

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Decision mailed: 4/5/13
Civil Service Commission

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

SHAMUS PECK,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: G2-12-206

DECISION

The Civil Service Commission (Commission) voted at an executive session on April 4, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated February 1, 2013.

After careful review and consideration, the Commission voted to: 1) *adopt* the findings of fact; and 2) *not adopt* the Recommended Decision of the Magistrate for the following reasons.

Consistent with the Commission's standard practice related to the processing of bypass appeals, I conducted a pre-hearing conference regarding this appeal on July 31, 2012. During the pre-hearing conference, DOC stated that the sole reason for bypassing the Appellant was an open investigation against him that could result in discipline. I scheduled a full hearing for November 16, 2012 and issued the following verbal orders memorialized in the case file:

- 1) DOC was to complete the investigation against the Appellant on or before the date of the full hearing, November 16, 2012, giving DOC approximately 3 ½ months to bring closure to an ongoing investigation.
- 2) If the Appellant was cleared of any wrong-doing, both parties were to submit a joint request for relief in which the Appellant's name would be placed at the top of the next certification for CO III to ensure that he received one additional consideration for promotion.
- 3) If the Appellant was found to have engaged in misconduct, a full evidentiary hearing was to go forward to determine whether that determination provided reasonable justification for bypassing the Appellant for promotion.

Although not referenced in the Magistrate's decision, it appears, based on Exhibit 6, that, at the time of the hearing on November 16th, DOC completed their investigation in September 2012, determined that the Appellant violated certain rules, and referred the matter for a (DOC) Commissioner's hearing. Also, although not referenced in the Magistrate's decision, it appears, based on the recorded testimony, that no (DOC) Commissioner's hearing had been completed at the time of the hearing before the Magistrate. Thus, while the intent of my verbal orders at the pre-hearing had been to insure finality of the disciplinary issue prior to the

full hearing, the disciplinary matter was still effectively open and unresolved as of November 16th.

In his decision, the Magistrate concluded that, as a matter of fact, the DOC has a consistent practice of not promoting personnel where they are under active investigation for wrongdoing. He cited the Commission's prior decision in Gonsalves for the proposition that such a practice is permissible. He concluded that in light of this consistent practice, the bypass was appropriate. While it is correct that the Commission upheld the bypass in Gonsalves on the basis of the ongoing investigation in that case, this does not mean that the DOC is free to act on the basis of an ongoing investigation without diligently proceeding to conclude the investigation and then acting appropriately according to the outcome of the investigation. In light of my instructions, it does not appear that they have proceeded appropriately here.¹

My verbal orders at the pre-hearing conference were meant to avoid the precise conundrum cited by the magistrate in his decision in which he opines of the potential injustice of an individual who is bypassed based on a pending investigation that may ultimately result in no findings and/or discipline against that individual. Unfortunately, DOC failed to bring closure to the then-pending investigation by completing a (DOC) Commissioner's hearing prior to the full hearing at DALA on November 16th.

While I am cognizant of the Herculean task of managing a paramilitary organization as large as DOC, it is inconsistent with basic merit principles to bypass individuals for promotional appointment based solely on reasons related to administrative efficiency (i.e. – not being able to hold up promotional appointments until any pending disciplinary investigations are completed.)

To avoid placing an undue and potentially unattainable burden on DOC, while still balancing the rights of Mr. Peck to receive fair and impartial treatment in regard to this promotional appointment, the Commission, consistent with its authority under Chapter 31 and Chapter 310 of the Acts of 2003 hereby orders the following:

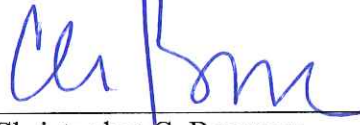
1. The Appellant's appeal under Docket No. G2-12-206 is hereby **allowed** -- effective July 1, 2013.
2. The Appellant's name shall be placed at the top of the next certification for the position of Correction Officer III until he is promoted or bypassed --- effective July 1, 2013.
3. DOC shall conclude the Commissioner's hearing related to Mr. Peck and issue all findings and conclusions related to that investigation, including any discipline, on or before June 3, 2013.
4. If the (DOC) Commissioner's hearing results in any findings of misconduct and/or discipline against Mr. Peck, DOC may file with the Commission a motion to revoke this decision on or before July 1, 2013.
5. Absent any motion to revoke by DOC on or before July 1, 2013, this decision shall become effective July 1, 2013.
6. In the event that DOC disciplines Mr. Peck as part of the (DOC) Commissioner's hearing and Mr. Peck appeals that discipline to the Commission, the Commission reserves its

¹ The Magistrate also cited the appeals court decision in *Beverly* for the proposition that a hearing before us is not the appropriate forum for determining the merits of the allegations against the Petitioner. While this proposition is correct, *Beverly* is not the best citation for the proposition. In that case, a former employer had completed its investigation and had terminated the employee. Beverly then reviewed the evidence on which that determination had been made by the prior employer, concluded that the investigation was reasonable, and made its decision accordingly. Here, the investigation has not been completed.

right, under Chapter 310 of the Acts of 2003, to issue relief consistent with Order 2 above if it is found that DOC did not have just cause to discipline Mr. Peck.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on April 4, 2013.

A true record. Attest.



Christopher C. Bowman
Chairman

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 to:

Shamus Peck (Appellant)

Earl Wilson, Esq. (for Respondent)

John Marra, Esq. (HRD)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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WEBSITE: www.mass.gov/dala

February 1, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Shamus Peck v. Department of Correction
DALA Docket No. CS-12-636
CSC Docket No. G2-12-206

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Shamus Peck
Earl Wilson, Esq.

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals
1 Congress Street, 11th Floor
Boston, MA 02114
www.mass.gov/dala


Shamus Peck,
Appellant

v.

Docket No. G2-12-206
DALA Docket No. CS-12-636

Department of Correction,
Appointing Authority

Appearance for Appellant:

Shamus Peck


Appearance for Appointing Authority:

Earl Wilson
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Kenneth Bresler

SUMMARY OF RECOMMENDED DECISION

Because the appointing authority had a long-standing policy and practice of not promoting employees who were under internal investigation, as the appellant was, the appointing authority was reasonably justified in bypassing him for promotion. I recommend that the Civil Service Commission dismiss the appeal.

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CIVIL SERVICE COMMISSION

RECOMMENDED DECISION

The petitioner, Sergeant Shamus Peck, applied for a promotion with the Department of Correction (DOC), but because of a pending internal investigation against him, was bypassed. He appealed the bypass.

I held a hearing on November 16, 2012, which I recorded digitally. Sergeant Peck testified and called no other witness. Cheryl Brannan, a personnel officer with DOC who has worked in the personnel office for 14 years, testified on its behalf.

I have accepted into evidence eight exhibits. I accepted Exhibits 1 through 5 and Exhibit 8 at the hearing. I left the record open for submission of Exhibits 6 and 7, which arrived by U.S. mail.

Both parties submitted post-hearing briefs. Sergeant Peck's brief alleges facts that are not in evidence, such as alleged facts about the substance of the investigation against him; I have not considered those facts.

Findings of Fact

1. In 2011 and 2012, Shamus Peck was a sergeant with the Department of Correction (DOC). (Exs. 1, 6).
2. In 2011, Sergeant Peck sought a promotion to lieutenant, that is, from Correction Officer II to Correction Officer III. (Exs. 1, 4.)
3. On the Active Standing List for Correction Officer III, established December 7, 2011, Peck tied for eighth place. (Ex. 4.)
4. On or about June 28, 2012, DOC informed Sergeant Peck that it had bypassed him for promotion because of poor work history, specifically, an open investigation. (Ex. 2.)

5. On June 25, 2012, Sergeant Peck timely appealed. Sergeant Peck appealed before DOC informed him that he had been bypassed, because on or about June 17, 2012, he learned that DOC had promoted 20 to 25 people as lieutenants, and he was not among them. (Ex. 1.)

6. The investigation then open against Sergeant Peck (Ex. 1) was based on a confidential incident report alleging that he and three other correction officers were creating a hostile work environment for another correction officer at the Massachusetts Correctional Institution at Shirley. (Exs. 3, 6.)

7. DOC has an unwritten policy not to promote any employee against whom an internal investigation or internal discipline is pending, and has had the policy since at least May 2005. (Brannan testimony.)

8. DOC uniformly applied the policy (Brannan testimony), thus making it a practice.

9. The purpose of the policy and practice is to avoid promoting an employee who could, as the result of the investigation, be later demoted, suspended, or terminated. (Brannan testimony.)

10. If an investigation determines that the allegations against an employee are false or fabricated and the promotion has already occurred, the investigated employee who was not eligible for promotion during the investigation has no direct recourse. (Brannan testimony.)

Discussion

DOC proved by “a preponderance of the evidence, that there was reasonable justification for the decision to bypass the candidate.” *Police Department of Boston v. Kavaleski*, 463 Mass. 680, 688 (2012)(citation and internal quotation marks deleted). DOC was reasonably justified in not wanting to promote an employee whom an open investigation could later find deserved discipline, demotion, or even termination. DOC’s policy and practice is reasonable for the

following reasons: to avoid expending administrative resources in promoting an employee, resources that that might be wasted; avoid the potential disruption of promoting an employee who is later suspended, demoted or terminated; avoid promoting employees to positions of more authority when they are under a cloud of suspicion for, among other things, misusing authority; and avoid signaling implicitly that the allegations or the result of the investigation do not matter. The Civil Service Commission has found DOC's policy of not promoting employees under internal investigation to be reasonable in *Carl Gonsalves v. Department of Correction*, G2-07-67 (March 4, 2008).

The issues before me are not whether Sergeant Peck engaged in the conduct he was investigated for; whether he was fairly disciplined for that alleged conduct (I have no facts about whether he has been disciplined); whether the investigation was flawed; or whether DOC employees whose credibility or impartiality could be questioned played roles in the investigation. I cannot place "an added evidentiary burden" on the appointing authority, *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 190 (2010), by examining those issues. Because the *existence* of the investigation is the relevant fact before me, and not its *substance*, it is not relevant whether and for how long Sergeant Peck had substantive information about the investigation before his hearing that I held. (Peck Br. 2.)

To the extent that Sergeant Peck intends to argue that a meritless, flawed, or unduly long investigation can have the consequence – unintended or intended – of blocking an appellant's promotion, he is probably correct. Although Sergeant Peck argues that the allegations are inaccurate and the investigation was flawed, he does not argue that the investigation was baseless on its face or a pretext to block his promotion.

Sergeant Peck asserts that one DOC employee, who was instrumental in bringing the allegations against Sergeant Peck, is not credible. He also asserts that DOC's investigator is not credible and had a conflict of interest in investigating him. The assertions, even if true, would not negate DOC's justification in bypassing Sergeant Peck while it investigated him.

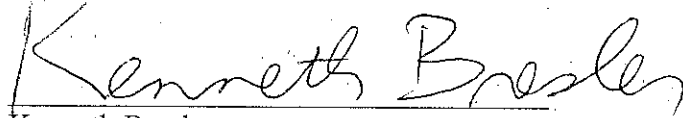
Sergeant Peck argues that DOC had a policy of not transferring employees under investigation and that it violated the policy by transferring him from one correction facility to another while he was under investigation. Sergeant Peck's *transfer* does not negate the DOC's policy and practice of not *promoting* employees under investigation. Nor would any violation of DOC's policy on transfers, the violation of which presumably benefited Sergeant Peck, negate the DOC's reasonable justification in bypassing him. Furthermore, DOC's policy and practice of not promoting an employee under investigation is reasonably justified, even if DOC errs in implementing it. *Carl Gonsalves v. Department of Correction* G2-07-67 (DOC omitted appellant's name from discipline list and erroneously informed him of promotion).

DOC's consistent adherence to a policy may cause unfairness in some individual cases. If DOC were willing to make exceptions to its policy, that, too, may cause unfairness in some individual cases. I am not called on to judge the fairness of DOC's larger treatment of Sergeant Peck, and do not mean to imply that I would make a different recommendation if that were my task. I consider only whether DOC's bypassing of Sergeant Peck was reasonably justified under its policy and practice, and find that it was.

Conclusion and Order

I recommend that the appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script that reads "Kenneth Bresler". The signature is written in dark ink and is positioned above a horizontal line.

Kenneth Bresler
Administrative Magistrate

Dated:

FEB - 1 2013