction officer himself, Mr. S indicated that he did not recommend the Appellant for employment with DOC. Mr. S stated that the Appellant had numerous no call/no shows and was too "immature" for the job. He stated further that he didn't believe that the Appellant would handle himself well in stressful situations. (Resp. Ex. 4; Testimony of Jalette).
19. The Appellant also received a negative reference from a former supervisor (Mr. N) at the security company who the Appellant had listed as a professional reference. (Testimony of Jalette; Resp. Ex. 4).
20. The Appellant has known Mr. N his entire life, through the Appellant's mother. (Testimony of Appellant) On January 9, 2019, Mr. Ortiz called Mr. N to discuss the Appellant. Mr. N initially indicated at the beginning of the call that he did not want to speak with Mr. Ortiz regarding the Appellant's past job performance and told him to speak with the security company's main office. Mr. Ortiz then explained that the Appellant actually chose to list Mr. N as a reference. With that explanation, Mr. N was willing to answer a few questions. (Testimony of Jalette; Resp. Ex. 4).
21. Mr. N stated that he had known the Appellant for all of the Appellant's life through the candidate's mother. When asked if he considered the Appellant a dependable person, Mr. N indicated, "I can't answer that question. I don't really know him like that." When asked if he

thought the applicant could handle himself in stressful situations, Mr. N responded, “maybe.” He then said that the Appellant is a “good kid” but that he does not really know much about him. (Resp. Ex. 4; Testimony of Jalette).

Past Criminal History

22. After reviewing the Appellant’s sealed criminal history, Mr. Ortiz obtained the underlying police reports from the Fitchburg Police Department. (Testimony of Jalette; Resp. Ex. 8 and 9).
23. The police reports, dated April 22, 2016, indicate that officers were on patrol that day when they noticed a male (not the Appellant) exit a vehicle prior to the vehicle coming to a complete stop. The officers noticed the male walking hurriedly and nervously up and down the street while on his cell phone. The male then walked up a nearby street and approached a Jeep that stopped in the middle of the narrow street. Once he approached the driver’s side door, the officers observed the male reach into the window with his hand. Based on the officers’ training and experience, they believed they were observing the male party purchasing illegal narcotics. (Resp. Ex. 9).
24. The officers pulled the Jeep over and approached the driver, who was Mr. M.. The officer asked Mr. M. if there was anything in the vehicle that the officer should know about and Mr. M. said, “no.” The officer asked to search the vehicle and Mr. M. asked, “why?” The officer asked again if there was anything in the vehicle she should know about, stating that this was not her first day on the job and she suspected he had drugs. The police report indicates that the Appellant told the officers that he had some “pot”. The report indicates that the Appellant then attempted to show the officer where it was by opening the back door. Once inside the vehicle, the officer noted that she found a black nylon bag that contained a glass mason jar

with a large amount of marijuana that was in separate baggies (one large/one small), a digital scale and a stun gun. In the back seat of the Appellant's Jeep next to the black bag, the officer found a box of plastic baggies. (Resp. Ex. 9).

25. The Appellant was then placed under arrest by the Fitchburg Police and transported to the station. Once there, the officers noted that the Appellant had a large amount of cash wrapped with rubber bands on his person. The money was folded in three (3) separate stacks. (Resp. Ex. 9).

26. An inventory search of the vehicle was done following the arrest of the Appellant and the officers found another glass mason jar on the floor in the back of the vehicle, inside a McDonald's bag. Inside the jar was one small baggie containing marijuana. Additionally, another individually wrapped bag of marijuana was found in the middle console along with three (3) cell phones. The officers indicate that two (2) cell phones (an Apple cell phone and a Samsung Galaxy S7) continuously rang over a dozen plus times and a black cell/flip phone (Samsung) received numerous text messages. The total amount of marijuana found in the Appellant's possession was more than the amount a person was legally allowed to possess at the time. (Resp. Ex. 9).

27. The Appellant was charged with three (3) felonies, to include (1) Possession with Intent to Distribute a Class D Substance, (2) Possession of an Electric Stun Gun, and (3) Possession of a Class D Drug. (Resp. Ex. 8 and 9). All criminal charges were subsequently dismissed and the Appellant's criminal record was sealed.⁵ (Testimony of Appellant; Resp. Ex. 8).

⁵ The court docket was not entered into evidence at the hearing of this appeal. The Commission ordered the Appellant to produce the docket post-hearing. The Appellant indicated in an email that he was unable to obtain the docket from the clerk at the court since his record had been sealed.

Decision to Bypass

28. Commissioner Carol Mici was the Appointing Authority for DOC at the time of this bypass.

(Testimony of Jalette).

29. Mr. Jalette presented Mr. Ortiz's findings to Commissioner Mici and the Assistant Deputy

Commissioner of Human Resources, Kelly Correia. He presented the Appellant's entire

hiring folder, including Mr. Ortiz's investigative report. The three (3) met in the

Commissioner's office whereupon Commissioner Mici made the decision to bypass the

Appellant based on the alleged misconduct referenced in the police reports and the negative

references. (Testimony of Jalette).

30. DOC notified the Appellant of the reasons for bypass after which the Appellant filed a timely

appeal with the Commission. (Resp. Exs. 1 and 2).

Legal Standard

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).

Original and promotional appointments of civil service employees are made from a list of candidates, called a "certification", wherein names are ranked in the order in which they appear 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. An appointing

authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for 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 has 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. 461, 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, 243 (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”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, *rev. den.*, 428 Mass. 1102 (1997). 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.” *Id.* (*emphasis added*). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Analysis

As a preliminary matter, DOC, as a criminal justice agency reviewing the application of a candidate for correction officer, is permitted to review and consider the Appellant’s sealed criminal record. As stated in Kodhimaj v. Dep’t of Correction, 32 MCSR 377 (2019), “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...”.

The Legislature has explicitly provided criminal justice agencies with the ability to: “obtain” and “use as necessary” sealed criminal records for the “actual performance of their criminal justice duties.” G.L. c. 6, § 172; G.L. c. 276, § 100. DOC is a “criminal justice agency” and the appointment of correction officers, who must provide care and custody of criminal offenders, is among the criminal justice duties that DOC must perform. 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 record information, including sealed records. Finally, it would be nonsensical and inconsistent with the above referenced statutes to prohibit the DOC from entering the sealed criminal record into evidence before the Commission.

Importantly, DOC did not rely solely on the CORI reports, but, rather, obtained the underlying police reports from the Fitchburg Police Department⁶ which provided detailed accounts of what the police officers observed after they stopped the Appellant's vehicle, including the observation of a box of clear plastic baggies, individually packaged plastic baggies containing marijuana, \$647 in cash on the Appellant's person that had been separated into three (3) separate stacks banded by separate rubber bands, a small electric scale, three cell phones, and an electric stun gun in the car. While it appears that the DOC investigator, as part of the home interview, did not raise the issue of the alleged criminal conduct and/or give the Appellant the opportunity to address it at that time, DOC did contact the Appellant via letter in this regard. That correspondence put the Appellant on notice that DOC had reviewed his CORI and informed him that DOC may be inclined to make an adverse decision based on the information obtained *and* that he had the right to dispute the accuracy of the information, which he did not. While this is not the most effective way to provide the Appellant with the opportunity to address the criminal records in possession of DOC, it appears from the Appellant's testimony that he does not dispute some of the most salient points in those police reports.

The Appellant acknowledges that he was the driver of the vehicle and that someone approached the driver's side, that he was in possession of marijuana, that he had three (3) cell phones in the car, and that he was in possession of a small scale, a large amount of separated cash, and an electric stun gun. I carefully reviewed the Appellant's testimony in which he attempted to offer an explanation regarding the observations in the police reports. His

⁶ A Waiver that the Appellant executed on or about November 1, 2018 explicitly authorized DOC to acquire this information and use it in the background investigation process. See Finding of Fact no. 6, *supra*.

testimony, taken as a whole, either stretches the bounds of reasonableness and commonsense or independently raises other issues regarding the Appellant's judgment. For example, the Appellant testified that the marijuana was solely for his own personal use, that he broke up the marijuana into separate baggies for his own use; that he keeps a small scale in his car so that when he buys "weed" the sellers are not "ripping me off". His explanation regarding why he carried \$670 in cash on his person, broken up into three separate stacks and wrapped with rubber bands, was less than credible as well. Honesty is a paramount attribute that correction officers must display at all times and I do not believe that the Appellant was appropriately forthcoming about this incident.

Even though the Appellant's criminal charges were dismissed, the observations noted in the detailed police reports provided DOC with ample reasons to question the Appellant's judgment that day and to conclude, by a preponderance of the evidence, that he was engaging in misconduct.

In addition to DOC being able to rely on the conduct outlined in the police reports, the two negative references reviewed by DOC, standing alone, also provided DOC with reasonable justification to bypass the Appellant. Specifically, the president of the security company where the Appellant was previously employed failed to recommend the Appellant for appointment as a correction officer, telling Mr. Ortiz that the Appellant was not mature enough to handle the responsibilities required of a correction officer. Further, a professional reference that the Appellant personally chose to list on his application equivocated, at best, regarding the Appellant's suitability to be a correction officer. The reference, who has known the Appellant for many years, was reluctant to discuss the Appellant over the telephone and, when pressed, was unwilling to describe the Appellant as a dependable person.

Finally, as part of the full hearing, Commissioner Ittleman asked DOC to produce the entire application records for the five candidates appointed who were ranked below the Appellant. I have reviewed those records in their entirety. While nothing in those records changes my conclusion that DOC had reasonable justification to bypass the Appellant for the reasons discussed above, I have not overlooked the fact that the background of one of those candidates raises questions as to whether DOC has uniformly applied its standards as it relates to prior, recent, alleged misconduct. The Commission reserves the right to independently inquire about this matter, including, if warranted, through its investigative authority under Section 2(a) of Chapter 31.

Conclusion

For all of the reasons stated above, the Appellant's appeal under Docket No. G1-19-068 is hereby *denied*.

CIVIL SERVICE COMMISSION

/s/ Christopher Bowman

Christopher Bowman

Chair

By vote of the Civil Service Commission (Bowman, Chair; Stein & Tivnan, Commissioners [Camuso – Absent]) on April 21, 2022.

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 to:

Joseph M. (Appellant)

Norman Chalupka, Esq. (for Respondent)

Earl Wilson, Esq. (DOC)