

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

AXEL MORSE,
Appellant

v.

G1-12-114

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Axel Morse

Appearance for Respondent:

Earl Wilson, Esq.
Department of Correction
P.O. Box 946
Norfolk, MA

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

On March 21, 2012, the Appellant, Axel Morse ("Mr. Morse"), 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") to bypass him for original appointment to the position of permanent, full-time Correction Officer I. A pre-hearing conference was held at the offices of the Commission on May 14, 2012 and a full hearing was held at the same location on July 24, 2012. The hearing was digitally recorded and both parties were provided with a CD of the hearing. The parties submitted proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Kari-Ann E. Greene in preparing this decision.

FINDINGS OF FACT:

Eleven (11) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- James O’Gara, Personnel Officer II, Department of Corrections;

Called by the Appellant:

- Axel Morse, Appellant;

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

1. Mr. Morse is a thirty-three (33) year old single parent of one child; he resides in Winchendon. (Testimony of Mr. Morse)
2. Mr. Morse graduated from Narragansett Regional High School in 1998. (Testimony of Mr. Morse)
3. In September 2011, Mr. Morse’s name appeared 123rd on Certification No. 4011045 from which the DOC ultimately appointed two hundred four (204) permanent, full-time correction officers, one hundred sixty seven (167) of whom were ranked below Mr. Morse. (Stipulated Facts)
4. A DOC investigator was assigned to conduct a thorough background investigation of Mr. Morse, the results of which were entered as Exhibit 4. (Exhibit 4)
5. The background investigation revealed that Mr. Morse had previously been employed selling automobile parts by Advance Auto Parts (“AAP”) in Gardner, MA from March to June 2010. The DOC investigator was unable to obtain information about

Mr. Morse's employment at AAP. The investigator contacted Mr. Morse and learned that during his employment at AAP, Mr. Morse had been subject to two urine drug tests, a pre-employment drug test on 3/29/10 and another drug test on 6/21/10, and that both tests had come back as "negative-dilute," which for AAP is the same as a positive result pursuant to AAP's Policies and Procedures. It is inconclusive whether the second drug test is random or is pre-employment as on the intake form it is indicated that the test is random, while on the results form it is indicated that the test is pre-employment. Mr. Morse stated that the second drug test was a pre-employment drug test and that all employees of AAP are subject to pre-employment drug tests. Mr. Morse was tested for amphetamines, cocaine, marijuana, opiates, and phencyclidine. It is not noted in the specimen results certificate which substance or substances came back with negative-dilute findings. There is, however, a comment on the specimen results certificate indicating that AAP should "[f]ollow your company policy on negative dilutes." Mr. Morse denies using drugs, but did not contest the results. Mr. Morse was not notified of the first drug test result and remained employed at AAP until AAP received the results from his second drug test, at which point Mr. Morse was terminated. (Testimony of Mr. Morse and Exhibits 4, 5, 7, and 9)

6. Mr. Morse advised the investigator, that in an effort to prove his innocence, after his termination, he had independent urine and blood drug tests performed, which resulted in negative findings. Mr. Morse had the independent tests done on 6/28/10, or one week after AAP last tested him. (Exhibits 4 and 11)

7. Through telephone and in-person interviews, the investigator learned that other past employers consider Mr. Morse to be a hard worker, to work well with co-workers and managers, to have experience in managing people and resources, and to have experience working in a fast-paced environment. (Testimony of Mr. Morse and Exhibit 4)
8. Officer O’Gara is a Personnel Officer who supervises the civil service process with respect to the hiring process and related matters at the DOC, and he appears to be very knowledgeable in this regard. Officer O’Gara reviewed Mr. Morse’s background investigation and employment application and noted Mr. Morse’s negative-dilute drug test results from AAP. He informed his supervisor, Director of Personnel Alexandra McInnis, of his concerns regarding the negative-dilute drug test results. His supervisor advised him to explore the issue further. (Testimony of O’Gara)
9. Officer O’Gara contacted Mr. Morse by telephone. Mr. Morse stated to O’Gara that both his pre-employment drug test and subsequent drug test both resulted in negative-dilute findings, meaning that the samples were sufficiently diluted so as to preclude the testing facility from obtaining actual results. Mr. Morse reported that, according to AAP’s company policy, samples reported to have “negative-dilute” results are considered to be adulterated and are treated as positive test results. Mr. Morse could proffer no explanation why he would have two negative-dilute test results, other than asserting that he drinks “a lot of water.” However, AAP policy states that employees whose test result is deemed adulterated may have a second test to be given

immediately after the first test, but AAP did not give Mr. Morse a second test.

(Testimony of Mr. Morse and Officer O’Gara; Exhibits 5, 7, and 9)

10. Since Mr. Morse had these effectively positive drug test results from a prior employer, the DOC made the decision to bypass Mr. Morse. It is the DOC’s policy and practice to bypass an applicant who has been terminated within the last five (5) years by a prior employer due to what the prior employer considers to be a positive drug test result. (Testimony of Officer O’Gara)
11. In a letter dated January 20, 2012, the City notified Mr. Morse of the reasons for bypass based on an “[u]nsatisfactory background check/[n]egative employment.” (Exhibit 2) This appeal followed.

LEGAL STANDARD

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. Brckett v. Civil Serv. Comm’n, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (1928)).

An appointing authority may use any information that it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See City of Beverly v. Civil Serv. Comm’n, 78 Mass. App. Ct. 182, 189 (2010). “In its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to

examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev. den., 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 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.” Id. at 824 (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev. den., 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... officer than in disciplining an existing tenured one.” See City of Attleboro v. Mass. Civil Service Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The appointing authority has a duty to conduct a reasonable investigation to find a credible basis for its decision whether to bypass a candidate or not. See Beverly at 189-90. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm’n of Salem v. Civil Serv. Comm’n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635

(1983); Comm'r of Health & Hosps. of Bos. v. Civil Serv. Comm'n, 23 Mass. App. Ct. 410, 413 (1987)).

ANALYSIS

The DOC argues that its decision to bypass Mr. Morse was reasonably justified. A prior employer required Mr. Morse to take a pre-employment drug test, which resulted in a negative-dilute finding. Although AAP considered that result consistent with tampering, and, therefore, a positive result, AAP elected to continue to employ Mr. Morse. A couple of months later, AAP required Mr. Morse to take a random drug test, which also resulted in a negative-dilute finding. Based on the repeated negative-dilute test results, AAP then chose to terminate Mr. Morse pursuant to its policies and procedures. Therefore, DOC avers, based on DOC's policy against hiring someone who was terminated based on positive drug test results, it was justified in bypassing Mr. Morse.

Mr. Morse argues that he should not have been bypassed. He has a number of positive reviews from a number of past employers, indicating that he is a hard worker and that he has experience managing people and resources, and working in a hectic environment. Mr. Morse denies using drugs and argues that he was not notified of the first negative-dilute finding while working at AAP, nor was he given an opportunity following either drug test result at AAP to take another test. He notes that his independent drug test results following his termination from AAP were negative.

Therefore, Mr. Morse argues, DOC should not be allowed to bypass him based on the AAP test results.

While it is true that Mr. Morse has a number of supportive references from numerous previous employers, the fact remains that he received not one, but two negative-dilute drug test results while employed at AAP, which AAP considered to be adulterated test results and, therefore, positive results. The DOC investigator was unable to obtain an employment reference from AAP. As a result, the investigator contacted Mr. Morse directly to obtain information about his employment at AAP and Mr. Morse referenced the AAP drug tests. To further understand what was involved in AAP's drug tests and results, DOC obtained the pertinent parts of AAP's policies relating to drug testing. The AAP policies indicate that upon receiving a negative-dilute result, the employee is to be offered an immediate opportunity to provide a second specimen for testing. Mr. Morse stated that he was not given that opportunity. It is inconclusive whether the second drug test was a random drug test or a second pre-employment drug test as on the intake form it is marked as a random drug test, but on the results form it is marked as a pre-employment drug test. Mr. Morse, however, characterized the second test as a "pre-employment" drug test in his testimony. The only explanation Mr. Morse offers for the negative-dilute results is that he drinks a lot of water, a protest which is unsupported in any manner. While Mr. Morse may have a valid concern about his treatment by AAP, it is not an issue that the Commission can address. Mr. Morse had independent drug tests performed a week after his random test and the independent tests produced negative results but that was at a date and time of his choosing, unlike the random test. The purpose of random drug tests is to secure a valid result, preventing the

test subject from potentially secreting his or her alleged drug use. There is no evidence to suggest that the drug tests performed pursuant to AAP policy produced inaccurate results or that the test process was flawed. Therefore, DOC made a reasonable investigation regarding Mr. Morse's employment and drug test results at AAP and appropriately relied on the information it found. Moreover, the DOC's decision is consistent with its policy to bypass candidates for positive drug test results, which resulted in termination of prior employment within the last five (5) years. The DOC is a law enforcement agency with a substantial public safety responsibility and its employees must be above suspicion with regard to upholding the law.

The Commission gives deference to an appointing authority's judgment in choosing whether to select a candidate for appointment when it conforms to the requirements of civil service law and is consistently applied. The appointing authority here has shown just cause for its choice to not appoint Mr. Morse to the position of correction officer. Specifically, Mr. Morse had repeated negative-dilute drug test results while employed at AAP, which the employer's policy indicates constitutes a positive result, sufficiently disqualifying Mr. Morse from being selected and appointed to the position of correction officer pursuant to DOC's consistent practice. As such, the DOC was reasonably justified in bypassing Mr. Morse for appointment.

CONCLUSION

For the reasons stated herein, the DOC had reasonable justification to bypass Mr. Morse. Therefore, Mr. Morse's appeal filed under Docket No. G1-12-114 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [AYE]; Ittleman [AYE], Marquis [AYE], McDowell [AYE] and Stein [NO], Commissioners) on May 30, 2013.

A true record. Attest:

Commissioner

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:

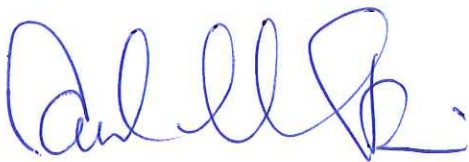
Axel Morse (Appellant)

Earl Wilson, Esq. (for Respondent)

John Marra, Esq. (HRD)

DISSENTING OPINION OF COMMISSIONER STEIN

I respectfully dissent. City of Beverly v. Civil Serv. Comm'n, 78 Mass. App. Ct. 182, 189 (2010) allows an appointing authority to rely on an adverse employment action taken by a prior employer after a reasonably thorough and independent review of the circumstances. I do not believe, however, that the DOC conducted such a review in this case and that, an appropriate review would show that a “negative dilute” urine test is not the equivalent of alteration, that there is a range of dilution that is “consistent with human urine” and the information about the Appellant’s tests are not sufficient to establish that the test results were outside that range (the fact that the test was reported as NEGATIVE by the lab tends to confirm this conclusion), that the DOC received incorrect information about and misinterpreted the employer’s test standards, and that established test protocols for urine testing requires further specific testing to treat a negative dilute as a positive test, which steps were not followed in this case. See, e.g., www.verificationsinc.com/newsletter/04272007/negative_dilute.html; [www.premierinfosource.com/articles/drug_testing/general_information](http://www.premierinfosource.com/articles/drug_testing/general_information(dilute_specimens)) (dilute specimens). Accordingly, I would not disqualify the Appellant solely on the basis of his prior employment history of negative dilute drug tests.



Paul M. Stein
Commissioner