

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

ARMANDO ORTIZ, JR.,
Appellant

CASE NO. G1-18-157

v.

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

Appearance for Appellant:

Armando Ortiz, Jr. Pro Se

Appearance for Respondent:

Norman Chalupka, Esq.
Joseph S. Santoro, Labor Relations Advisor
Department of Correction
P.O. Box 946 – Industries Drive
Norfolk, MA 02056

Commissioner:

Paul M. Stein

DECISION

The Appellant, Armando Ortiz, Jr., appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), to contest his bypass for appointment by the Massachusetts Department of Correction (DOC) as a Correction Officer I (CO-I).¹ A pre-hearing conference was held at the Commission’s Boston office on September 25, 2018 and a full hearing was held at that location on November 27, 2018, which was digitally recorded.² Eight exhibits (*Exhs. 1 through 4, 5A-5K, 6 through 8*) were received in evidence and one exhibit marked for identification (*Exh.9ID*). Neither party chose to file a proposed Post-Hearing Decision. For the reasons stated below, Mr. Ortiz’s appeal is denied.

¹ 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.

² Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the 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.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Eugene T. Jalette, DOC Supervising Identification Agent
- Nathan Souza, DOC CO- I, Background Investigator

Called by the Appellant:

- Armando Ortiz, Jr., Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Armando Ortiz, Jr., is a 1999 high school graduate who resides in Fitchburg MA. He took and passed the civil service examination for CO-I on March 19, 2016 with a score of 95. (*Exh.6; Stipulated Facts*)

2. Mr. Ortiz's name appeared in the 50th place on Certification #05164 issued by the Massachusetts Human Resources Division (HRD) to the DOC on or about January 19, 2018, from which DOC eventually hired 156 applicants, of which 129 were ranked below Mr. Ortiz on the Certification. (*Stipulated Facts; Exh. 2*)

3. Mr. Ortiz signed the Certification willing to accept employment and completed the DOC's standard form (rev. 0/2117) of Application for Employment. (*Exhs. 6 & 7*)

4. As required by the application, Mr. Ortiz listed the following employment:

- 3/14 to present – Press Operator, Gardner MA
- 1/13 to 3/14 – Press Operator, Greensboro NC
- 5/03 to 9/12 – Press Operator, Gardner MA (involuntary termination)
- 11/00 to 5/03 – Machine Operator, Shirley MA (Left for better job)

Mr. Ortiz provided copies of his disciplinary records with the Gardner printing company regarding eight incidents (1/20/04, 3-day suspension, threw brush; 10/24/05, 5 day suspension, attitude, refused task and bad language; 4/1/06, 3-day suspension, attitude/behavior, refused task; 5/1/07, 1-day suspension, attitude/behavior, disrespect; 1/24/10, 1-day suspension, unsatisfactory

work; 3/29/2010, 2-day suspension, unsatisfactory work; 1/31/11, 1-day suspension, did not follow procedure; 8/3/11, 1-day suspension, unsatisfactory work. He stated that he was “unsure” of the reason he was terminated from his job in 2012. (*Exhs. 5D through 5K & 6*)

5. The DOC assigned CO-I Nathan Souza to perform a background investigation on Mr. Ortiz. CO Souza reported that Mr. Ortiz had a prior juvenile and criminal record as well as an “excessive” history of traffic violations. His personal and family references were all positive, (*Exh. 4; Testimony of Souza*)

6. On March 29, 2018, CO Souza conducted a home visit with Mr. Ortiz and his family present. CO Souza described Mr. Ortiz as “well-mannered and answered all questions asked of him. Mr. Ortiz told CO Souza that he took full responsibility for his past criminal record and knew what he did was wrong and learned from his mistakes. CO Souza discounted Mr. Ortiz’s driver history, crediting his explanation that he had been a victim of identity theft and it was not possible for the investigator to determine which, if any, of the offenses listed on the driving record were, in fact, attributable to Mr. Ortiz. Mr. Ortiz attributed his disciplinary history at with the Gardner printing company to a particular supervisor who was “hard on him” and attributed his 2012 termination to his conflict with this supervisor, but he also agreed that, sometimes, his “tone” can get him in trouble. (*Exhs. 4 & 8; Testimony of Appellant & Souza*)

7. On April 2, 2018, CO Souza met with Mr. Ortiz’s current shift supervisor at the Gardner printing company who stated that Mr. Ortiz had been disciplined for “performance related” issues as well as “behavior and interpersonal skills”, that “he could do the job of a Correction Officer but may need guidance on self-control”, although he had a good attendance record and now “had a stable relationship with coworkers” and has “grown a lot since his original employment and has improved his behavior.” (*Exh. 4; Testimony of Souza*)

8. Also on April 2, 2018, CO Souza met with an employee in the HR office of the company, who confirmed that Mr. Ortiz “had an issue with one specific supervisor that resulted in a difficult working relationship”. She could not confirm Mr. Ortiz’s disciplinary history prior to his 2012 termination as the company did not keep records that far back. She did state that Mr. Ortiz had three more recent additional disciplinary incidents on his record since his rehire, but would provide them only to Mr. Ortiz. (*Exh.4: Testimony of Souza*)

9. Later that day, CO Souza received an email from Mr. Ortiz, enclosing the three additional disciplinary records which included:

- 1/13/2016 – Written Warning – Work performance – Failure to report issue
- 5/3/2017 – Written Warning – Insubordination – Refusing to follow direction
- 11/28/2017 – 1-day Suspension – Insubordination – Aggressive & Disrespectful

Mr. Ortiz called CO Souza to say that he had “forgotten about the last three issues” and apologized for the error. (*Exhs. 4 & 5A thorough 5C; Testimony of Souza*)

10. CO Souza completed his background investigation report on April 3, 2018, concluding that Mr. Ortiz presented with some positives (all positive professional references³, eligible for rehire by all his employers, good attendance record) and some negatives (12 disciplinary actions taken on current employer, several police contacts to include arrest). (*Exh.4; Testimony of Souza*)

11. By letter dated April 13, 2018, DOC extended Mr. Ortiz a “conditional offer of employment” subject to a review of his background investigation, a drug test and medical and psychological examination. (*Exh.3*)⁴

³ At the Commission hearing, Mr. Ortiz provided a packet of additional character references which he procured prior to the hearing but were not available at the time of his bypass or previously presented to DOC. Accordingly, these documents were marked for identification (*Exh. 9ID*), but have not been considered in the decision of this appeal.

⁴ The Commission has noted its concern with the DOC practice to extend a “conditional offer of employment” prior to completion of the background investigation, as that procedure makes problematic a subsequent disqualification for any non-medical reasons. There is no evidence presented in this appeal to suggest that Mr. Ortiz had a medical condition that could have entered into the DOC’s decision-making process here.

12. After a review of Mr. Ortiz’s application by a committee of senior DOC management that included then Deputy DOC Commissioner Paul Dietl, Mr. Ortiz was informed, by letter dated July 9, 2018, that he was not selected for appointment due to a “Failed Background Based on poor work history at present employer: Specifically, the applicant was subjected to 8 disciplinary suspensions prior to being terminated in [2012]. In 2014 he was re-hired by the same company due to his knowledge in the business. Since that time he has been subjected to three more disciplinary proceedings (2 in 2016 and 1 in 2017).” (*Exh.2; Testimony of Jalette*)

13. This appeal duly ensued. (*Exh.1*)

APPLICABLE CIVIL SERVICE LAW

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)

Basic merit principles in hiring and promotion calls for regular, competitive qualifying examinations, open to all qualified applicants, from which eligible lists are established, ranking candidates according to their exam scores, along with certain statutory credits and preferences, from which appointments are made, generally, in rank order, from a “certification” of the top candidates 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. In order to deviate from that formula, an appointing authority must provide specific, written reasons –

positive or negative, or both, consistent with basic merit principles, to affirmatively justify 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 had 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. 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, 543 (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")

Appointing authorities are vested with a certain degree of discretion in selecting public employees of skill and integrity. 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."

City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (emphasis added) However, the governing statute, G.L.c.31,§2(b), 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 for the Commission to find that the appointing authority acted “arbitrarily and capriciously.” Id.

ANALYSIS

The DOC has established, by a preponderance of the evidence, that it had reasonable justification for the decision to bypass Mr. Ortiz for appointment as a Correction Officer. Although Mr. Ortiz presented many positive qualities, and appears to have a strong and sincere desire to serve the Commonwealth, his employment record provides reasonable justification for his non-selection. That record, which is largely undisputed, includes a dozen disciplinary actions spanning more than a dozen years, most of which involve insubordinate behavior against multiple supervisors, most recently within a year of the bypass.

The DOC is a para-military organization where order and discipline is a critical component of the work that is required of the high-stress work of a Correction Officer responsible for the care and custody of incarcerated criminals and other persons who present risks to the safety of themselves and others. While Mr. Ortiz sincerely believes that he possesses the qualities that would enable him to work under the pressures of such a position, the undisputed record, including the detailed descriptions of the specific misconduct that Mr. Ortiz acknowledges he committed and the opinions expressed to the DOC background investigator, presently before the Commission shows a history of behavior that supports the DOC’s conclusion that Mr. Ortiz does not presently have the temperament and self-control needed to perform the job of a DOC Correction Officer.

I give Mr. Ortiz credit for acknowledging his flaws and recognizing that his “tone” sometimes gets him in trouble, and that he is well-regarded as a dependable worker (“Employee of the Year” in 2016 in a 500 employee company) and good neighbor and family man (as noted by CO

Souza in his background investigation report). The DOC is entitled, however, to balance his positive traits against the negative ones, especially, when the facts are not disputed and the DOC's decision has been vetted at the senior management level as it was in this case. The Commission may not substitute its own judgment on these thoroughly reviewed, undisputed facts, but, rightfully, must defer to the DOC's reasonable and unbiased assessment in such circumstances as are presented in this appeal.

I have considered Mr. Ortiz's argument that he has overcome the obstacles of a troubled youth and his past disciplinary record does not fairly represent his present good working relationship with peers and supervisors. I have carefully reviewed the detailed disciplinary reports (which are written by various supervisors and reviewed by the Department manager). They span more than a decade, into Mr. Ortiz's thirties, well beyond what might be discounted as "youthful indiscretion", and do fairly show a well-documented, recent pattern of continuing misconduct that DOC is reasonably justified to view as problematic to the current fitness for a candidate for Correction Officer.⁵ I also give weight to the DOC's concern that Mr. Ortiz was not entirely forthcoming about his three incidents of recent discipline, claiming that he omitted them from his application because he "forgot" about them.

Fourth, Mr. Ortiz offered to present evidence through his current supervisor and other character witnesses to vouch for him. I excluded this evidence as the supervisor was not available to testify at the date of the Commission hearing and the other evidence was presented in the form of unsworn, statements that were not part of the application record and not available to the DOC at the time of the bypass. While such evidence may be relevant to a consideration of Mr. Ortiz's future applications, I cannot consider this untested, hearsay evidence as worthy of

⁵ By way of contrast, I note that DOC accepted Mr. Ortiz's responses to questions about his criminal and driving history, and those factors were not included in the reasons for bypass..

such weight as would compel a different conclusion from that reached by DOC on the evidence that was before it at the time of the bypass decision.

CONCLUSION

For the reasons stated herein, this appeal of the Appellant, Armando Ortiz, Jr., is *denied*.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020.

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:

Armando Ortiz, Jr. (Appellant)

Norman Chalupka, Esq. (for Respondent)

Joseph S. Santoro. (for Respondent)

Mark Detwiler, Esq. (HRD)