

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

EDWIN A. RAMIREZ,
Appellant

v.

G1-19-073

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Edwin A. Ramirez

Appearance for Respondent:

Norman Chalupka, Esq.¹
Senior Labor Relations Specialist
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

Cynthia A. Ittleman

DECISION

On March 25, 2019, the Appellant, Edwin Ramirez (Appellant or Mr. Ramirez), filed an appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 31, § 2(b), contesting the decision of the Department of Correction (DOC) to bypass him for appointment to the position of Correction Officer I (CO I). A pre-hearing conference was held at the

¹ After April 23, 2019 Eugene Jalette at the MA Department of Corrections represented the Respondent. Mr. Jalette is also a witness in this matter.

Commission on April 23, 2019. A full hearing was held at the same location on May 24, 2019.² The full hearing was digitally recorded and both parties received a CD of the proceeding.³ On June 28, 2019, the Respondent submitted a post-hearing brief in the form of a proposed decision.

FINDINGS OF FACT

Twelve (12) Exhibits (Respondent Ex. 1-11 and Appellant Ex. 1) were entered into evidence at the hearing and one (1) document (Post-Hearing Exhibit 1) was submitted by the DOC after the hearing at my request. Based on the documents submitted and the testimony of the following witnesses:

For the DOC:

- Jonathan Thomas, Background Investigator, DOC
- Eugene Jalette, Supervising Identification Agent, DOC

For the Appellant:

- Edwin A. Ramirez, Appellant

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

1. Mr. Ramirez (Appellant or Mr. Ramirez) is Hispanic and speaks Spanish fluently. He was born in New Jersey and moved to Massachusetts when he was seven years old. Since then, he has lived in Worcester. He has several siblings and graduated from Doherty High School in 2005. He has full custody of his teenage child. (Appellant Testimony)

² 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.

³ 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 he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

2. Mr. Ramirez currently works at the Department of Mental Health's Worcester Recovery Center and Hospital (WRCH), a locked and secure facility. He has been employed at WRCH since 2015 and his current title is Mental Health Worker 2. In this position, he works directly with patients in a variety of ways, including teaching activities of daily living, teaching patients skills such as respect, responsibility, and morals, and monitoring visits from the community. Many patients who are housed in the facility have come from the House of Corrections. (Appellant Testimony). Mr. Ramirez is trained in CPR, proper restraint protocols, de-escalation techniques, and updates his CPR and other trainings yearly. He creates personnel schedules and writes reports, such as responses to safety and health and reports of restraint, on a daily basis. As part of his employment responsibilities, he regularly transports patients. (Appellant Testimony).
3. Prior to working at WRCH, Mr. Ramirez worked at Devereaux School with children, adolescents and adults with disabilities, autism spectrum disorder, and mental health challenges. He also worked at Work Out World at the front desk and at IMobile US as a wireless phone sales consultant. (Ex. 7).
4. Mr. Ramirez's past employment also includes working for approximately three years at AstraZeneca of North America, where he started in packaging and was promoted to other positions such as Production Supervisor. (Appellant Testimony, Ex. 8). In 2008, contrary to the DOC's assertion that the Appellant was fired by AstraZeneca, the company decided to significantly reduce its workforce and offered employees the opportunity for voluntary layoffs with severance packages, which Mr. Ramirez accepted. The Appellant volunteered to leave the company and received a severance package. (Appellant Testimony).

5. For many years, Mr. Ramirez was estranged from one of his siblings and did not have any contact with her because he disapproved of her romantic relationship. Because of this estrangement, he did not know that his sibling or his sibling's partner had been incarcerated or were currently incarcerated. The family member who knew about his sibling's incarceration did not share that information until after Mr. Ramirez applied to the DOC and after the DOC had conducted a home visit. (Appellant Testimony).
6. Mr. Ramirez applied for a position with DOC to be a Correction Officer (CO I) on November 25, 2018. He was ranked 47 on Certification No. 05868 dated October 22, 2018. (Ex. 2).
7. As part of the application package, and also on December 6, 2018, Mr. Ramirez signed an acknowledgement that all facts in his application were true and that he did not have an immediate relative, any family, a personal friend or an acquaintance who had been or was currently incarcerated. He also wrote that he had not been terminated from a former employment situation. (Ex. 4, 7).
8. One of the first steps in the hiring process at the DOC includes a pre-employment background investigation, which includes the following: review of criminal history; home interview; verification of education; consideration of language abilities, confirmation of employment; reference check; interview of neighbors; and review of other information throughout the process. (Jalette Testimony; PH Ex. 1).
9. Mr. Thomas, the investigator assigned to perform the pre-employment background investigation for Mr. Ramirez, was trained to do investigations in 2018. He has completed over a hundred background investigations and works very closely with his direct supervisor, Mr. Jalette. He discussed Mr. Ramirez's application with Mr. Jalette while compiling his investigation report (report). (Thomas Testimony).

10. Mr. Thomas conducted a home interview with Mr. Ramirez on December 6, 2018. Prior to the interview, Mr. Thomas had taken approximately eight or ten names from the list of Mr. Ramirez's Facebook friends and checked those names against state and county incarceration databases. (Ex.5; Thomas Testimony).
11. During the interview, Mr. Thomas asked Mr. Ramirez about his "Facebook friends" who Mr. Thomas had found to have been incarcerated. Mr. Ramirez explained he knew two of the individuals but did not know they had been incarcerated.⁴ Mr. Ramirez stated that the third individual, "Mr. X," was a friend of a friend, that he did not have recent contact with him and did not know he had been incarcerated. (Appellant Testimony).
12. In the section of the report entitled "Home Visit/Applicant Interview," Mr. Thomas wrote "Mr. Ramirez was asked about [Mr. X] who appeared as a friend of the applicant on social media website [sic]. [Mr. X] is currently incarcerated... Mr. Ramirez denied knowing [Mr. X]." (Ex. 5).
13. The day after the home interview, on December 7, 2018, Mr. Ramirez reevaluated his connections with people on his Facebook page and removed several people, including Mr. X, from his friends list. He removed those people whom he did not know well and did not have recent contact with. (Appellant Testimony).
14. Mr. Thomas believed the action of removing Mr. X from the Facebook page to be "noteworthy." His report states that by removing Mr. X's name, Mr. Ramirez was trying to "hide his association" with Mr. X. (Ex. 5; Thomas Testimony).
15. In addition to reevaluating his Facebook friends, Mr. Ramirez also contacted his family about his sibling and her partner. He then learned that his sibling had been incarcerated and that the

⁴ Mr. Thomas stated testified Mr. Ramirez's Facebook page was publicly available information.

sibling's partner, of whom he did not approve and who was the reason for the estrangement, had also been incarcerated. (Ex.5 ; Thomas Testimony; Appellant Testimony). In that communication, the Appellant explained to Mr. Thomas that he had been estranged from his sibling for many years, which is why he did not know she or her partner had been incarcerated. Mr. Ramirez stated that he occasionally saw his sibling's partner every few weeks when the partner, whom the sibling was no longer seeing, picked up their children. (Ex. 5; Thomas Testimony; Appellant Testimony).

16. Mr. Thomas' report stated that Mr. Ramirez had no explanation for omitting information about his sibling and sibling's partner being incarcerated. (Ex. 5).

17. As part of his investigation, Mr. Thomas contacted AstraZeneca to inquire about Mr. Ramirez's employment.⁵ On December 13, 2018, he received an employment verification form generated by AstraZeneca, which states "employment status" as "Terminated." (Ex. 8). Mr. Thomas did not contact the company or Mr. Ramirez after receiving this information. (Thomas Testimony).

18. As part of the investigation process, Mr. Thomas obtained Mr. Ramirez's criminal background information (CORI). Parts of the CORI report relevant to this matter are the Board of Probation information (BOP) and the Driver History. (Exs. 9, 11).

19. On Mr. Ramirez' Driver History there are multiple entries. These entries include driving infractions relating to a lack of inspection sticker (2017, 2013, 2012, 2007); failure to wear a seatbelt (2012, 2010); a crosswalk violation (2014); and registration not in possession (2010). Non-payment of child support in 2012 appeared on the BOP. Mr. Ramirez' license was

⁵ At the hearing, the Respondent stressed that Mr. Ramirez did not list his employment at AstraZeneca. This, however, was not listed as an issue or contributing factor in the investigator's background report, nor was it listed as a reason for bypass in the non-consideration letter. (Ex. 2, 5).

suspended for not paying fines and costs. Three surchargeable accidents occurred - one in 2012, one in 2006, and one in 2004. The BOP lists three violations of driving after a suspended license, all of which were dismissed when Mr. Ramirez paid the fines that were the cause of the suspensions. (Exs. 9 and 11; Thomas Testimony).

20. The section of the report entitled “Drivers History/Drivers License Data states: “Applicant has an active Massachusetts state driver’s license... Last incident on the applicant’s MA driving history was failure to pay a fines [sic] date 10/27/2017. Previous to that incident the applicant was cited on 9/21/2017 [for] an inspection sticker. The applicant has an extensive driving history dating back to 2002”. (Exs. 5, 9 and 11).
21. The report also states that in 2007, Mr. Ramirez had one dismissed charge of “Operating After,” and two charges of “Operating After” in 2008 and 2013, which were closed after Mr. Ramirez paid fines owed.⁶ (Exs. 5, 9 and 11).
22. Mr. Thomas did not discuss the items on the BOP with Mr. Ramirez at the home interview or at any other time. (Appellant Testimony)
23. Mr. Ramirez has no record of discipline. His supervisor at WRCH recommended him highly, stating that he would rate him a 9 of 10 for integrity and honesty. (Ex. 5).
24. At the end of the report, Mr. Thomas listed the positive employment aspects as training in CPR and restraint training, at least four years of stable work history, and several positive reference statements. Negative employment aspects were listed as:
 - Applicant has a poor driving history;
 - Applicant was less than truthful on this application by failing to disclose an employment termination; and
 - Applicant was less than truthful on his application by failing to disclose at least three (3) family, in-laws, acquaintances and/or personal friends that are currently or have been incarcerated in any Federal, State, or County jail/prison. (Ex. 5).

⁶ Based on the driver history report, I deem “Driving After” to mean driving after one’s license has been suspended.

25. Mr. Jalette, the DOC Commissioner, and HR personnel reviewed Mr. Ramirez’s file. (Jalette Testimony).

26. On March 7, 2019, Mr. Ramirez was informed that he was not considered for the position of Correction Officer I because of the results of the background investigation. The non-consideration letter stated,

Failed background investigation due [to] your MA Board of Probation (BOP), poor driver history and for omissions of untruthfulness; specifically you have three adult arraignments for operating on a suspended license, your driver history report indicates various negative entries from 2002-2017 to include a license suspension for non-payment of child support; you failed to disclose a termination from AstraZeneca of N. America and you failed to disclose at least 3 people that may [have been] or are incarcerated in any jail or prison. (Ex. 2).

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 (2001), citing Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300 (1997).

Section 1 of G.L. c. 31 defines “basic merit principles”, in pertinent part, as follows, “(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens; and (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.”

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). 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)).

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 Appellant. After the Appeals Court’s decision in Beverly, the Supreme Judicial Court, in Boston Police Department v. Civil Service Commission and another, 483 Mass. 461, 469 (2019), clarified that it is Appointing Authority’s “burden to establish such reasonable justification by a preponderance of the evidence.” Id. at 469.

Analysis

The DOC has not shown that its decision to bypass Mr. Ramirez was based on an adequate review of Mr. Ramirez' background and that the decision was reasonably justified by a preponderance of the evidence.

An appointing authority is justified in bypassing a candidate who does not meet the pertinent standard. *See, e.g., LaChance v. Erickson*, 522 U.S. 262 (1998)(lying in a disciplinary investigation alone is grounds for termination); *Goldrick v. New Bedford*, 32 MCSR 91, 94 (2019); and *Wine v. City of Holyoke*, 31 MCSR 24 (2018). "Labeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and uniform review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Dabene v. Boston Police Department*, 31 MCSR 143 (2018). *See Morley v. Boston Police Department*, 29 MCSR 456 (2016) (based on unreliable hearsay and false assumptions, the Boston Police Department erroneously concluded that a federal police officer and a disabled veteran who had been deployed on active duty overseas on four occasions, was untruthful).

Two of the three reasons for bypassing Mr. Ramirez were DOC's determination that Mr. Ramirez was untruthful. DOC stated he did not disclose "at least" three family, in-laws, acquaintances or personal friends that are currently or have been incarcerated. This is not supported by the record. Mr. Ramirez had been estranged from his sibling for years; and did not know she had been incarcerated because it was, in essence, a family secret. Mr. Ramirez told the investigator this information on his own initiative the day after his home interview. On that date, he contacted the investigator for the specific purpose of informing him about these incarcerations, about which he had just been informed. In all, Mr. Ramirez was credible in his

testimony and gave reasonable and understandable explanations for why he did not know, and therefore did not disclose, that his sibling and sibling's partner had been incarcerated.

The third individual who had been incarcerated was an individual, Mr. X, found listed as a "friend" on Mr. Ramirez's Facebook page. Mr. Ramirez told Mr. Thomas he no longer knew Mr. X. At hearing, he explained that this person was a friend of a friend, someone he used to know but no longer had contact with. He informed Mr. Thomas that he did not know that Mr. X was incarcerated. Further, Mr. Ramirez's testimony about his reason for the deletion of this individual from his Facebook account was clear and specific. Mr. Thomas' interpretation that Mr. Ramirez was trying to "hide" his acquaintance with Mr. X by removing him from his list of friends is not reasonable or based in fact. Mr. Ramirez had just learned from the investigator that Mr. X had been incarcerated. Based on his credible testimony I understand that he decided, in good conscience, to reevaluate his list of friends and remove those with whom he was no longer close. Mr. Thomas assumed that the Appellant had a negative reason for the removal and erroneously noted in his report that there was "no explanation" for not disclosing Mr. X and the other two individuals who were incarcerated.

Mr. Thomas' conclusion that Mr. Ramirez was untruthful about Mr. X, and was "hiding" his acquaintance with him, was made without basis in fact. Additionally, I find the phrase "at least" in the assertion that Mr. Ramirez "did not disclose 'at least' three family members" to imply that the investigator believed Mr. Ramirez to have known more incarcerated people than three but the investigator could not name them. While seemingly inconsequential, this phrase has the effect of indicating that Mr. Ramirez knows more than three people who have been incarcerated and willingly withheld information. Nothing in the record supports this implication and the lack of clarity in the report and non-consideration letter caused by the words "at least" gives rise to the

prospect of implicit bias towards Mr. Ramirez for some reason other than his experience and qualifications for the position of CO I.

DOC cited a second reason it believed Mr. Ramirez to be untruthful. Based on the documentation from AstraZeneca, Mr. Thomas understood the word “termination” to mean “fired” and decided that Mr. Ramirez lied on his application when he did not disclose that he had been terminated. Mr. Ramirez was not terminated from AstraZeneca, a fact to which he credibly testified at hearing. He voluntarily left the company with a severance package when the company was in the midst of layoffs in 2008 during the economic downturn. Mr. Thomas did not contact AstraZeneca for more information and did not talk to Mr. Ramirez about how or why he left the company after receiving this report, even though Mr. Thomas received the paperwork shortly after the home interview and only three days after Mr. Ramirez contacted him to give him recently-acquired knowledge about his sibling and sibling’s partner having been incarcerated.

Mr. Ramirez was entitled to more than a paper review of his situation, especially as he told the investigator about the voluntary layoffs and severance package and, especially, because he disclosed information about his family members to the investigator promptly, within a day of learning that information. Instead of making a deliberate and reasoned assessment of all of the facts that should be thoroughly considered in a proper background investigation, it appears that DOC relied primarily on the paper record. Given the serious nature and severe consequences of disqualifying a candidate for untruthfulness, a more thorough and reasoned evaluation should have taken place.

Because the DOC’s finding of untruthfulness is not supported by the record, the remaining issue is whether the DOC’s use of driving records as a reason to bypass Mr. Ramirez for a position as CO I was valid.

As the commission has stated in Stylien v. Boston Police Department, an appointing authority must evaluate an appellant's driving history in the proper context. Stylien v. Boston Police Department, 31 MCSR 209, 210 (2018)(context of driving record includes consideration of hours and locations). "An appointing authority, as part of a reasonably thorough review, should at least afford the applicant with the opportunity to address the underlying issues, either with the background investigator or the interview panel." Wine v. City of Holyoke, 31 MCSR 19, 24 (2018). By affording a candidate the opportunity to address driving infractions head-on, an appointing authority will have an adequate basis on which to decide whether the infractions have any bearing on the candidate's fitness to perform the responsibilities of the position. *See, e.g. Gibbons v. City of Woburn*, 32 MCSR 14 (2019). "In order for an appointing authority to rely on a record of prior misconduct as the grounds for bypassing a candidate, there must be a sufficient nexus between the prior misconduct and the candidate's current ability to perform the duties of the position to which he seeks appointment." Kodhimaj v. DOC, 32 MCSR 377 (2019).

DOC's investigative report, the non-consideration letter, and testimony did not clarify why the driving record was "poor" or "extensive". The report stated that the most recent record on the Appellant's MA driving history involved a failure to pay fines on 10/27/2017. Previous to that entry, the Appellant was cited on 9/21/2017 for lack of an inspection sticker. The charge against Mr. Ramirez in 2017 for operating after a license suspension was dismissed after he paid the pertinent fines and costs. The two other charges of operating after license suspension occurred five or more years prior to Mr. Ramirez's application and were closed in 2008 and 2013 after fines and costs were paid. DOC has not explained why these violations might impact Mr. Ramirez's ability to be a CO I. The DOC has indicated that its look-back policy when considering candidates' records is generally five (5) years. *See Teixeira v Department of*

Correction, 27 MCSR 471 (2014) and Whelan v Department of Correction 28 MCSR 168 (2015). Further, violations such as nonpayment of fines for inspection stickers may be attributable to socioeconomic factors, and, accordingly, may have no bearing on whether an appellant can effectively serve in a public safety position. See Dorn v. Boston Police Department, 31 MCSR 375, 376 (2018).

The events on Mr. Ramirez's driver history that were not economic in nature were accidents. In March of 2012, six years before his application to the DOC, Mr. Ramirez was involved in a surchargeable accident and two other surchargeable accidents occurred earlier, in 2004 and 2006. The DOC investigative report did not mention these incidents and the record as a whole shows no information about these past events. In determining the driving record to be "poor," the DOC did not make efforts to explain or qualify why the entries on the driver history reflect that Mr. Ramirez could not be trusted with the care and custody of inmates.

The DOC has not shown by a preponderance of the evidence that it had adequate reasons for the bypass that are sufficiently supported by credible evidence. Therefore, basic merit principles compel that he be afforded the opportunity for a fair and proper reconsideration of the merits of his present fitness for employment with the DOC.

Conclusion

For all of the above reasons, Mr. Ramirez's appeal under Docket No. G1-19-073 is hereby ***allowed***.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the state's Human Resources Division and/or the Department of Corrections in its delegated capacity to take the following actions:

1. Place the name of Edwin Ramirez at the top of any current or future certifications for the positions of CO I until such time as he has been appointed or bypassed, to ensure that he receives at least one additional consideration for appointment.
2. DOC may not rely on those bypass reasons found to be unsupported in this decision in future hiring cycles.
3. If Mr. Ramirez is appointed as a CO I, he shall be granted a retroactive civil service seniority date equivalent to those appointed from Certification No. 05868.
4. This retroactive date is for civil service purposes only and is not meant to provide Mr. Ramirez with any additional pay or benefits, including any creditable time toward retirement.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein, Commissioners) on May 6, 2021.

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:

Edwin Ramirez (Appellant)
Joseph Santoro (for Respondent)
Michele Heffernan, Esq. (HRD)
Regina Caggiano (HRD)

