

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

TIGHE SPADY,
Appellant

v.

G1-18-147

DEPARTMENT OF CORRECTIONS,
Respondent

Appearance for Appellant:

Tighe Spady, *Pro Se*

Appearance for Respondent:

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

Commissioner:

Cynthia A. Ittleman

DECISION

On August 21, 2018, the Appellant, Tighe Spady (Appellant), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the July 9, 2018 decision of the Massachusetts Department of Correction (DOC or Respondent) to bypass him for original appointment as a permanent, full-time Correction Officer I. A prehearing conference was held on September 18, 2018 at the Commission. I held a full hearing at the same location on November 13, 2018.¹ The hearing was digitally recorded.²

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT:

Thirteen (13) exhibits were entered into evidence at the hearing, twelve from the DOC (Respondent Exhibits 1-12 (Resp. Ex. 1-9) and one (1) from the Appellant (App. Ex. 1). I requested that DOC submit additional documents after the hearing which are marked as post-hearing exhibits (Resp. PH 1-5) and affidavits from Stephen Kennedy, Deputy Superintendent of Operations (Kennedy Aff.) and Patricia Snow, Personnel Analyst (Snow Aff.). Based on the documents submitted into evidence and the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent, DOC;
- Sandra Walsh, Lieutenant, Background Investigator, DOC;

Called by the Appellant:

- Tighe Spady, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant took and passed the Civil Service Examination for the position of Correction Officer on March 19, 2016. (Resp. Ex. 5).
2. The Appellant is currently employed as a heavy equipment operator and was enlisted in the Army National Guard in Massachusetts for six years. He was honorably discharged in 2014. He possesses a license to carry a firearm and has a Certificate of Completed Gunsmithing. (Appellant Testimony; Resp. Ex. 4).
3. The DOC hiring processes outlined in Policy 103 DOC 201 relevant to this appeal include the DOC's review of candidates' applications, candidate interviews, criminal checks; driver

history checks; interviews with a hiring panel; and physical abilities testing. (Resp. PH Ex. 3, 5).

4. In all instances when a candidate's background information shows that the candidate had been arraigned, the DOC will look to the police narrative of that incident to see what occurred. DOC personnel do not "reinvestigate" the crimes, only examine the facts. (Jalette Testimony).
5. DOC policy does not include a specific "look back" period regarding prior convictions or criminal history in its hiring process. (Jalette Testimony). A bypass will occur if a candidate has any conviction but an ex-offender may be employed if the Commissioner certifies that the appointment will contribute substantially to the work of the Department. (Jalette Testimony; Resp. PH Ex. 3).
6. The Appellant applied for a position with the DOC as a Correctional Officer I on February 20, 2018. At the time of the hearing at the Commission, the Appellant was 32 years old. (Appellant Testimony, App. Ex. 1).
7. As part of the hiring process, DOC accessed and obtained Criminal Offender Record Information (CORI) regarding the Appellant from the state's Criminal Justice Information Services (CJIS). The January 26, 2018 CJIS report for the Appellant contained Massachusetts Criminal History, (BOP), Massachusetts Warrants check, a criminal history which included an NCIC [National Crime Information Center] and III [Interstate Identification Index], a Wanted or Missing Persons Check, Massachusetts Driver's License check, and a Driver history record. (Jalette Testimony; Resp. Ex. 4).
8. The Appellant's criminal background, which he does not dispute, contains many charges that were continued without a finding (CWOFF) and later dismissed, or charges that were

dismissed outright.³ The Appellant was arraigned for driving negligently in June 2004; for two charges of OUI, one dated September 24, 2007 and one dated March 20, 2011; for firearms violations on March 20, 2011; and for riding an unregistered and uninspected motorcycle on June 10, 2011. The detailed charges and dispositions are as follows:

- The 2004 charge of operating negligently was continued without a finding and dismissed after a probationary period.
- The September 24, 2007 charge of OUI was continued without a finding and dismissed after probationary period, which included the loss of his driver's license for six months.
- The March 20, 2011 charge of OUI was continued without a finding and dismissed after a probationary period, including a two-year loss of license.⁴
- The Appellant had a loaded gun in his glovebox and a part of a gun underneath the passenger seat of his vehicle when he was stopped on March 20, 2011. The charge of carrying a firearm while intoxicated was continued without a finding and dismissed after a probationary period.⁵
- Other firearms charges, carrying without a license, carrying without an FID card, and carrying a loaded weapon without a license, were dismissed. (Appellant Testimony; App. Ex. 1).
- The June 2011 charge for driving an uninspected and unregistered motorcycle was dismissed. (Appellant Testimony; App. Ex. 1).

9. Lieutenant Sandra Walsh, a trained investigator who has conducted hundreds of pre-employment background investigation, was assigned to the preliminary background investigation for the Appellant. (Walsh Testimony). Mr. Jalette, who had obtained the Appellant's CORI, provided her with the paperwork for the Applicant prior to her interview with him. (Walsh Testimony, Resp. Ex. 4).

10. On March 1, 2018, at the home interview, Lieutenant Walsh spoke to the Appellant about the requirements and responsibilities of correctional officers, interviewed the Appellant's

³ "Under the practice known as 'continuing without a finding,' a District Court judge continues a case for a lengthy period of time without making a finding of guilty. The judge may impose certain conditions on the defendant. At the end of the designated period, if the defendant has complied with the conditions of the continuance, the case is dismissed." *Com. v. Duquette*, 386 Mass. 834, 837-838 (1982).

⁴ The probationary period imposed by the court ended earlier than scheduled because the Appellant had paid his fines and adhered to the terms of probation. (Appellant testimony).

⁵ Under cross examination at hearing, the Appellant provided further details about having a barrel of a gun, but not the entire gun, under the passenger side front seat during the March 20, 2011 traffic stop. (Appellant Testimony).

partner, and discussed his driver's history and charges against him. (Walsh Testimony; Resp. Ex. 4).

11. Lieutenant Walsh's practice during home interviews is to present the candidate's BOP to the candidates and ask them to talk about what is written there. (Walsh Testimony).
12. During Lieutenant Walsh's discussion with the Appellant, the Appellant stated that his charges had all been dismissed. When he did those things, he described himself as "young and dumb." The investigator heard the details of the charges but did not spend a great deal of time discussing them because the charges were dismissed. (Walsh Testimony).
13. Lieutenant Walsh recorded her interview with the Appellant conversation on the investigative report:

At the home visit, I had the opportunity to speak with the Appellant about the driver history. Starting in 2004, the Appellant stated he was young. For his first DUI he stated he lost his license for six (6) months. He had a weapon with him and didn't realize that being drunk would negate the LTC [license to carry]. Then in 2011, he stated it was a nice day out and he decided to take his motorcycle out, not thinking. He was stopped without inspection/registered. Then later in 2011, his second DUI occurred. He stated it occurred while still in the military. He further stated he fought it in court for over two (2) years, and received a CWOFF, and lost his license for two (2) years. He concluded by stating he seldom drinks now. (Resp. Ex. 4).⁶

14. Lieutenant Walsh spoke with the Appellant's references, checked his employment history, and discussed the Appellant's work with his current employer. (Walsh Testimony, Resp. Ex. 4). She did not speak to Mr. Jalette about the Appellant or his qualifications in any part of her process. (Walsh Testimony).

⁶ At hearing, the Appellant cross-examined Lieutenant Walsh to correct certain facts in the report. Specifically, he noted that firearms were involved in the second OUI in 2011, not the first OUI in 2007. Lieutenant Walsh responded that she should have written the report to reflect that the second DUI offense was the offense with the firearms. (Walsh Testimony).

15. On the last page of the report, Lieutenant Walsh wrote that the Appellant's positive employment aspects were a "Certificate of Completion Gunsmith (260 hours)" and the Appellant's military awards, including the Massachusetts Emergency Service Ribbon and the National Defense Service Medal. She wrote that the Appellant's negative employment aspects were: "BOP includes 2 DUI's – both dismissed and carrying a firearm while intoxicated."
16. On January 9, 2018, DOC informed the Appellant via letter that his CORI report contained criminal background. This letter informed the Appellant that he could dispute the accuracy of the CORI results with the DOC. (Resp. Ex. 6).
17. On February 22, 2018, a three-member panel interviewed the Appellant. (Resp. PH Ex. 1). During the interview, the panel asked three questions that all interviewees were asked. (Resp. PH Ex. 2; Kennedy Aff; Snow Aff). The panel did not ask anything about the Applicant's criminal history. (Appellant Testimony, Kennedy Aff; Snow Aff; Resp. PH Ex. 2).
18. On April 9, 2014, DOC extended a conditional offer of employment to the Appellant, contingent on a full background check and physical pre-screening test results. (Resp. Ex. 3).
19. When he reviewed the Appellant's application file, Mr. Jalette was concerned with the Appellant's conduct of driving while intoxicated with a loaded weapon in his vehicle. He stated that "it was a very dangerous situation." (Jalette Testimony).
20. A group of senior DOC officials, including the DOC Commissioner and Mr. Jalette, met to discuss approximately sixty (60) candidates whose files needed further review to determine whether they would be bypassed for appointment. The Commissioner reviewed the Appellant's file. Of the candidates reviewed, approximately half were bypassed, including the Appellant, and half were not. (Jalette Testimony).

21. On July 9, 2018, DOC wrote to the Appellant that he was not considered for an appointment as a correctional officer because of “Failed Criminal Background based on Criminal Offender Record Information.” The letter included a list of charges that had been brought against the Appellant.

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 must ensure that the system operates on “[b]asic merit principles.” *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259, citing *Cambridge v. Civil Serv. Comm’n*, 43 Mass.App.Ct. 300, 304 (1997). “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. “A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support.” (*Cambridge*, at 304).

The Commission must decide “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); *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 727-728 (2003). The Commission’s charge is to review the legitimacy and reasonableness of the appointing authority’s actions and ensure that the appointing authority conducted an “impartial and reasonably thorough review” of the applicant. *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).

The state's CORI law (G.L. c. 6, § 172) states in relevant part: "... Criminal justice agencies may obtain all criminal offender record information, including sealed records, for the actual performance of their criminal justice duties ...". As a criminal justice agency, DOC may obtain and use criminal information from a CORI to determine the suitability of an applicant for the position of Correctional Officer. *Kodhimaj v. DOC*, 32 MCSR 380 (2019) and cases cited. However, an agency must not rely only on criminal record checks when determining whether to bypass candidates. Before the agency can consider the misconduct as a possible reason to bypass a candidate, the agency must speak with candidates and gather any other relevant information such as police reports, regarding the accuracy and relevance of the underlying misconduct. *Golden v. DOC*, 33 MCSR 194 (2020). Candidates must be provided the opportunity to explain their criminal history and to justify why the criminal record is not disqualifying. *Kodhimaj*, 33 MCSR at 382.

The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown when, as in this case, misconduct is not in material dispute. *Boston Police Dep't. v. Civil Serv. Comm'n* and another, 483 Mass. 461 (2019); *Cambridge* at 305. In all,

"[n]o bright lines have been set between when an applicant's history remains an unreasonable risk of present fitness to be appointed to perform the duties of a public safety officer or other civil service job and when intervening circumstances demonstrate rehabilitation that makes such behavior too stale to be used as an indicator of present fitness consistent with basic merit principles of civil service law... Ultimately, however, absent any showing of bias, political motivation or other unlawful motives, the judgment call on rehabilitation rests within the sound discretion of the Appointing Authority." *Mann v. City of Quincy*, 31 MCSR 37, 46-47 (2018) and cases cited.

Analysis

The Appellant argues that nearly seven years with a clean record, along with his work experience and military record, shows a sufficiently long enough period of rehabilitation to be

considered for a position as a correctional officer with the DOC. He also argues, in essence, that because some of his criminal cases were continued without a finding and ultimately dismissed after successful probationary periods, that the DOC could have considered those charges as dismissed, and therefore not as weighty as convictions. He stated at hearing that he is a different person than he was when he was when he was arraigned for the criminal actions appearing on his CORI.

The Commission has found that an applicant's arrests and arraignments can warrant a bypass, even where those arrests led to dismissed charges. *Lapointe v. Department of Correction*, 27 MCSR 110 (2014) (bypass of a candidate for CO I upheld based on an arrest for possession of marijuana, which was nol prossed, and an arraignment for driving under the influence and negligent operation); *Louis v. Department of Correction*, 27 MCSR 31 (2014); *Solbo v. Department of Correction*, 24 MCSR 519 (2011); *Thames v. Boston Police Department*, 17 MCSR 125 (2004).

Among the inquiries into the DOC's decision to bypass the Appellant, I first address whether the DOC properly utilized the information in the Appellant's CORI report.

Prior to issuing the non-consideration letter, the DOC thoroughly reviewed and considered the Appellant's suitability for employment as a correctional officer based on a variety of factors, not only the CORI report. The home interview by Lieutenant Walsh and her subsequent investigation and report demonstrate that the DOC looked to a variety of factors in addition to misconduct, such as education, home life, employment history, and references.

During the home interview, the Appellant discussed the entries on his BOP.⁷ The Appellant acknowledged all of the charges brought against him and stated to the investigator that

⁷ Despite cataloguing some of the chronology of the charges imprecisely, the investigator captured all of the Appellant's criminal charges in her report.

he was a different person then than he was when the misconduct occurred. The investigator recollected that the Appellant explained his younger self as “young and dumb.” Although she did not spend much time on the charges brought against the Appellant, she gained background information from him about when and why they appeared on his BOP. Based on this information, the investigator made determinations about the positive and negative attributes of the Appellant as a suitable candidate for a position as a correctional officer with the DOC.

In addition to the interview and investigation, the DOC also gathered information about the Appellant through an interview with a three-person panel, during which the Appellant was asked no questions about prior driving or criminal history. After that stage in the hiring process, DOC officials, including the Commissioner, reviewed his file. The decision to not hire the Appellant was made after a reasonably thorough review of the Appellant’s application and was based on concerns directly related to custody functions of a Correction Officer I.

Next, I turn to the question of whether the Appellant’s incidents of misconduct justified DOC’s decision to bypass him for appointment.

The charges of reckless driving that occurred when the Appellant was 17, and the charge of driving without a registration or inspection sticker, do not weigh as heavily as does the Appellant’s multiple OUI charges and a firearms charge in 2011.⁸ The Appellant’s most serious misconduct for which he was charged occurred on March 20, 2011, seven years prior to his application to the DOC. On this date, he was driving while intoxicated. He was carrying a loaded gun in his glovebox and there was a barrel of a gun on the floor beside him. The charge of carrying a firearm while intoxicated charge stemmed from this single, “dangerous” incident.

⁸ *Dorn v. Boston Police Department*, 31 MCSR 375, 376 (2018) (Commission may weigh driving record in past 5 years more heavily than in 10 years; “less weight is given to those entries which may be attributable to socioeconomic factors such as expired registrations, no inspection sticker, etc. which may have no bearing on whether the Appellant can effectively serve in a public safety position”).

This was not the first time the Appellant had been stopped for operating under the influence, however. In 2007, the Appellant had been charged with OUI and lost his license for six months as a condition of his probation. Even though the two OUI's and the charge of carrying a gun while intoxicated did not result in conviction, they were serious enough to cast doubt on the Appellant's ability to follow the law regarding operating firearms and vehicles, and therefore conduct himself within the regulations of the DOC as a correctional officer.

Further, the two charges of OUI arguably demonstrate that there was a pattern of behavior involving driving under the influence of alcohol. That the second violation of OUI and carrying a firearm while intoxicated occurred during the same incident compounds the seriousness of these offenses and gives the DOC justifiable reason to conclude that the Appellant was not qualified to conduct the duties of a DOC correctional officer at the time of application.

The preponderance of evidence in this appeal establishes that DOC had just cause to bypass the Appellant based on a legitimate concern about the Appellant's history of operating a vehicle and carrying firearms under the influence of alcohol. No evidence of any impermissible political or personal factors is evident, and the DOC has acted within its statutory discretion to not hire the Appellant for the position of Correctional Officer I.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. G1-18-147 is hereby ***denied.***

Civil Service Commission

/s/ Cynthia Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein and Tivnan, Commissioners) on March 25, 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)(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. 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 to:

Tighe Spady (Appellant)

Joseph Santoro (for DOC)

Michele Heffernan, Esq. (HRD)