

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JUSTIN SOUSA,
Appellant

v.

Case No.: G1-12-79

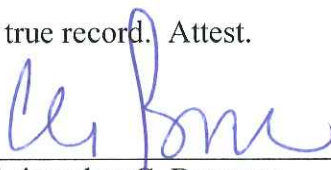
**DEPARTMENT OF
CORRECTION,**
Respondent

DECISION

The Civil Service Commission (Commission) voted at an executive session on January 10, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated November 9, 2012. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 10, 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)(1), 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:

Orlando F. DeAmbrew, Esq. (for Appellant)

Earl Wilson, Esq. (for Respondent)

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



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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November 9, 2012

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

Re: Justin Sousa v. Department of Correction
CSC Docket No. G1-12-79
DALA Docket No. CS-12-349

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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: Orlando F. De Ambrew, Esq.
Earl Wilson, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Justin Sousa,
Appellant

v.

Docket No. G1-12-79
DALA No. CS-12-349

Department of Correction,
Respondent

Appearance for Appellant:

Orlando F. de Abreu, Esq.
63 Winthrop Street
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Appearance for Respondent:

Earl Wilson, Esq.
Director of Employee Relations
P.O. Box 946
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Norfolk, MA 02056

Administrative Magistrate:

Maria A. Imparato, Esq.

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CIVIL SERVICE COMMISSION

SUMMARY OF RECOMMENDED DECISION

The Appointing Authority has met its burden of demonstrating reasonable justification for the bypass of the Appellant for original appointment as a CO I based on his failure to mention on his application for employment that he had previously been employed as a CO I by the DOC in 2008 and had been discharged from that position based on his failure to report for work or call in to report his absence on three consecutive days, in violation of the Rules and Regulations Governing All Employees of the Department of Correction.

RECOMMENDED DECISION

Justin Sousa filed a timely appeal under M.G.L. c. 31, s. 2(b) of the decision of the Department of Correction (DOC) to bypass him for original appointment to the position of Correction Officer I.

I held a hearing on July 16, 2012 at the office of the Division of Administrative Law Appeals, One Congress Street, 11th floor, Boston, MA.

I admitted documents into evidence. (Exs. 1- 12.) James O'Gara, Personnel Officer II at the DOC testified on behalf of the DOC. Justin Sousa testified in his own behalf. The hearing was digitally recorded. The record closed on August 17, 2012 with the filing of proposed decisions and post-hearing briefs by both parties.

FINDINGS OF FACT

1. Justin Sousa was a candidate for the position of Correction Officer I with DOC from Certification No. 4011045 which was requested by DOC on September 28, 2011. His Civil Service test score was 85. (Exs. 3, 11.)
2. By letter of January 18, 2012 from the Commonwealth Division of Human Resources (HRD), Mr. Sousa was informed that he was not considered for appointment to the January 2012 Academy because of an unsatisfactory background check and a negative employment history. (Ex. 2)
3. Mr. Sousa filed a timely appeal. (Ex. 1.)
4. Mr. Sousa had previously worked for the DOC as a Correction Officer I. On January 20, 2008, Mr. Sousa began employment with the DOC as a recruit in the 303A Basic Training Class at the Shirley Training Academy. Prior to completing the Academy, he

was required to familiarize himself with the Rules and Regulations Governing All Employees of the Massachusetts DOC (Rules and Regulations). (Exs. 4, 8.)

5. After successful completion of the Academy, Mr. Sousa was assigned to MCI-Cedar Junction where he began work on April 7, 2008 on the 3 – 11 p.m. shift. He was assigned to a housing unit in the general population and was “shadowed” by another CO. (Testimony, Sousa.)
6. On April 8, 2008, his second day at MCI-Cedar Junction, Mr. Sousa was assigned to the DDU, the disciplinary unit. Mr. Sousa was assigned to perform an “eyeball watch” on a problem inmate. At the beginning of his shift, someone stopped by to “shadow” Mr. Sousa every fifteen minutes, but as the shift went on, the shadowing checks became less frequent. The problem inmate yelled profanities at Mr. Sousa and threw things at him. (Testimony, Sousa; Ex. 6.)
7. At the end of his shift at 11 p.m., Mr. Sousa felt overwhelmed and disgusted. After he was relieved, Mr. Sousa looked around for someone to talk to. He could not find anyone, so he punched out and went home. He was due back at work the next day at 3 p.m. (Testimony, Sousa.)
8. On April 9, 2008, Mr. Sousa had second thoughts about whether he wanted to work for the DOC. He did not report for work, and he did not call in to report his absence. Mr. Sousa thought someone from the institution would notice that he was not at work and would call him. (Testimony, Sousa; Ex. 6.)
9. On April 10, 2008, Mr. Sousa did not report for work. He called in and asked whether he should report to work. The unidentified person who took Mr. Sousa’s call told him someone would call him back. (Testimony, Sousa.)

10. Mr. Sousa did not report to work on April 11, 2008, and he did not call in to report his absence. He received a telephone call telling him he was terminated. (Testimony, Sousa.)
11. By letter of April 15, 2008, Mr. Sousa was informed of his termination for "No Call, No Show" since April 8, 2008, in violation of General Policy I, Rule 1 and Rule 18(a) of the Rules and Regulations. (Ex. 4.)
12. Mr. Sousa appealed his termination, and on June 6, 2008 was given a hearing under M.G.L. c. 31, s. 41. By letter of August 5, 2008, DOC Commissioner Harold W. Clarke found just cause for Mr. Sousa's termination during his probationary period for violation of the General Policy I, Rule 1 and Rule 18(a) of the Rules and Regulations. (Exs. 5, 6, 7.)
13. Mr. Sousa collected unemployment compensation benefits as a result of his termination. (Ex. 10.)
14. Mr. Sousa filed an application for employment with the DOC on November 9, 2011, to which he appended his resume. Mr. Sousa omitted his employment with DOC in 2008 from both the application and his resume, although he noted on the education part of his resume that he had attended the DOC Academy in 2008. (Ex. 12.)
15. Where he was asked whether he had ever been formally disciplined by an employer, Mr. Sousa indicated that he had been terminated from his job at Lowe's, but he failed to mention that he had been terminated from the DOC in 2008. (Ex. 12.)
16. The DOC director of Personnel and the Assistant Deputy Commissioner decided to bypass Mr. Sousa for appointment for failing to disclose this information. (Testimony, O'Gara.)

17. 103 DOC 515 outlines the DOC policy with respect to Security Employees Assigned a Special Management Unit. Under its general provisions, 515.01, the policy states that “All security personnel selected to work in a special management should normally have served a minimum of one year in the Department of Correction (DOC) and should have exhibited signs of maturity, tolerance and correctional skills. They should exhibit a desire and interest in working with unit inmates.” (Ex. 9.)
18. When Mr. Sousa was assigned on April 8, 2008 to work in the DDU, a special management unit, he had not served a minimum of one year with the DOC, and he had not exhibited a desire and interest in working with DDU inmates. (Testimony, Sousa.)

CONCLUSION AND RECOMMENDATION

The Civil Service Commission, under M.G.L. c. 31, s. 2(b), is required “to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1997). Justified 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.” *Id.*, at 304. If the Commission finds by a preponderance of the evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004). 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, 334 (1983).

The Commission’s role, while important, is relatively narrow in scope; reviewing the legitimacy and reasonableness of the appointing authority’s action. *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 187 (2010).

M.G.L. c. 31, s. 2(b) requires that bypass cases be determined by a preponderance of the evidence. A “preponderance of the evidence requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reason assigned for the bypass of an appellant were more probably than not sound and sufficient.” *Mayor of Revere v. Civil Service Commission*, 31 Mass. App. Ct. 315 (1991).

In order to prevail in a bypass case, the Appellant must demonstrate that the reasons proffered by the Appointing Authority were untrue, apply equally to the selected candidate and the bypassed candidate, are incapable of substantiation, or are a pretext for other, impermissible reasons. *Borelli . MBTA, G-1160, 1 MCSR 6*.

I conclude that the DOC had reasonable justification for bypassing Justin Sousa for appointment as a CO I, based on his failure to include his prior employment with the DOC on his application or his resume; his failure to mention in his application that he had been terminated from the DOC when asked whether he had ever been disciplined by an employer; and his prior work history in 2008 with the DOC that demonstrates a stunning lack of judgment.

The Appellant did not list his prior employment with DOC on his application or resume because he only worked at MCI-Cedar Junction for two days. On cross-examination, the Appellant acknowledged that he began being paid by DOC beginning in January 2008 when he began training at the Academy, so he was actually employed by the DOC from January 20 to April 11, 2008. The Appellant then said he did not mention his work as a CO I because he thought he should only list the "positives."

The Appellant understood that the question on the application about prior discipline included prior termination, because he did indicate on his application that he had been terminated by Lowe's. He did not explain why he failed to mention his termination from DOC.

The Appellant's unsatisfactory work history refers to his termination from the DOC in 2008 for failing to report to work and failing to call in his absence for three days, in violation of Rule 18(a) in the Rules and Regulations that states in pertinent part: "Absence from duty without permission or notice shall not be allowed." The Appellant was aware that he should call in on April 9, 2008, but he inexplicably thought that if he did not report for work, someone from the institution would call him and he could explain himself. He deliberately chose not to call in.

The decision of the DOC to bypass the Appellant for appointment was reasonably justified in view of the omissions on his application that speak directly to the Appellant's credibility, and in view of the Appellant's termination from the DOC in 2008 for reasons that speak directly to the Appellant's lack of judgment.

The fact that the Appellant deliberately failed to call in on April 9, 2008, despite being aware of requirement that he do so, that he took no reasonable steps to preserve his

employment with the DOC, and that he actually thought someone from DOC would call him when his absence was discovered demonstrates a lack of maturity and good judgment that render him unsuitable for the job of CO I.

The fact that the Appellant deliberately failed to mention his prior work with the DOC and his prior termination from the DOC seems to indicate a deliberate attempt to mislead.

The Appellant argues that he was deprived of a "fair shot" at being a CO I because the DOC violated its policy, 103 DOC 515, by placing him in the DDU even though he had not been with the DOC for more than a year, he was not given supervision, and he never expressed an interest in working in the DDU. Even if this were a convincing argument, it in no way addresses or excuses the Appellant's failure to call in to report his absence on April 9, 2008. I additionally note that the language of the policy uses the word "should," not "shall."

The Appellant argues that the decision to award unemployment compensation benefits to the Appellant based on a finding by the hearing officer that the DOC does not uniformly enforce its attendance policy is binding on the Commission because of issue preclusion. I disagree. The issue in the unemployment case is a different issue than the issue before me in this bypass case.

The reasons for the bypass of the Appellant were more probably than not sound and sufficient. The Appellant has not demonstrated that the reasons for his bypass are untrue, apply equally to the selected and the bypassed candidate, are incapable or substantiation or are a pretext for other impermissible reasons. I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imperato
Maria A. Imperato
Administrative Magistrate

DATED: NOV 9 - 2012