

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

Dymetris Nunez,
Appellant

v.

Department of Correction,
Respondent

Case No.: G1-22-043

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission and the parties had thirty days to provide written objections to the Commission. The Appellant submitted a one-paragraph objection on October 26, 2022 which, in essence is a plea for an “opportunity to prove” himself and “a second chance”, notwithstanding admitted “bad choices [he had] made in [his] past” and “young carelessness”.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate, thus making this the Final Decision of the Commission.

For the reasons stated in the Magistrate’s Tentative Decision, the Commission agrees that the Department of Correction had reasonable justification to bypass the Appellant for the position of Correction Officer I (CO I). This does not prevent the Appellant from applying for this position in the future, assuming he continues to display greater maturity.

As the record establishes, various results from the Appellant’s background investigation gave the DOC reasonable and legitimate concern about the Appellant’s judgment. In particular, regarding the 2019 shoplifting arraignment, the Appellant provided the DOC investigator with information that conflicted with the Lunenburg Police Report. The Appellant stated that he was focused on shopping, while watching his children on his own, which resulted in them accidentally grabbing candy that was unpaid for; while the police report states that there was a female adult with him, and the stolen items included \$108.22 of clothing and jewelry. Although this incident was handled as a civil, rather than criminal matter, it still serves as a valid point of concern for the Department of Correction.

The Appellant also has a lengthy driving record that primarily consists of traffic violations associated with driving with a suspended license. The Appellant blamed these infractions on his immaturity and carelessness when he was younger, as well as being a common target of law enforcement due to the unique cars he drove. However, the sheer length of this record, not to mention a poor performance review from a former employer in the towing business, present sufficient additional justification for bypass. The Commission does not give much weight to the poor performance review, as that employer has since willingly re-hired the Appellant. But, overall, with these various concerns considered altogether, the preponderance of the evidence supplies reasonable justification for this bypass.

The decision of the Department of Correction to bypass the Appellant is affirmed and the Appellant's appeal under Docket No. G1-22-043 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on December 15, 2022.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

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:
Dymetris Nunez (Appellant)
Eamonn M. Sullivan, Esq. (for Respondent)
Edward B. McGrath, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

DIVISION ADMINISTRATIVE LAW APPEALS
14 Summer Street, 4th Floor
Malden, MA 02148
(781)397-4700

DYMETRIS NUNEZ,
Appellant

v.

Docket Nos: DALA: CS-22-0261
CSC: G1-22-043

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Dymetris Nunez

Appearance for Respondent:

Eamon Sullivan, Esq.
Joseph S. Santoro
Department of
Correction
50 Maple Street
Milford, MA 01757

Magistrate:

Edward B. McGrath
Chief Administrative Magistrate

SUMMARY

DOC proved that it had reasonable justification for bypassing Mr. Nunez for appointment as a CO I and his appeal should, therefore, be dismissed.

TENTATIVE DECISION OF DALA MAGISTRATE

On March 15, 2022, the Appellant, Dymetris Nunez (Mr. Nunez), pursuant to G.L. c. 31, § 2(b), timely filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) dated February 4, 2022 to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). The

Commission held a remote pre-hearing conference on June 28, 2022 and assigned the matter to the Division of Administrative Law Appeals (DALA). I held a full hearing at the Commission's office on September 22, 2022.¹ The hearing was digitally recorded.² The parties decided not to submit proposed decisions and I closed the administrative record on October 11, 2022.

FINDINGS OF FACT

Eighteen (18) exhibits were entered into evidence at the hearing.³ Based on those exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent;
- Jason Ruschioni, Correction Officer II (CO II), Background Investigator;

Called by the Appellant:

- Dymetris Nunez, Appellant;

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

1. Mr. Nunez resides in Fitchburg, MA. A 2010 graduate of Leominster High School, he has four children. (Testimony of Mr. Nunez & Ex. 3 R0008)
2. Mr. Nunez completed the Grafton Job Corps program. (Ex. 8 R0030)
3. From November 2017 through February 2018, Mr. Nunez was employed as a childcare

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² 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 they wish to challenge the decision as unsupported by substantial evidence, arbitrary or 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

³ I cite to the exhibits using the number of the exhibit and the Bates number.

- worker at Robert F. Kennedy Children's Action Corps. (Ex. 3 R0009)
4. Mr. Nunez worked at Five Star Towing beginning in December 2018 and continued working there until August 2021. He worked there as a tow truck driver. (Ex. 3 R0010)
 5. On March 19 and 21, 2021, Mr. Nunez took the civil service examination for CO I and received a score of 79. (Stipulated Facts)
 6. Mr. Nunez's name appeared ranked 48th on Certification No. 08017, from which DOC ultimately appointed one hundred-thirty-eight (138) candidates as CO Is, twenty-eight (28) of whom were ranked below Mr. Nunez. (Stipulated Facts)
 7. Mr. Nunez began working at a waste management company in August 2021 and was working there at the time the background check was done. (Ex. 3 R 0011)
 8. Eugene Jalette is Deputy Chief of Investigations at DOC. He was the person responsible for overseeing background investigations to review the background investigations of all DOC candidates, including Mr. Nunez. (Testimony of Jalette)
 9. The job of CO I requires highly disciplined individuals to supervise the Commonwealth's most dangerous individuals. The purpose of the background investigation is to obtain facts to allow DOC to determine the quality of the applicant's character. (Testimony of Jalette)
 10. Deputy Chief Jalette assigned Background Investigator Jason Ruschioni to perform a background check concerning Mr. Nunez on behalf of DOC. (Testimony of Jalette)
 11. At the time of the instant hearing, Mr. Nunez had returned to work at Five Star Towing. (Testimony of Nunez)
 12. At the time Investigator Ruschioni began this investigation, he had completed about 100 background checks for DOC. As part of his investigation of Mr. Nunez, Ruschioni spoke

to Mr. Nunez's employers and personal references. He conducted a Criminal Offender Records Information (CORI) check and obtained a copy of Mr. Nunez's driving history. (Testimony of Ruschioni, Ex 6. R0021-0022)

13. Investigator Ruschioni interviewed Mr. Adam Goodhead, who stated that he was the owner of Five Star Towing. He reported that Mr. Nunez was a "great kid" who was devoted to his children. Mr. Goodhead also stated that Mr. Nunez had a questionable work ethic, thought "the grass was always greener" and had displayed instances of erratic driving. Mr. Goodhead told Mr. Ruschioni that he would not re-hire Mr. Nunez, stating that "he worked here too long with too many issues." (Testimony of Ruschioni, Ex. 3 R0010)

14. Investigator Ruschioni spoke to Debbie, an employee of Robert F. Kennedy Children's Action Corps. Debbie was able to confirm Mr. Nunez's dates of employment at the Action Corps, but had no other information to provide, because of updates to its computer system. (Testimony of Ruschioni, Ex. 3 R0009)

15. Mr. Nunez asked that his current employer not be contacted until he was in line to receive a job offer from DOC and it was not contacted. (Testimony of Ruschioni, Ex. 3 R 0011)

16. Investigator Ruschioni spoke to Joshua Santiago and Les Gomez, who had known Mr. Nunez for 15 years and 10-12 years respectively. Mr. Santiago informed the investigator that he worked with Mr. Nunez and thought Mr. Nunez was a "dedicated employee who works too much." Mr. Gomez stated that although Mr. Nunez had a past problem using sick time, he responded well when the issue was raised. Mr. Gomez stated that Mr. Nunez had grown up and "turned into a responsible worker." (Testimony of Ruschioni,

Ex. 3 R0012)

17. Investigator Ruschioni also spoke to Harley Delancey who had known Mr. Nunez for two years. Mr. Delaney worked with Mr. Nunez at Five Star Towing. In fact, Mr. Nunez trained Mr. Delancey. In Mr. Delancey's opinion, Mr. Nunez was a dedicated worker who got along with others. According to Mr. Delancey, Mr. Nunez was quick to assist him when he needed help at an accident scene. (Ex. 3 R0013)
18. In addition, Investigator Ruschioni spoke to the property manager of the building where Mr. Nunez rents his apartment. She stated that Mr. Nunez rented in her building for between four and five years. During that time, he matured into a responsible tenant. She had not received any complaints about Mr. Nunez and he was "pretty good" about paying his rent on time. (Ex. 3 R0013, Testimony of Ruschioni)
19. The CORI check revealed that Mr. Nunez had been arraigned six times between April 22, 2011 and April 2, 2019. Five of the charges involved the operation of a motor vehicle after suspension. The sixth was for shop lifting. All the charges were dismissed. The shop lifting charge was handled as a civil matter. (Testimony of Ruschioni, Ex. 7 R0024-0025)
20. Investigator Ruschioni obtained reports from several police departments, including the Lunenburg Police Report, pertaining to the shop lifting charge. The report provided that a loss prevention officer from Walmart stated that Mr. Nunez was shopping with a female and children when he used a self-check-out station and failed to scan several items, including clothes, jewelry, and candy totaling \$108.22. He allegedly left the store without paying for the items. (Testimony of Ruschioni, Ex. 10 R0060)
21. Investigator Ruschioni met with Mr. Nunez and provided him with the opportunity to respond to the issues raised in the background investigation. Mr. Nunez did address

the issues. (Testimony of Ruschioni and Nunez, Ex. 2 R0014)

22. Investigator Ruschioni provided the results of his investigation to Deputy Chief Jalette. He did not provide his opinion as to Mr. Nunez's suitability for the position of CO I. (Testimony of Jalette)

23. The DOC Commissioner and Human Resources Director met with Deputy Chief Jalette to review the background investigations of all candidates, including Mr. Nunez. (Testimony of Jalette)

24. The DOC Commissioner and Human Resources Director reviewed the entire investigative file, including the positive and negative aspects of the background investigation of Mr. Nunez and decided to bypass him for appointment as a CO I. (Testimony of Jalette)

25. DOC bypassed Mr. Nunez because of:

Background Investigation: Failed background due to 2019 shoplifting arraignment and extensive negative driver history additionally a poor work review from Five Star Towing that indicated that you had poor work ethic and a problem with erratic driving.

(Exhibit 2 R0004, Testimony of Jalette)

Legal Standard

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, 748 N.E.2d 455, 458 (2001), citing *Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d. 923 (1997). "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees

from “arbitrary and capricious actions.” G.L. c. 31, section 1. 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 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).

The Commission’s role, while important, is relatively narrow in scope: reviewing the

legitimacy and reasonableness of the appointing authority’s actions. *City of Beverly v. Civil*

Service Comm’n, 78 Mass. App. Ct. 182, 189, 190-191 (2010), citing *Falmouth v. Civil Serv.*

Comm’n, 447 Mass. 824-826 (2006), and ensuring that the appointing authority conducted an

“impartial and reasonably thorough review” of the applicant. The Commission owes

“substantial deference” to the appointing authority’s exercise of judgment in determining

whether there was “reasonable justification” shown. *Beverly, supra at 189*, citing *Cambridge*,

43 Mass. App. Ct. at 305, and cases cited. “It is not for the Commission to assume the role of

super appointing agency, and to revise those employment determinations with which the

Commission may disagree.” *Town of Burlington*, 60 Mass. App. Ct. 914, 915 (2004).

Analysis

By a preponderance of the evidence, DOC has shown that it had reasonable justification for bypassing Mr. Nunez for appointment as a CO I. I begin by noting that there is no evidence that the decision to bypass Mr. Nunez was due to political considerations, favoritism, or bias. The background investigator gathered the facts in an objective manner and prepared an unbiased summary of his findings that was reviewed by the DOC Commissioner and Human Resources Director. In addition to potential concerns, the summary included positive attributes of Mr. Nunez for DOC to weigh in the decision-making process.

In addition, the above-referenced review was sufficiently thorough. The background investigator did not simply conduct a document review. He spoke with former employers, references, and Mr. Nunez himself before completing his report. Also, instead of delegating the decision-making process to subordinates, the DOC Commissioner and Human Resources Director personally reviewed the background investigation of Mr. Nunez, which included both positive and negative information for consideration.

Moreover, the reasons for the bypass were legitimate and reasonable, including DOC's concerns related to the alleged shoplifting incident. DOC was reasonably justified in noting that there were inconsistencies in the record. While Mr. Nunez said he was having difficulty watching the children while using the scanner, the police report noted that he was accompanied by a woman. In addition, while Mr. Nunez told Mr. Ruschioni that because he was distracted, he failed to pay for some candy, additionally, according to the police report there were jewelry and clothes that had not been paid for. The driving history obtained Mr. Ruschioni was two pages long and, while Mr. Nunez explained that most of the violations were the result of his carelessness and youth, DOC was reasonably concerned by Mr. Nunez's

poor driving record and spotty job performance. Both issues shed light on Mr. Nunez's maturity and suitability for the position of CO I.

Nothing in this decision should be viewed as permanently disqualifying Mr. Nunez for appointment as a correction officer. Mr. Nunez has several positive attributes, including his determination to provide support for his children and his willingness to accept responsibility for the careless actions of his youth. In addition, the record demonstrates that Mr. Nunez has matured since the incidents that created DOC's concerns. Perhaps that is why Mr. Goodhead agreed to re-hire Mr. Nunez after telling Investigator Ruschioni that he would not re-hire him. Mr. Nunez offered candid, forthright testimony at the hearing and passionately described his sincere desire to pursue a career in law enforcement. With the appropriate passage of time and assuming Mr. Nunez ranks high enough to be considered for appointment, he may warrant further consideration by DOC.

Recommendation of DALA Magistrate

For the reasons stated above I recommend that the Commission **DENY** Mr. Nunez's appeal.

Division of Administrative Law Appeals

s/Edward B. McGrath
Edward B. McGrath
Chief Administrative Magistrate

Dated: October 26, 2022

Notice:
Dymetris Nunez (Appellant)
Eamon Sullivan, Esq. (for Respondent)

