

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

BOBBY R. THERIAULT,
Appellant

v.

G1-23-069

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Keith J. Nicholson, Esq.
308 Victory Road, 3rd Floor
Quincy, MA 02171

Appearance for Respondent:

Eamonn M. Sullivan, Esq.
Department of Correction
50 Maple Street
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Commissioner:

Christopher C. Bowman

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

Summary of Decision

The Commission dismissed the Appellant’s bypass appeal as DOC had reasonable justification to bypass him based on his prior misconduct that resulted in his termination from employment at DOC five years ago.

Procedural Background

On June 2, 2023, the Appellant, Bobby R. Theriault (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). On July 25, 2023, I held a remote pre-hearing conference which was attended

by the Appellant, his counsel and counsel for DOC. The parties agreed that the sole reason for bypass was that, in 2018, the Appellant was terminated from his position as DOC Captain. He appealed that termination to an arbitrator and the arbitrator concluded that there was just cause for the Appellant's termination. Consistent with the discussion at the pre-hearing, the parties filed cross motions for summary decision.

Undisputed Facts

Based on the parties' statements at the pre-hearing and their written submission, the following does not appear to be in dispute:

1. In 2002, the Appellant was appointed by DOC as a CO I. While serving as a CO I, he routinely received positive performance evaluations and commendations.
2. Over the years, the Appellant worked his way up the ranks and was promoted to DOC Captain in 2011.
3. In or around 2017 and 2018, two female employees submitted separate reports regarding separate issues related to the Appellant.
4. The first female employee had a prior dating relationship with the Appellant while they were both employed at DOC. This employee subsequently left her employment at DOC and became a traveling nurse. She subsequently returned to Massachusetts and sought per diem employment at DOC. Upon learning of this, the Appellant sent this employee vulgarity-laced text messages, referring to her as a "c**t"; a "b***h" and ominously informing her that, if she returned, "... the first time you remotely fuck something up, I'll write it up and have you fired."
5. In regard to the second female employee, the Appellant sent her unsolicited, sexually explicit text messages, including pictures of his genitals, even after the female employee objected,

eventually resulting in that employee obtaining a harassment prevention order against the Appellant.

6. DOC, after conducting an internal investigation, terminated the Appellant in 2018 for his above-referenced misconduct.
7. On appeal, an arbitrator upheld the termination in 2019, concluding that there was just cause for his termination.

Legal Standard Regarding Bypass Appeals

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original appointments of civil service employees are made from a list of candidates, called a “certification”, whose names are drawn in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4).

A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission. The Commission’s role is to determine whether the appointing authority has shown,

by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

“Reasonable justification . . . 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’”. Brackett v. Civil Service Comm’n, 447 Mass. 233, 243 (2006); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass. App. Ct. 315, 321 (1991) (bypass reasons “more probably than not sound and sufficient”).

The governing statute, G.L. c. 31, gives the Commission’s de novo review “broad scope to evaluate the legal basis of the appointing authority's action” and it is not necessary that the Commission find that the appointing authority acted “arbitrarily and capriciously.” City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1997). The commission “. . . cannot substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority” but, when there are “overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.” Id. (emphasis added). See also Town of Brookline v. Alston, 487 Mass. 278 (2021) (analyzing broad scope of the Commission’s jurisdiction to enforce basic merit principles under civil service law).

Summary Decision Standard

When a Respondent before the Commission is of the opinion there is no genuine issue of disputed material fact relating to the Appellant’s stated claim, no viable ground of appeal on the facts stated, and the Respondent is entitled to prevail as a matter of law, this party may move, with or without supporting affidavits, either to dismiss the entire appeal or for summary decision on a particular claim. 801 CMR 1.01(7)(h). Such motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., “viewing the evidence in the light most favorable to the non-moving party,” the substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case,” and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring an evidentiary hearing. *See, e.g., Nigro v. City of Everett*, 30 MCSR 277 (2017); *Lydon v. Massachusetts Parole Bd.*, 18 MCSR 216 (2005). *Accord Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008). *See also Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss); *cf. R.J.A. v. K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss). *See also Zachary v. Civ. Serv. Comm’n & Dept. of Correction*, Suffolk Sup. Ct. No. 07-3197 (2008) (Commission was justified in upholding a 5-day suspension without a full hearing when the Appellant admitted that he engaged in the alleged misconduct.)

DOC’s Argument

DOC argues, while the Appellant’s prior termination occurred while he was a Captain in a supervisory role, the crucial matter related to his overall suitability. DOC notes that the

arbitrator concluded that the Appellant “committed egregious misconduct that is incompatible with continued DOC employment” and further argues that past behavior, especially in a leadership position, can be indicative of an individual's character, decision-making abilities, and ethical standards.

In summary, DOC argues that, regardless of the specific position being applied for, a history of misconduct in a supervisory position inevitably gives rise to concerns regarding the Appellant's suitability for *any* job within the organization. Further, DOC argues that it is essential for DOC to maintain a reputation for upholding standards and ensuring the public's trust, as well as the trust and safety of its own employees and that hiring an individual with a documented history of misconduct similar to the Appellant's, even if it occurred in a different capacity, could damage the organization's credibility in the public eye and put other staff members at risk.

Appellant's Argument

While the Appellant acknowledges the serious nature of his prior misconduct, he argues that the misconduct, which now dates back more than five years, occurred while he was serving in a “position of authority”. Here, the Appellant argues that he is seeking an “entry level corrections officer position” with no supervisory roles and responsibilities where he would be required to answer to others in positions of authority. The Appellant argues that his past performance as a CO1, not his conduct while serving as a DOC Captain, is indicative of future performance, arguing that his prior performance reviews, commendations, accolades, and letters of support show that he was an exceptional CO I. In sum, he disagrees with DOC's position that the events which preceded his termination from employment are predictors of future behavior in a role that carries no supervisory authority.

Analysis

Even when viewing the evidence in the light most favorable to the Appellant, he has no reasonable expectation of prevailing here. The crux of the Appellant's argument is that his prior misconduct occurred while he served in the supervisory position of DOC Captain, which he argues should be given less weight than his prior performance as a CO I, the position he now seeks to be re-appointed to.

The nature of the Appellant's prior misconduct, however, transcends the position he held at the time. Specifically, in one instance, the Appellant repeatedly sent unsolicited, sexually-explicit text messages to a female employee, even after she asked him to stop his behavior, forcing the employee to seek an abuse prevention order against him. This egregious behavior is unacceptable for *any* employee at *any* level at DOC, including CO I. Further, the Appellant has failed to show, nor would he be able to if this appeal went to a full hearing, that his misconduct only occurred because he held the title of Captain at the time.

Similarly, seeking to "dissuade" a former employee, who previously dated the Appellant, from returning to DOC on a per diem basis by sending her vile text messages is also unacceptable behavior for any employee at any level at DOC, including DOC I.

In sum, the Appellant's prior misconduct, which resulted in his termination, provided DOC with reasonable justification to bypass him for re-appointment as a CO I.

Conclusion

DOC's motion for summary decision is allowed and the Appellant's appeal under Docket No. G1-23-069 is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on October 19, 2023.

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 their 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:

Keith J. Nicholson, Esq. (for Appellant)
Eamonn Sullivan, Esq. (for Respondent)