

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

JESSE MONTEIRO,
Appellant
v.
DEPARTMENT OF CORRECTION,
Respondent

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

G1-14-153

Appearance for Appellant: *Pro Se*
Jesse Monteiro

Appearance for Respondent: Jeffrey S. Bolger, Esq.
Department of Correction
P.O. Box 946, Industries Dr.
Norfolk, MA 02056

Commissioner: Paul M. Stein¹

DECISION

The Appellant, Jesse Monteiro (Mr. Monteiro or Appellant), pursuant to G.L.c.31,§2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC), delegated to act on behalf of the Massachusetts Personnel Administrator, to approve bypassing him for original appointment to the position of Correction Officer I (CO I). A pre-hearing conference was held on July 29, 2014 and a full hearing was held on October 10, 2014 at the UMass Dartmouth School of Law.² Witnesses were sequestered. The hearing was digitally recorded and both parties were provided with a CD of the hearing³. On December 5, 2014, the DOC submitted a proposed decision.

¹ The Commission acknowledges the assistance of Law Clerk Chris Windle in the drafting of this decision.

² 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.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT

Sixteen (16) exhibits were entered into evidence at the hearing (Exhibits 1 through 16). At my request, after the conclusion of the testimony, DOC provided three additional documents that were marked Post Hearing (PH) Exhibits 17 through 19. Based on these exhibits, the testimony of the witnesses (Erin Gotovich, Dale Prescod, Joseph Santoro, and Mr. Monteiro) and inferences reasonably drawn from the evidence I find credible, I make the findings of fact stated below.

Background

1. Mr. Monteiro is a long-time resident of New Bedford. He attended the New Bedford public schools but left without graduating. He subsequently obtained his GED in 2009. He is married with one child. His wife's parents and two of her siblings are DOC Correction Officers. *(Exhs. 5, 12 & 19; Testimony of Monteiro)*

2. Mr. Monteiro got his first job in 1999 as a clerk at a Seven-Eleven store on Rockdale Avenue in New Bedford. He worked there until November 2002. He was robbed at gunpoint in the early morning hours of November 18, 2002 while working the night shift as the cashier and quit the next night, after telling the owner he never wanted to work the night shift alone again. *(Exhs. 5 & 15; Testimony of Monteiro; Santoro Offer of Proof)*

3. Prior to leaving the Seven-Eleven, Mr. Monteiro wrote two money orders, payable to himself, one for \$600 and another for \$225 to cover the money he believed he was due for pay and vacation time. He was alone at the time, but did not conceal what he did. He made the money orders out to himself, wrote them in plain view of the store video camera, left the owner a note telling him he quit, showed the money orders to the camera and waited several days before cashing them. *(Exhs. 5, 15 & 19; Testimony of Monteiro; Santoro Offer of Proof)*

4. After quitting Seven-Eleven, Mr. Monteiro worked briefly as a maintenance man for a juice manufacturer until the company went out of business. He also did short-term work as a landscaper and a dishwasher. From 2004 to 2009, he obtained steady employment as a laborer with Mirra Co, Inc. Since 2009, Mr. Monteiro has worked as a warehouse selector at the Stop & Shop distribution center in Assonet, MA. (*Exhs. 5 & 12; Testimony of Monteiro*)

5. When the owner of the Seven-Eleven store discovered what Mr. Monteiro had done, he contacted the New Bedford police regarding Mr. Monteiro's taking of the money orders. The police attempted to contact Mr. Monteiro at the address they were given, but Mr. Monteiro had moved. On December 19, 2002, on application of the New Bedford Police Department (NBPD), a Criminal Complaint issued against Mr. Monteiro, charging him with a felony (larceny over \$250) and a misdemeanor (larceny under \$250). Upon learning of the complaint, Mr. Monteiro appeared in court, took responsibility for his actions, agreed to an admission of sufficient facts and made restitution. His case was Continued Without A Finding (CWOFF) and eventually the charges were dismissed in June 2004. (*Exhs. 14 & 15; Testimony of Monteiro*)

2013 Application

6. On March 23, 2012, Mr. Monteiro took and passed the Civil Service Exam for the position of Correction Officer I and his name appeared (tied) in 52nd place on the Eligible List established on August 7, 2012. (*Exh. 13*)

7. On February 12, 2013, the DOC requested and received Certification #00415 for appointment to the June 2013 CO I Academy. (*Exh. 17*)

8. Mr. Monteiro signed the Certification. He passed the initial "CORI" criminal records and driving history check and filled out an employment application. In describing his employment at 7-11, Mr. Monteiro erroneously stated that his dates of employment were 1999 – 2001. He stated

the reason for leaving was that “owner sold store.” He also reported that, in 2002, he had walked off a landscaping job (DeMello Bros) after one month, and was fired because he couldn’t speak Portuguese. (*Exh. 18: Testimony of Monteiro*)

9. The DOC performed a background investigation on Mr. Monteiro and discovered further detail about the 2002 criminal case. Although the criminal record, alone, was not disqualifying, the background investigator asked Mr. Monteiro to explain the situation during his home interview with Mr. Monteiro. The investigator’s report states that Mr. Monteiro took two money orders on his last shift when he left employment at Seven-Eleven and had informed his boss that he was taking the money in lieu of his final paycheck. He also stated that Mr. Monteiro went to court and that the matter was continued without a finding and dismissed after he paid court costs and completed one year probation. (*Exh. 19; Testimony of Monteiro, Godovich*)

10. Mr. Monteiro’s name was not reached during the 2013 hiring process. For this reason, Mr. Monteiro’s 2013 application, including the DOC investigator’s 2013 report, was filed without further processing or review. (*Exh. 17; Testimony of Godovich*)

2014 Application

11. On January 15, 2014, DOC requested and received Certification # 01474 for appointment from the 2012 Eligible List of 66 candidates for a June 2014 CO I Academy. (*Exh. 13*)

12. Mr. Monteiro signed the 2014 certification willing to accept appointment. (*Exhs. 4 & 12*)

13. DOC again made a “CORI” check of Mr. Monteiro’s criminal and driving history which again disclosed his 2002 criminal record, a few prior juvenile cases, and nothing new since then. He also showed a clean driving record save for one speeding ticket. On January 30, 2014, DOC Acting Director of HR Operations Gotovich again found the criminal record not disqualifying.

She approved Mr. Monteiro to proceed along in the application process and he completed a new employment application. (*Exhs. 5, 8 through 12; Testimony of Godovich*)

14. In the application, Mr. Monteiro again wrote that he was employed with Seven-Eleven as a cashier from 1999 to 2001, stating he had left that employment because he had “found another job.” He provided the name and telephone number for the store and gave DOC permission to contact Seven-Eleven.

15. The next step in the 2014 application process involved a Physical Abilities Test (which Mr. Monteiro passed) followed by an interview the same day with a panel of two Corrections Officers and a Deputy Superintendent. The panel does not have access to the candidate’s CORI record and asks a series of generic questions which are graded. Mr. Monteiro scored 39 out of 60 total points. On February 21, 2014, the panel recommended Mr. Monteiro for hire. (*Exh. 16; Testimony of Godovich*)

16. After Mr. Monteiro passed the CORI check and interview process, DOC assigned CO I Dale Prescod to conduct a new background investigation of Mr. Monteiro. CO Prescod contacted Mr. Monteiro’s current employer, Stop & Shop, as well as his last prior employer, Mirra Construction. Both employers provided positive references, citing his record as “an outstanding employee who works hard to get the job done”, his “pride in his appearance and is very well liked”, “never had any disciplinary issues” and showed “dedication and commitment to work”. Both employers would rehire him. Mr. Prescod also contacted DeMello Bros, but they had no record of his brief employment there. (*Exh. 5; Testimony of Prescod*)

17. CO Prescod did not check Mr. Monteiro’s employment at Seven-Eleven or any other prior employers because, as a general rule, DOC does not look beyond a five year window of employment. (*Exh. 5; Testimony of Godovich & Prescod*)

18. CO Prescod also checked with the professional and neighborhood references provided by Mr. Monteiro, one of whom was also a DOC Correction Officer. All of them spoke highly of him as a “team player”, “works well under stressful situations” and “cool under pressure”, and “someone you can count on.” (*Exhs. 5 & 12; Testimony of Prescod*)

19. On March 4, 2014, CO Prescod conducted a home interview with Mr. Monteiro and his wife. Mr. Monteiro was “very upbeat” and his home was “spotless”. CO Prescod reported: “The applicant did not hesitate to answer any questions I had for him and he was very excited to go through this process.” Mrs. Monteiro was “very outgoing and friendly” and since “the majority of her family works for the [DOC] already, she knows what to expect and is fully comfortable with her husband’s interest in becoming a Correction Officer. (*Exh. 5; Testimony of Prescod*)

20. On February 28, 2014, CO Prescod faxed the New Bedford Police Department (NBPD) requesting copies of all “field reports” on Mr. Monteiro. The NBPD responded later that same day, faxing twenty-two pages of materials to DOC’s HR department, which included NBPD incident reports concerning the 2002 larceny charges, as well as other NBPD incident reports that documented the earlier related armed robberies (the perpetrator of the 7-11 robbery had also robbed another convenience store that same night). (*Exhs. 6, 7 & 15; Testimony of Prescod*)

21. CO Prescod was never provided with the copies of the NBPD materials sent to the DOC HR Operations Department on February 28, 2014. During the March 4, 2014 home interview, CO Prescod inquired about the 2002 larceny charges. CO Prescod has no specific memory of exactly what he asked or what Mr. Monteiro said. CO Prescod’s report states:

“The applicant was asked by this investigator about the arraignment on 1/7/2003 for Larceny. The applicant stated he was working at 7-11 and was robbed while working and quit that night. When the applicant was leaving, the owner of the store believed he took some money on his way out.”

(*Testimony of Prescod; Exh. 5*)

22. Mr. Monteiro's recollection is that he told the investigator "everything", meaning substantially the same information he gave to the prior investigator in 2013 and what he later credibly testified before me. (*Testimony of Monteiro; Santoro Offer of Proof*)

23. Mr. Monteiro attributed his errors in misstating the dates of employment to the twelve (12) years that had elapsed between his Seven-Eleven employment and the DOC applications. He also admitted that what he had done was "stupid" and was the immature action of a youth, "not the man who stands before you today." (*Testimony of Monteiro*)

24. When I asked Mr. Monteiro to explain why he had written "found another job" as the reason for leaving Seven-Eleven, he stated, without hesitating, that it was because he already had another job arranged with a juice company. (*Testimony of Monteiro*)⁴

25. On March 6, 2014, still not having seen the NBPD reports, CO Prescod filed his investigative report. He noted as Positive Employment Aspects:

- All current and previous employers would re-hire him
- Applicant maintains a neat appearance
- Applicant is energetic and upbeat to be an Officer
- Steady Employment and Reliable

The sole Negative Employment Aspect: "1/7/2003 Applicant was arraigned on Larceny charges." (*Exh. 5: Testimony of Prescod*)

26. On March 12, 2014, Erin Gotovich, DOC Acting HR Director of HR Operations reviewed Mr. Monteiro's application, including the 2014 background report and the NBPD incident reports that had been faxed directly to the DOC's HR department on February 28, 2014. Until she reviewed the NBPD's fax, she had not connected Mr. Monteiro's criminal case with his employment at Seven-Eleven. She endorsed the 2014 investigation report: "No. Based on police reports and prior work history 7&11". (*Exhs. 3 & 5; Testimony of Gotovich*)

⁴Mr. Monteiro's applications did list this brief employment with Coast Log Industries "making up pallets of juice". (Exhs. 12 & 18)

27. Ms. Gotovich prepared a DOC document entitled “Civil Service Non-Selection Form” which she forwarded to her superior, Paul DiPaolo, Deputy Commissioner, Administrative Services, stating that she recommended bypassing Mr. Monteiro for the following specific reason: “3/12/14 – Failed Background Investigation Based on Police Reports and Prior Work History at 7-11.” Deputy Commissioner DiPaolo approved this recommendation on April 3, 2014. (*Exh. 3*)

28. On June 9, 2014, DOC notified Mr. Monteiro that he had been bypassed, stating the reason as “Background Investigation: 3/12/14 – Failed Background Investigation Based on Police Reports and Prior Work History at 7-11”. This appeal duly ensued. (*Exhs.1 & 2*)

29. At the full hearing before the Commission, DOC introduced Mr. Monteiro’s 2014 employment application along with the 2014 background investigation and the NBPD incident reports faxed on February 28, 2014 from the NBPD in support of the reasons stated for bypassing Mr. Monteiro. Neither the 2013 application, nor the 2013 background investigation (which also included a NBPD larceny report and other information on the Seven-Eleven incident) were introduced in evidence at the hearing. The 2013 documents were received by the Commission on October 14, 2014, after the evidence had concluded, in response to my request and I marked them as additional post-hearing exhibits. (*Exhs.2 through 13; Testimony of Gotovich; DOC letter dated October 10, 2014*)

30. Prior to the Commission hearing, Mr. Monteiro was unaware that DOC relied on his prior criminal history, in general, or the documents faxed by NBPD on February 28, 2014, taken together with alleged inconsistencies in those records with his own statements, as the basis for arriving at the decision that he should be bypassed. (*Testimony of Monteiro, Gotovich & Prescod*)

Applicable Standard of Review

This appeal involves a bypass of the Appellant for original appointment to a permanent civil service position. This is governed by G.L.c.31, Section 27 which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not the highest.”

An appointing authority’s discretion to bypass candidates for civil service appointments who have qualified for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. When a candidate for appointment appeals from a bypass, however, the Commission’s role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines, on the basis of the evidence before it, whether the appointing authority has sustained its burden of proving, by a preponderance of the evidence, that the decision to bypass the candidate was made after a “thorough review” and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L.c.31,§ 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010).

“Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rule of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass 477, 482 (1928) In determining whether the department has shown a reasonable justification for a bypass, the Commission’s primary concern is to ensure that the appointing authority’s action comports with

“basic merit principles,” as defined in G.L.c.31,§1. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001).

In conducting this inquiry, the Commission “finds the facts afresh,” and is not limited to the evidence that was before the appointing authority. E.g., Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012), Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (bypass reasons must be “objectively” reasonable); Borelli v. MBTA, 1 MCSR 6 (1988) The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs., 439 Mass. 766, 787 (2003); Doherty v. Retirement Bd, 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988).

Conclusion of Commissioner Stein (Hearing Officer)

Applying the applicable standards to the circumstances of the present case, I conclude that DOC’s decision to bypass Mr. Monteiro for original appointment as CO I is not reasonably justified. It was not based on a reasonably thorough review. The decision was made without providing Mr. Monteiro the required notice concerning the DOC’s reliance on criminal history and alleged inconsistencies with his own statements. Finally, the DOC has failed to provide a reasonable justification for relying on a single, isolated incident over twelve years old when all

other factors in his record were overwhelmingly positive and pointed to his 2002 behavior as an isolated incident and not any indication of a pattern of misconduct.

I. Work History at Seven-Eleven

In general, according to both Ms. Godovich and CO Prescod, DOC does not look into employment over five years old. Here, however, the DOC disqualified Mr. Monteiro due to his “work history” at Seven-Eleven twelve (12) years prior as one of the core reasons to justify the bypass. The DOC never questioned the employer or found any reason to doubt that he had been a problem employee before he quit the job following his harrowing experience of being robbed at gunpoint. In ignoring their own records, about the actual circumstance at Seven-Eleven and the subsequent criminal case, it is clear that DOC’s reliance on this work history is not based on the required level of thorough review.

Ms. Godovich was clearly mistaken to claim that, until she saw the NBPD police reports faxed to her office in 2014, DOC had no way to know that the criminal larceny charges were related to an employment situation, contending that Mr. Monteiro was somehow trying to conceal the workplace connection. In fact, the connection was clearly known as early as 2013, when Mr. Monteiro gave a full explanation to the first background investigator, who reported that in his report and attached a copy of the salient NBPD report and the criminal record. Similarly, although the second investigator, CO Prescod, had never seen the NBPD’s response to his 2014 fax, his home interview notes clearly show that he knew the larceny was tied to Mr. Monteiro’s work at Seven-Eleven.

In the same vein, Ms. Gotovich seemed to believe that Mr. Monteiro had not been candid with the DOC and his behavior at Seven-Eleven showed “disregard for the law”, claiming that he had never admitted to “taking the money” or that what he did was wrong, when he clearly did so

at the time of his arraignment, in both his home interviews and in his testimony to the Commission. Indeed, Ms. Gotovich, twice reviewed Mr. Monteiro's criminal history, which included the CWOFF for two counts of larceny, and found that behavior was not disqualifying. See Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37 (1986) ("Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed. To the extent that the 'deliberate misconduct' relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification [from receiving unemployment benefits]"); Fire Chief of East Bridgewater v. Plymouth Co. Ret. Bd., 47 Mass.App.Ct. 66, 71n.13 (1999) citing Commonwealth v. Jackson, 45 Mass.App.Ct. 666, 700 N.E.2d (1998). See generally Commonwealth v. Angelo Todesca Corp., 446 Mass. 128, 154n.20 (2006) (Cordy, J. dissenting in 4-3 decision, favorably citing Wardell for proposition that "admission to sufficient facts, absent a subsequent finding of guilt, does not constitute substantial evidence from which a finder of fact . . . can determine that the alleged misconduct has indeed occurred"); Burns v. Commonwealth, 430 Mass. 444, 449-451 (1999) (state police officer discipline based on CWOFF reversed as legal error)

II. Reliance on Police Reports

The second prong of DOC's justification for bypassing Mr. Monteiro rests on its reliance on certain "police reports", which clearly is meant to refer to the NBPD documents faxed to DOC's HR Operations Department in February 2014. It is odd that DOC seems to claim that it had no institutional knowledge of any of these reports until the fax, when both the 2013 and 2014 background investigators knew the substance of what they contained, another example of how Ms. Gotovich's review was less than thorough.

My review of the police reports suggests that, but for a dispute about whether Mr. Monteiro had left a note for the owner or not, most all of the other information in these reports is largely consistent with Mr. Monteiro's statements, from the outset to the Commission hearing. This includes his claim that he took the money because he believed it was what he was owed in pay, that he wrote the money orders in plain view of the surveillance cameras, and took full responsibility in court (and before the Commission) for admitting that what he had done was the stupid and impulsive action of an immature youth that he acknowledged, in hindsight, was wrong. I do not see any basis to stretch the alleged nuanced ambiguities that DOC appears to see into a basis for inferring that the police reports add anything important or new to the underlying facts of the 2002 incident as Mr. Monteiro has consistently explained it.

This is not a case where the evidence is on its face disqualifying, such as a criminal felony **conviction** or another automatic disqualifier. When determining whether a candidate is qualified, the appointing authority must show that it has weighed the candidate's record as a whole. If the DOC believes it has "reasonable justification" to bypass an individual by relying on a single negative incident in an otherwise acceptable record, the Commission is entitled to expect, at a minimum, that the actual decision-maker did, in fact, "reasonably" weigh this one isolated incident and provide an explanation to support why it determined that it outweighed the positive factors. This is particularly true when the negative factor is one stale CWOFF that was twelve years old. Basic merit principles require evidence that the decision-maker was fully aware of all relevant facts, made a thorough review and a considered decision, and can provide some percipient evidence of the basis for that exercise of judgment **by the actual decision-maker** that is fairly subject to "de novo" review at the Commission hearing. In particular, a generic "check the box" list will not suffice to show the "thorough review" of the relevant facts and exercise of

“sound judgment” necessary to support reasonable justification for a bypass. Fairness requires the actual decision-maker to set forth in specific terms the documents and/or information reviewed and what substantive analysis led the decision-maker to find that the negative information outweighed the positive recommendations and become determinative. In sum, basic merit principles require evidence that the decision-maker was fully aware of all relevant facts, made a thorough review and considered decision, and articulated a valid reason for the bypass based on the record as a whole. See Trubisyn v. Department of Correction, 28 MCSR --- , CSC No. G1-14-136 (June 25, 2015).

But there is also a more fundamental reason that the DOC’s reliance on the NBPD “police reports” cannot serve as a legitimate basis to justify his bypass. The Commonwealth recently made “sweeping changes in the CORI law” and, for nearly five years now, the Governor’s Executive Order No. 495 regarding a state agency’s use of CORI information now requires notice to an applicant prior to taking adverse employment action based on CORI. See G.L.c.6, §171A, St. 2010, c.256; Exec. Order No. 496 (Jan. 11, 2010). This subject has been previously addressed by the Commission and is well-known to DOC. See, e.g., Gore v. Department of Correction, 27 MCSR 582 (2014); Conner v. Department of Correction, 27 MCSR 556 (2014) and cases cited. Here, DOC plainly used CORI information to bypass Mr. Monteiro without ever informing him, or even the background investigator who interviewed him, that it had obtained such information, let alone use it as the basis for his bypass. This omission is not, under the circumstances, a minor procedural glitch, but represents a material breach of the duty of the DOC under Massachusetts law and, therefore, under basic merit principles required by civil service law and rules. For this reason alone, Mr. Monteiro must be afforded another opportunity for consideration in full compliance with the rules.

III. Untruthfulness

DOC first raised the issue of untruthfulness at the Commission hearing regarding the bypass of Mr. Monteiro. Neither the DOC's Civil Service Non-Selection Form, nor the bypass letter sent to Mr. Monteiro included "untruthfulness" as a stated reason for the bypass. Therefore, under Personnel Administration Rules, PAR.08(4), the DOC is precluded from claiming at the Commission hearing that Mr. Monteiro's alleged untruthful statements on his DOC applications justifies his bypass.

Moreover, when the alleged untruthful statements on which DOC relies are weighed together with the evidence as a whole, it is clear that, while Mr. Monteiro's applications do contain inconsistent and erroneous statements as to such facts as the exact dates of his employment at Seven-Eleven, whether he quit the day of the robbery or a day or week later, I am persuaded that those mistakes were not intended to conceal or excuse his underlying behavior, which he has admitted was wrong, and do not establish that he was deliberately lying about them. Similarly, I do not find that the preponderance of the evidence establishes that his statement in his 2014 application that he left Seven-Eleven when he got another job was a deliberate misrepresentation. His spontaneous explanation that he left to go to work for a "juice company" is supported by the other facts in the record, and I find this testimony credible, especially as he had never been put on notice that anything in his application was under question, first hearing this at the Commission hearing. As to his statement in the 2013 application as leaving Seven-Eleven because "owner selling the store", this alleged inconsistency only arose after the hearing had concluded, and I do not credit the DOC's belated reliance on this statement as a reasonable basis for bypass. It clearly was not relied upon by DOC at the time of the bypass or even at the Commission hearing. I will not speculate as to whether, as with the 2014

explanation, Mr. Monteiro had some other credible and consistent explanation for why he wrote that statement in the 2013 application.

Mr. Monteiro never concealed what he did at Seven- Eleven and never denied that what he did, in retrospect, was foolish and illegal. It is clear that, whatever prompted him to quit without prior notice, quit he did. He was not fired for theft. His recent behavior is not that of a person who is intentionally trying to deny or conceal anything for his prior actions. During the home interview with Mr. Prescod, Mr. Monteiro's explanation regarding the events that transpired was consistent with his prior testimony. Mr. Monteiro was accused of stealing money the day he quit. While it was not the same day the store was robbed, Mr. Monteiro quit the following day. This inconsistency between these two dates is understandable taken that twelve (12) years had passed since the actual incident.

Finally, since DOC did not identify untruthfulness on the application as a reason for the bypass and there is no evidence that DOC Deputy Commissioner DiPaolo actually considered Mr. Monteiro's "untruthfulness" on either the 2013 or 2014 application, or both, as a reason for disqualification. This omission is further grounds to find that DOC has not met its burden to establish that Mr. Monteiro's untruthfulness may be used to justify his disqualification in this appeal.

/s/ Paul Stein

Majority Opinion (Chairman Bowman and Commissioners Ittleman and McDowell)

DOC's stated reasons for bypassing Mr. Monteiro for the position of Correction Officer I were: "failed background investigation based on police reports and prior work history." The Commission, as part of a de novo proceeding, heard evidence to determine whether DOC had reasonable justification to bypass Mr. Monteiro for these reasons. While DOC is limited to

relying on those reasons, they should not be prohibited from producing additional evidence at the Commission hearing to support those stated reasons. See Leominster v. Stratton and Civ. Serv. Comm'n, 58 Mass. App. Ct. 726 (2003) (“There is no limitation of the evidence to that which was before the appointing officer.”)

The evidence introduced at the Commission hearing showed the following about the police reports and prior work history.

A police officer’s incident report regarding Mr. Monteiro’s underlying criminal conduct on November 19, 2002, states:

“The Undersigned was working Unit 23A when I was called to 7&11 489 Rockdale Avenue on report of larceny by employee. I was assisted by [police officer] of Unit 22A. Upon arrival we spoke to the owner []. He said an employee / cashier of three years Jesse Monteiro was working on November 19th from 11 p.m. – 7 a.m. in which he made two money orders and pocketed them.

[Store Owner] showed [police officer] and I the receipt tape from the money order machine. It showed two transactions in which money orders were made out. One was for \$500 (made at 12:32 a.m.) the other was for \$225.00 (made at 5:02 a.m.) [Store Owner] checked the cashiers tape that showed all shifts transactions. The money order transactions never showed up on the cashier’s record for the shift. The receipts were not in the drop safe either.

[Store Owner] showed us a store videotape of Jesse walking to the money order machine and performing a transaction and pocketing it at the same approximate time the money orders were made.” (Exhibit 6)

After being charged with larceny under \$250 (a misdemeanor) and larceny over \$250 (a felony), Mr. Monteiro admitted to sufficient facts to both charges, made restitution and was placed on probation.

In April 2013, when Mr. Monteiro first applied to be a Correction Officer, he signed an application for employment under the pains and penalty of perjury in which he listed the reason for leaving 7-11 as “Owner sold store.” (Exhibit 18) During a background investigation in 2013, Mr. Monteiro told the background investigator that he had “taken two money orders at his

previous employment with 7/11. He stated that it was his last shift and told the owner that he was taking the money order in lieu of his pay check.” (Exhibit 19)

In February 2014, Mr. Monteiro once again completed an application for employment for CO I. This time, when asked to list the reason for leaving 7-11, he wrote, “Found another job.” (Exhibit 12) During his 2014 background investigation, Mr. Monteiro told the background investigator that “he was working at 7-11 and was robbed while working and quit that night. When the applicant was leaving, the owner of the store believed he took some money on the way out.” (Exhibit 5)

In summary, in a 12-month period during two hiring cycles, Mr. Monteiro effectively provided four (4) different versions regarding his felonious conduct in 2002 and the reason for leaving 7-11.

This is not a case where DOC, after reviewing the candidate’s CORI report, disqualified the candidate without further review. Rather, DOC provided Mr. Monteiro with an opportunity to complete two (2) employment applications and to meet with a background investigator – twice. Further, DOC took the additional step of obtaining the relevant police incident reports from the New Bedford Police Department. This is precisely the type of “reasonably thorough review” that appointing authorities should engage in as part of the review process. After conducting this review, DOC ultimately made a judgment call to bypass Mr. Monteiro for this public safety position.

Mr. Monteiro’s underlying felonious conduct; his conflicting accounts of the incident; and his clearly misleading answers about the reason for leaving his employment at 7-11, are all valid reasons for bypassing Mr. Monteiro for appointment to this public safety position. Further, the record shows that DOC did review the (many) positive references provided by subsequent

employers and other professional references. Ultimately, however, DOC gave more weight to the negative issues identified above. Absent evidence of any personal or political bias, that decision, based on the facts presented here, was a valid judgement call by DOC and it would be an impermissible substitution of judgment for the Commission to overturn DOC's well-reasoned decision to bypass Mr. Monteiro

/s/ Christopher Bowman

For the reasons stated in the Majority Conclusion, Mr. Monteiro's appeal under Docket No. G1-14-153 is hereby *denied*.

By a vote of the Civil Service Commission (Bowman, Chairman - Yes, Ittleman, Commissioner – Yes; McDowell, Commissioner – Yes; and Stein, Commissioner - No) on Aug 6, 2015.

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:

Jesse Monteiro (Appellant)

Jeffrey S. Bolger, Esq. (for Respondent)

John Marra (for Human Resource Division)