

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

BRIAN PIMENTEL,
Appellant

v.

G1-13-37

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Brian Pimentel
Pro Se

Respondent's Representative:

Kerri A. Rice
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Brian Pimentel (hereinafter "Mr. Pimentel" or "the Appellant"), filed an appeal on February 22, 2013, regarding the Department of Correction's (hereinafter "DOC" or "Appointing Authority") decision to bypass him for original appointment to the position of Correction Officer I. A pre-hearing conference was held on March 26, 2013 and a full hearing was held on May 21, 2013 at the offices of the Civil Service Commission (hereinafter "Commission"). The hearing was digitally recorded and a copy of the CD was provided to the parties. The parties submitted post-hearing briefs.

¹ The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

FINDINGS OF FACT

Nine (9) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- James O’Gara, Personnel Officer II, Human Resources, Department of Correction;

For the Appellant:

- Brian Pimentel, Appellant;

taking administrative notice of all matters filed in the case; as well as pertinent statutes, regulations and policies; drawing reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

1. The Appellant is a thirty (30) year old male who took a Civil Service Examination on March 24, 2012, receiving a score of 96. The Appellant applied for a position as a Correction Officer I with the DOC. He was ranked 218 among those willing to accept employment. Of the 146 candidates who accepted appointment, 76 were ranked below the Appellant. (Stipulated Facts)
2. Pursuant to his application, The Appellant duly accepted candidacy for the position by signing an appropriate list of candidates. The Appellant executed a waiver allowing the DOC to perform a background check. (Testimony of Mr. O’Gara)
3. The background check was performed by James O’Gara, Personnel Officer II (“Mr. O’Gara”), and/or by members of his staff. The search was performed using the Criminal Justice Information System (CJIS), on June 24, 2012. (Testimony of Mr. O’Gara).
4. The CJIS search indicated that there were several traffic incidents in the Appellant’s driving record, as well as criminal charges stemming therefrom. The bulk of the

entries in the driving record, as well as all of the criminal entries, arose from a single incident. In that incident, the Appellant, driving under the influence of alcohol, fled the scene of an accident (hereinafter referred to as the OUI incident). The incident occurred on or about May 25, 2008. (Exhibits 5, 9)

5. The OUI incident resulted in a total of five counts of criminal charges. Two charges were dismissed: negligent operation of a motor vehicle and leaving the scene of an accident. Three more charges were continued without a finding: a second count of negligent operation of a motor vehicle, a second count of leaving the scene of an accident, and one count of operating a motor vehicle under the influence of alcohol. Ultimately, the Appellant was ordered to pay fines, given probation, and his license was suspended. (Exhibit 5, Testimony of the Appellant)
6. The CJIS search also included records of several civil motor vehicle infractions: a surchargeable accident on May 1, 2001, a seatbelt violation on September 11, 2003, and a speeding violation on July 17, 2009. (Exhibit 9)
7. Mr. O’Gara noted these portions of the report, and passed the report on to Erin Gotovich, Acting Director of Human Resources (“Ms. Gotovich”) (Testimony of Mr. O’Gara).
8. Ms. Gotovich, who is reportedly vested with authority to determine the suitability of candidates, reviewed the report. Ms. Gotovich decided that the Appellant was unsuitable for the position. (Testimony of Mr. O’Gara).
9. On January 30, 2013, DOC notified the Appellant that he was being bypassed for appointment due to an “Unsatisfactory Criminal History Report (CJIS) – to include leaving the scene/property damage, operating under the influence of liquor – received

supervised probation; operating negligently 5/27/08; extensive [sic] motor vehicle history.” (Exhibit 2).

10. Mr. O’Gara testified before the Commission that it is DOC’s practice to view the complete history of an applicant, paying special attention to the last five years. He testified that the practice is not written or formal, but has been in effect for at least the entire time he has been employed at the DOC as a Personnel Officer. Mr. O’Gara has been employed in his position for about seven (7) years. (Testimony of Mr. O’Gara)
11. Mr. O’Gara testified that he had flagged the OUI incident and driving record in the CJIS report and passed it on to Ms. Gotovich to make the final decision regarding the Appellant’s suitability. He also testified that Ms. Gotovich had been delegated the authority to make final decisions in such matters. (Testimony of Mr. O’Gara)
12. The Appellant, in his testimony before the Commission, did not dispute the existence of the criminal or driving record. Rather, he challenged the classification of the charges arising from the OUI incident as criminal, noting that the charges were continued without a finding. He stated that he had no other criminal cases on his record, and that the charges at hand were not felonies. He further noted that the majority of the entries in his record arose from a single incident. (Testimony of the Appellant)
13. The Appellant further admitted personal responsibility for his actions, noting that the OUI incident had caused him severe personal loss, including the loss of his job, the loss of his home and other financial difficulties. The Appellant stated that he complied with all terms of his probation, paid all fines and has held steady employment for the past four years. (Testimony of the Appellant)

DISCUSSION

Applicable Civil Service Statutes and Rules

The role of the Civil Service Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1997). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, 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 Respondent's Argument

DOC argues that the Appellant's OUI incident and extensive driving record disqualify him for viable candidacy as a Corrections Officer. DOC argues that the OUI incident and related charges constitute a criminal record, or otherwise indicate that the Appellant is irresponsible and lacks the good judgment necessary to be a Corrections Officer.

The Appellant's Argument

The Appellant argues that the charges noted by CJIS do not constitute a criminal record as they were continued without a finding. Alternately, the Appellant argues that disqualification based on the OUI incident is unfair, claiming that the incident does not accurately reflect upon his character. Further, the Appellant avers that his driving record includes few infractions, which should not bar his appointment to the position of Correction Officer.

Analysis

DOC has shown, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant for the position of Correction Officer I. The reasons for the Appellant's bypass were the OUI incident, the related charges and his driving record. The Superior Court has held in another case that, "it is permissible for the

Department to review a CORI and make a determination based on the record as to whether the applicant should be denied.” See Dep’t of Correction v. Anderson and Civ. Serv. Comm’n, No. 09-0290, Suffolk Sup. Ct. (2010). Further, DOC may rely on information in a CORI report to bypass a candidate, even if the charge(s) on the CORI report were ultimately dismissed. Anderson at p. 6 citing prior Commission decisions. Preece v. Dep’t of Correction, 20 MCSR 152 (2007) (DOC could rely on a CORI report even though the Appellant was exonerated on all criminal charges); Lavaud v. Boston Police Dep’t, 17 MCSR 125 (2004) (Commission upheld bypass due to the Appellant’s long record of arrests although the charges were later dismissed); Brooks v. Boston Police Dep’t, 12 MCSR 19 (1999) (Commission upheld original bypass despite age of criminal record).

In this case, DOC’s policy of emphasizing the last five years of an applicant’s history serves to protect the interests of public safety in general the DOC in particular. However, this practice is not claimed to have been instituted in any formal and/or written manner. For such a standard to be recognized, it must be applied fairly and consistently. The DOC may wish to commit this standard to writing, or otherwise formalize its use.

Mr. O’Gara articulated sound and sufficient reasons to bypass the Appellant. DOC, as noted in Anderson, must hire applicants who demonstrate good judgment, controlled behavior, and respect for others and the law. Indeed, employees of law enforcement agencies must be above suspicion with regard to upholding the law, as they bear substantial public safety responsibilities. As in Anderson, DOC could reasonably conclude that the Appellant’s behavior, which occurred within five years of DOC’s review of his application and resulted in criminal charges, demonstrated the Appellant

may respond with poor judgment as a correction officer, and fail to uphold the law. This was a valid exercise of discretion based on merit and policy in which there was no evidence of political favoritism or bias.

The OUI incident and related criminal charges offered a sufficient basis to conclude that the Appellant had exercised poor judgment in a serious manner, within the last five years, which made him an unsuitable candidate. Although the DOC also cited the Appellant's extensive driving record as a reason for bypass, it should be noted that two of these incidents (the accident on May 1, 2001, and the seatbelt violation on September 11, 2003) are well outside the five year period which the DOC claims to be of primary importance. As the OUI incident alone provides sufficient basis for the DOC's actions, it is unnecessary to decide whether, under the five year policy, these records constituted an extensive record. However, if the DOC abides by its five year rule, older records such as these should be excluded, or given only minimal consideration.

While admitting the record offered by the DOC, the Appellant argued that the charges involved were not criminal because they were continued without a finding. The serious charges against the Appellant were criminally prosecuted and then continued without a finding and were dismissed one year later. As a result, the court ordered the Appellant to probation; he paid court-ordered fines, he attended a court-ordered program to prevent further alcohol abuse, and his driver's license was temporarily suspended. Whether or not this constitutes a conviction, there can be no doubt that the Appellant was criminally charged for his actions and ordered to various forms of probation. Moreover, the DOC policy does not appear to require convictions. Therefore, criminal charges and probation provide reasonable justification for the DOC's actions.

Such an OUI incident need not permanently disqualify a candidate. Such an incident alone only indicates that the Appellant exercised poor judgment at that time. Foolishness is not a permanent disability, unless it is repeated. Further, the Appellant's testimony before the Commission evinced credible, uncontrived contrition. The Appellant admitted responsibility for certain mistakes, showing that he had ultimately learned painful lessons from them.

The Commission does not have the authority "to substitute its judgment about a valid exercise of discretion based on merit and policy consideration by an appointing authority ...," Burlington v. McCarthy, 60 Mass. App. Ct. 914 (2004) quoting City of Cambridge, 43 Mass. App. Ct. 300, 304-305 (1997). "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." Burlington, 60 Mass. App. Ct. 914 (2004).

Were the OUI incident and driving record further in the past, and not followed by further criminal charges and continuing traffic violations, the bypass may not have been justified. However, the DOC has offered a fair and workable standard; so long as they abide by it in a consistent manner, this Commission will respect the validity of decisions based on the standard.

CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. G1-13-37 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners on June 13, 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:

Brian Pimentel. (Appellant)
Kerri Rice (for Appointing Authority)