

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

KENNETH STRONG,  
Appellant

v.

G1-15-28

DEPARTMENT OF CORRECTION,  
Respondent

Appearance for Appellant:

*Pro Se*  
Kenneth Strong

Appearance for Respondent:

Andrew McAleer, Esq.  
Department of Correction  
PO Box 946: Industries Drive  
Norfolk, Ma 02056

Commissioner:

Christopher C. Bowman<sup>1</sup>

**DECISION**

On January 31, 2015, the Appellant, Kenneth Strong (Mr. Strong), pursuant to G.L.c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to bypass him for original appointment to the position of Correctional Program Officer A/B. A pre-hearing conference was held on March 3, 2015 at the offices of the Commission and a full hearing was held at the same location on May 27, 2015<sup>2</sup>. The hearing was digitally recorded and both parties were provided with a CD of the hearing<sup>3</sup>. At my request, both parties made closing arguments in lieu of post-hearing briefs.

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Chris Windle in the drafting of this decision.

<sup>2</sup> 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.

## **FINDINGS OF FACTS:**

Twelve (12) exhibits were entered into evidence. Based on these exhibits, the testimony of the following witnesses:

*Called by DOC:*

- James O’Gara, Personnel Analyst III, Department of Correction;

*Called by Mr. Strong:*

- Kenneth Strong, Appellant;

and taking administrative notice of all matters filed in the case and the pertinent statutes regulations, policies, agreed post-hearing documents, and reasonable inferences from the credible evidence; I find the following:

1. Kenneth Strong is a 51-year old male, who is married with three (3) children, residing in Winchendon, Massachusetts. (Testimony of Mr. Strong)
2. Mr. Strong received his high school diploma from the Air Force. His diploma was lost, so he subsequently earned his GED as well. (Testimony of Mr. Strong)
3. Mr. Strong served in the United States Air Force from 1981 to 1983 as a Jet Engine Mechanic. He then served in the Air National Guard from 1983 to 1988 as a Corrosion Control Specialist. (Testimony of Mr. Strong)
4. Mr. Strong is currently enrolled in Western New England College, majoring in Criminal Justice. He had completed 36 credits at the time of the civil service examination related to this appeal. (Testimony of Mr. Strong)

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<sup>3</sup> 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.. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

5. Mr. Strong served as a Medical Officer at the Plymouth County Sherriff's Department from 1988 to 1990 where he distributed medication and assisted with inmates who sought medical assistance. (Exh. 3; Testimony of Mr. Strong)
6. Mr. Strong served as a Security Officer with Burns International Security from 1990 to 1992. He then worked as a Security Officer with Motorola Codex providing property security from 1992 to 1993. (Exh. 3; Testimony of Mr. Strong)
7. Mr. Strong served as a Patrolman for the Town of Carver, serving part-time from 1986 to 1993. In 1993, he became a full-time patrolman and served in that capacity until 1998. He also served as a Patrolman for the City of Gardner from 2000 to 2006. In his capacity as a Patrolman, Mr. Strong enforced the laws of the Commonwealth of Massachusetts. (Exh. 3; Testimony of Mr. Strong)
8. While working as a Patrolman, Mr. Strong would often, at the request of parents, visit their homes to give talks to teenagers who were running afoul of the law. He would also occasionally counsel various criminal offenders on how to identify resources and assistance available to them. (Testimony of Mr. Strong)
9. From 1999 to 2000, Mr. Strong worked as a Drill Instructor for Elliot Community Services. There he supervised and instructed juveniles assigned to the Department of Youth Services (DYS) boot camp to teach life skills and lessons. (Exh. 3; Testimony of Mr. Strong)
10. From 2007 to 2011, Mr. Strong worked as a Campus Police Officer. He worked with UMASS Medical School in Worcester from January until October 2007 and then with Fitchburg State College until July 2011. (Exh. 3)
11. While serving as a campus police officer, there were many times that Mr. Strong would take students who had run afoul with the College's disciplinary board on "ride-alongs". During

these “ride-alongs,” he would often answer questions from the students about what they could do to keep out of trouble. (Testimony of Mr. Strong)

12. Mr. Strong is currently working as a Quality Control Inspector for NHBB in Peterborough, NH. (Exh. 3)

#### *DOC Application*

13. Among the twelve (12) documents entered into evidence were: a) a Job posting, announcing that DOC was hiring Correctional Program Officers A/B (Job Bulletin); b) the “Human Resources Division Class Specification: Correctional Program Officer” (HRD Form); and c) the state’s Executive Office of Public Safety’s continuous job posting (Public Safety Post)<sup>4</sup>. Among these documents were two different descriptions for the minimum entry requirements for the position. (Exh. 4; Exh. 7; Exh. 9)

14. The minimum qualifications were listed in the Job Bulletin as follows:

“Applicants must have two years of full-time or equivalent part-time professional experience in counseling, guidance, criminal justice **or** social work that included counseling and/or rehabilitation of criminal offenders, inmates, or prisoners or any equivalent combination of the required experience and the substitutions below.” (emphasis added)

The “substitutions below” state that a Bachelors degree in a related field is worth two years’ experience and in an unrelated field is worth one year. Education toward those degrees will be measured in the same ratio. A Masters degree in a related field is the equivalent of one year’s experience. (Exh. 4)

15. The minimum qualifications were listed on the HRD Form and the Public Safety Posting as follows:

At least two years of full-time, professional experience in **counseling, rehabilitation, or custodial care and treatment of criminal offenders,**

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<sup>4</sup> Mr. Strong presented this evidence, but had not seen it prior to applying for the examination.

**inmates, prisoners or juvenile offenders;** social work; guidance counseling; or criminal justice (emphasis added)

The substitutions for education mirrored the Job Bulletin. (Exh. 7)

16. Mr. Strong was searching for upcoming civil service examinations when he saw the Job Bulletin. (Testimony of Mr. Strong)

17. After reading the Job Bulletin for the position of Massachusetts DOC Correctional Program Officer A/B, Mr. Strong believed that he met the minimum qualifications and took the exam. (Testimony of Mr. Strong; Exh. 4)

18. DOC relies on both the language in the Job Bulletin and the HRD Form to determine whether a candidate meets the minimum qualifications. (Exh. 4; Exh. 7; Testimony of Mr. O’Gara)

19. When there is a discrepancy between the two documents, DOC treats the Jobs Bulletin as the “controlling document”.<sup>5</sup> (Testimony of Mr. O’Gara)

20. Mr. Strong took and passed the Civil Service Exam for Correctional Program Officer A/B on May 17, 2014. (Stipulated Facts)

21. In September 2014, Mr. Strong’s name appeared on Certification No. 02345, from which DOC ultimately appointed fifteen (15) Correctional Program Officer A/Bs, fourteen of whom were ranked below Mr. Strong. (Stipulated Facts)

22. James O’Gara (Mr. O’Gara) is a Personnel Analyst III at DOC. He is in charge of reviewing candidates’ resumes to see if they meet the minimum entrance requirements. He read Mr. Strong’s resume and determined that he did not meet the minimum entrance requirements. (Testimony of Mr. O’Gara)

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<sup>5</sup> Mr. O’Gara testified that there is no substantive difference between the two documents and that is how the DOC reads them.

23. In regard to work experience that could be considered as part of the minimum entrance requirements, DOC looked solely at previous work experience that included *counseling and/or rehabilitation* of criminal offenders, inmates or prisoners. DOC has applied this standard for at least ten (10) years. (Testimony of Mr. O’Gara)

24. Based on DOC’s interpretation, Mr. Strong was given the following credit: six (6) months of experience for completing one year towards a Bachelor’s degree in Criminal Justice; and one (1) year of relevant work experience for working at DYS as a drill sergeant.<sup>6</sup> (Testimony of Mr. O’Gara)

25. Because Mr. Strong’s relevant work experience and educational substitutions amounted to only 1.5 years, DOC determined that he did not meet the minimum entrance requirements. (Testimony of Mr. O’Gara)

26. Mr. Strong was notified in a letter dated December 22, 2014 that he had been bypassed based on his failure to meet the minimum entrance requirements. This appeal followed. (Exh. 2)

### *Legal Standard*

The task of the Commission when hearing an appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the decision to bypass the candidate. . . . Reasonable justification in this context means ‘done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rule of law.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 223, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321

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<sup>6</sup> DOC had no written records to confirm that such calculations were performed at the time. It would behoove them to create and retain such documents on a going-forward basis.

(1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass 477, 482 (1928) (Same)

The Commission's primary concern is to ensure that the appointing authority's action comports with "basic merit principles," as defined in G.L.c.31,§1. Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission "finds the facts afresh," and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm'n, 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) ("An appointing Authority must proffer objectively legitimate reasons for the bypass"); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation or are a pretext for other impermissible reasons.")

The commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 4011 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141(1997). See also Covell v. Dep't of Social Services, 439 Mass.

766, 787 (2003) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing).

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).

### *Analysis*

This appeal involves the bypass of Mr. Strong for original appointment to the position of Correctional Program Officer A/B. Two issues are presented in the case at hand. First, was DOC correct in determining that the minimum requirements for the position had to include “*counseling and/or rehabilitation* of criminal offender, inmates, or prisoners”? Second, if DOC’s interpretation is correct, were Mr. Strong’s relevant work experience and education substitutions sufficient to meet these minimum entrance requirements? For the reasons discussed below, DOC has established by a preponderance of the evidence that its interpretation of the minimum entrance requirements is valid, that it has been consistently applied and its decision is not arbitrary and capricious. Further, when applying this correct interpretation of the minimum entrance requirements, DOC has shown, by a preponderance of the evidence, that Mr. Strong did not have sufficient related work experience and education substitutions to meet the minimum entrance requirements.



*Was DOC correct in determining that the minimum requirements for the position had to include counseling and/or rehabilitation of criminal offender, inmates, or prisoners?*

Mr. Strong argues that the minimum entrance requirements do not require that prior experience include *counseling and/or rehabilitation* of criminal offenders, inmates or prisoners. According to Mr. Strong, this counseling and rehabilitation component only applies to work experience related to social work. He points to wording of the Job Bulletin which states:

Applicants must have two years of full-time or equivalent part-time professional experience in counseling, guidance, criminal justice ***or social work*** that included counseling and/or rehabilitation of criminal offenders, inmates, or prisoners or any equivalent combination of the required experience and the substitutions below. (***Emphasis Added***)

According to Mr. Strong, the language before the word “or”, “professional experience in counseling guidance, criminal justice”, stands alone. As a standalone requirement, Mr. Strong effectively argues that these terms are not connected to the qualifying clause, and thus do not need to have “included counseling and/or rehabilitation of criminal offenders, inmates, or prisoners.”

DOC has interpreted the Job Bulletin’s requirements such that the qualifying statement after social work applies to the list as a whole and not only to social work. As read by DOC, the counseling, guidance, and criminal justice components all would require the qualifying statement to be considered relevant experience. DOC sought applicants with counseling and/or rehabilitation experience, and has applied that as their standard for over ten years.

When determining what qualifications are required for a position, the Commission generally defers to the Appointing Authority to determine the requirements. See generally, Harand v Soldiers’ Home in Holyoke, 21 MCSR 173 (2008) (Accepting the lessened interpretation of requirements for a reclassification of a nurse), Kurker v Dep’t of Conservation and Recreation,

22 MCSR 357 (2009) (Accepting that the written requirements for the position have been interpreted differently from when they were written when determining a reclassification) .The DOC has interpreted the requirements for the Correctional Program Officer A/B position as having counseling and/or rehabilitation experience with criminal offenders, inmates, and prisoners. DOC has treated the Jobs Bulletin as the controlling document in determining the requirements when there is a dispute between it and the HRD form. DOC has reasonably interpreted the Minimum Entrance Requirements as provided in the Jobs Bulletin, which was the “controlling” document used to determine the candidate’s qualifications. Based solely on the language in the Jobs Bulletin, I find this to be a reasonable interpretation which has been consistently applied.

Had this not been the “controlling” document, I may have reached a different conclusion. The two (2) other documents that define the minimum entrance requirements for the position of Correctional Program Officer A/B as:

“At least two years of full-time, professional experience in counseling, rehabilitation, or custodial care and treatment of criminal offenders, inmates, prisoners or juvenile offenders; social work; guidance counseling; or criminal justice.” (*Emphasis added*)

Put simply, this language, as written, could not be reasonably interpreted to require a counseling and rehabilitation component in every instance. To ensure clarity, accuracy and uniformity, DOC should, forthwith, correct the language in the above referenced documents.

*If DOC’s interpretation is correct, were Mr. Strong’s relevant work experience and education substitutions sufficient to meet these minimum entrance requirements?*

Mr. Strong argues that, even if DOC has correctly interpreted the Minimum Entrance requirements, he has at least an additional six (6) months’ worth of related work experience

involving rehabilitation and counseling that should be credited to him. Mr. Strong contends that he should receive some credit for the following: his involvement with the treatment of prisoners, inmates and criminal offenders when he was working as a Medical Officer with the Sheriff's Department; his work as a patrolman that involved giving advice to criminal offenders who were seeking help, as well as home visits where he would speak to teenagers who ran afoul of the law; and the times as a Campus Police Officer when he provided advice to college students.

DOC does not dispute that Mr. Strong has one and a half (1.5) years of relevant experience and educational substitutions. However, they argue that Mr. Strong did not present them with sufficient evidence to show that his other jobs involved duties and responsibilities related to counseling and rehabilitation. The problem with that argument is that DOC never asks the candidates for such detailed information. Here, however, after a de novo proceeding, I have concluded that the additional work experience referenced by Mr. Strong does not constitute the type of experience that relates to counseling and rehabilitation. At best, the duties described by Mr. Strong were ancillary in nature and not the type of activities that one would traditionally consider as counseling and/or rehabilitation. For this reason, Mr. Strong has not met the minimum entrance requirements. Thus, DOC's decision here should not be disturbed.

### *Conclusion*

Mr. Strong's appeal under Docket No. G1-15-28 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman

Christopher Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – Not Participating])

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:

Kenneth Strong (Appellant)

Andrew McAleer, Esq. (for Respondent)

John Marra, Esq. (HRD)