

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

ANTON TRUBITSYN,

Appellant,

v.

G1-14-136

DEPARTMENT OF CORRECTION,

Respondent.

Appearance for Appellant:

Pro Se

Appearance for Respondent:

Andrew McAleer, Esq.

Department of Correction

One Industries Drive: P.O. Box 946

Norfolk, MA 02056

Commissioner:

Paul Stein¹

DECISION

The Appellant, Anton Trubitsyn (Mr. Trubitsyn), appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), from the decision of the Department of Correction (DOC), the Appointing Authority, to bypass him for appointment to the position of Correction Officer I (CO I). The Commission held an evidentiary hearing on Sept 8, 2014.² The hearing was digitally recorded; the parties were provided copies of the recording³. The DOC called one witness and Mr. Trubitsyn called one witness as well as testifying on his own behalf. The witnesses were sequestered. The Commission received fifteen (15) exhibits in evidence. Each party submitted a proposed decision.

¹ The Commission acknowledges the assistance of Law Clerk Christopher Windle in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings 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 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.

FINDINGS OF FACT:

Giving appropriate weight to the documents in evidence (Exhibits 1 through 15), the testimony of the witnesses (James O’Gara, Keisha Chance, and Mr. Trubitsyn) and inferences reasonably drawn from the evidence I find credible, I make the findings of fact stated below.

Appellant’s Background

1. The Appellant, Anton Trubitsyn, graduated from Acton-Boxboro High School. He later went to Quinnipiac University where he graduated with a Bachelor’s Degree in Criminal Justice in 2010. During his college years, he worked as an intern at the Sierra Center Halfway House for inmates and the New Haven Police Department. During his senior year, he served as a peer tutor instructor for fellow students (*Exhs. 8, 11 & 15*)
2. In September 2010, Mr. Trubitsyn became employed at CAB Health and Recovery Services (CAB), a short term treatment center for substance abuse clients. (*Testimony of Appellant & Chance; Exhs. 5, 6, 8, 11 & 12*)
3. During Mr. Trubitsyn’s time at CAB, the facility at which he worked was managed by a House Manager, Ms. W, who was known to play favorites with clients, which was considered an unethical practice. (*Exhs. 5 & 12; Testimony of Appellant & Chance*)
4. Mr. Trubitsyn questioned Ms. W on her favoritism toward client’s treatment. This criticism, along with his unwillingness to “look the other way” when a favored client misbehaved, drew Ms. W’s ire. Ms. W had admitted that she didn’t like Mr. Trubitsyn. (*Exh. 12; Testimony of Appellant & Chance*)
5. Under Ms. W’s supervision, the personnel turnover rate of the employees at the facility she supervised was over 90%. Ultimately, another employee brought Ms. W’s behavior to

the attention of the company's corporate offices, which led to Ms. W's eventually being fired. (*Exhs. 5 & 12; Testimony of Chance*)

6. On or about May 1, 2011, Ms. W directed that Mr. Trubitsyn be given a "final written warning" for "unsatisfactory work performance" and he was terminated shortly thereafter. A partial copy of the written warning was introduced in evidence and was signed by one of his direct supervisors, Mr. B. Despite the written warning, Mr. Trubitsyn had been considered a generally good employee who had a good working relationship with Mr. B, and his other direct supervisor, Keisha Chance. (*Exhs. 5, 6, 10 & 12; Testimony of Chance; Testimony of Trubitsyn*)

7. Mr. Trubitsyn went on to work at Worcester County Sheriff's Office as a Corrections Officer from Oct 2011 until July 2013. His superior officer, Cpt. Vandersalen described Mr. Trubitsyn as "very honest and [having] a great professional attitude" (*Exh. 6*)

8. In July 2013, Mr. Trubitsyn was hired by the Acton Police Department. He received a non-disciplinary dismissal from the Police Academy in December 2013 due to a failed emergency driving component. The Acton Police Recruit Supervisor had high praise for him, noting his hard work ethic, his stable relationships with supervisors, subordinates, and colleagues and his maturity and even-temper. Even after washing out of the academy, he made a point of expressing gratitude to Acton for affording him the opportunity. (*Exh. 5*)

9. After leaving the Police academy, Mr. Trubitsyn obtained employment at Spectrum Health Systems Inc. as an Orientation Counselor, the job he held at the time of this appeal, working directly with inmates at various DOC facilities. (*Exhs. 5, 8; Testimony of Appellant*)

DOC 2012 Application

10. Mr. Trubitsyn took and passed the Civil Service Exam for CO I, on March 24, 2012. In August 2012, his name appeared on Certification No 00024 for appointment of Correctional Officers.

11. James O’Gara is a Personnel Analyst III in the DOC’s Human Resources Department. Mr. O’Gara is responsible for the supervision of the hiring process for correctional officers.

(Testimony of O’Gara)

12. During the hiring review process, a full background investigation is performed on the candidates. This includes a trained background investigator going out and speaking with former and current neighbors, employers and family. *(Testimony of O’Gara)*

13. A DOC investigator’s report on Mr. Trubitsyn noted primarily positive aspects, including high integrity and truthfulness, along with numerous positive recommendations from former employers, professional references and neighbors.

14. The one negative aspect reported was Mr. Trubitsyn’s having been “terminated” from CAB. Cab would not provide an explanation regarding the termination, but dates of employment only. The investigator did speak to Ms. Chance, who described Mr. Trubitsyn as a “great employee” and “would rehire” him. *(Exh. 6; Testimony of Chance)*

15. Mr. Trubitsyn had explained in his written application that his “termination” from CAB involved a “personal situation” that he would like to discuss in person. He was not interviewed about CAB, but he was asked for a written explanation. He complied with this request, submitting a four page letter detailing all of the facts and circumstances surrounding his employment there, including the “intolerable” friction between himself and Ms. W that led to his termination. He described his departure as having been “forced to leave” and that he

has taken the “unfortunate turn of events” as an “invaluable experience” in handling “internal tensions within the staff in a professional and non-confrontational way.” (*Exh. 12*)

16. Initially, on Mr. O’Gara’s recommendation, Mr. Trubitsyn was bypassed for being “less than truthful” about his disciplinary history as well as the negative work history. This bypass decision was issued by Erin Gotovich, DOC Acting Director of HR Operations. (*Exh. 13; Testimony of O’Gara*)

17. After Mr. Trubitsyn questioned DOC about the bypass, the letter was retracted and Ms. Gotovich issued a revised letter stating the only reason for bypass to be the negative work history with CAB. This bypass was not appealed to the Commission. (*Exh. 14; Testimony of Appellant & O’Gara*)

DOC 2014 Application

18. Mr. Trubitsyn’s name reappeared on Certification 01474, in the 46th position, issued to DOC on January 15, 2014. DOC selected 66 applicants for appointment, 46 of whom were ranked below Mr. Trubitsyn. (*Stipulated Facts*)

19. Mr. Trubitsyn submitted a new application for employment. On this application he did not expressly mention termination from CAB, only that he had been formally disciplined by the employer and wished to explain more details if needed. (*Exh. 8*)

20. Another background investigation was conducted which, again, reported positive references from Mr. Trubitsyn’s previous employers, including the Acton Police along with the Worcester County Sheriff’s Department, as well as his current employer Spectrum Health.

⁴ (*Exh. 5*)

⁴ Mr. Trubitsyn requested that DOC not contact Spectrum Health directly, as he was then a new employee still on probation but supplied the name of a DOC employee who was his former supervisor at Spectrum, who provided a positive recommendation. (*Exhs. 5 & 8*)

21. The 2014 investigator also had a conversation with Ms. Chance who informed the investigator in further detail about the true circumstances behind Mr. Trubitsyn's dismissal. This explanation fully aligned with the written explanation Mr. Trubitsyn wrote in 2012. Namely, that Ms. W played favorites and took the favored client's side in arguments over the staff's. (Exhs. 5 & 12; *Testimony of Chance*)
22. The background report cited no negative employment aspects; specifically the investigator did not cite his negative work history as an aspect. (*Exh.5*)
23. Mr. O'Gara reviewed the background employment reports from both 2012 and 2014 and determined that he would again recommend a bypass of Mr. Trubitsyn. DOC HR Director of Operations Erin Gotovich passed on this recommendation to DOC Deputy Commissioner Paul DiPaolo, who approved the bypass based on "Failed Background Based on Prior Work History at CAB Health and Recovery Services." (*Testimony of O'Gara*)
24. Neither Ms. Gotovich nor Deputy Commissioner DiPaolo testified at the Commission hearing. The sole evidence of the review that was made by either of them is a one-page form that recites that the bypass was based on "Investigative Background (to include Employment Application)", but does not indicate who made the review or whether or not the review included both the 2012 and 2014 application packets. (*Exh. 3*)
25. Mr. Trubitsyn was informed through letter on June 9, 2014 that he was being bypassed again, solely due to negative employment history at CAB. (*Stipulated facts*)
26. Mr. Trubitsyn duly appealed DOC's 2014 decision to bypass him for the position of Correction Officer I to the commission. (*Stipulated Facts*)\

Applicable Standard of Review

This appeal involves a bypass of the Appellant for original appointment to a permanent civil service position. This is governed by G.L.c.31, Section 27 which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not the highest.”

An appointing authority’s discretion to bypass candidates for civil service appointments who have qualified for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. When a candidate for appointment appeals from a bypass, however, the Commission’s role is not to determine whether that candidate should have been bypassed. Rather, the Commission determines, on the basis of the evidence before it, whether the appointing authority has sustained its burden of proving, by a preponderance of the evidence, that the decision to bypass the candidate was made after a “thorough review” and that there was “reasonable justification” for the decision. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L.c.31,§ 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010) See generally Barry v. Town of Lexington, 21 MCSR 589, 597 (2008) citing Sabourin v. Town of Natick, 18 MCSR 79 (2005) (civil service test score is a baseline tool for relative ability, knowledge and skills under basic merit principles)

“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. 233, 241 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass 477, 482 (1928)

In determining whether the department has shown a reasonable justification for a bypass, 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., Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012), 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) (bypass reasons must be "objectively" reasonable); Borelli v. MBTA, 1 MCSR 6 (1988) 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 function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs., 439 Mass. 766, 787 (2003); Doherty v. Retirement Bd, 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988).

Analysis

Applying the applicable standards to the circumstances of the present case, the DOC's decision to bypass Mr. Trubitsyn for original appointment as a CO I was not based on a thorough review, has not been reasonably justified and is unsupported by the substantial evidence.

I. Prior Employment History at CAB

The DOC's reliance on Mr. Tributsyn's employment history at CAB as the sole reason for his bypass is the unfortunate result of either a disregard for, or lack of a thorough review of, the evidence about that employment. In 2012, DOC had received no specific information from CAB that suggested a poor work history. It did have a positive recommendation from Ms. Chance, one of Mr. Tributsyn's supervisors, as well as Mr. Tributsyn's own detailed self-report of his experience there. During the 2014 background investigation, a second, even more detailed interview with Ms. Chance at CAB corroborated the written explanation provided by Mr. Tributsyn regarding his termination and that he would be eligible for rehire. These documents as well as their credible testimony clearly explained that the true reason for his termination was the conflict between Mr. Tributsyn and the House Manager that was caused by the manager's misconduct and could not be construed in any way to reflect negatively on Mr. Tributsyn. The only piece of negative information that DOC ever received was a single page, incomplete form of "Final Written Warning", which both Ms. Chance and Mr. Tributsyn credibly discredited as a bona fide disciplinary action.

Specifically, Ms. Chance presented as an exceptionally credible witness who demonstrated clear recollection and percipient knowledge of the circumstances involving Ms. W and Mr. Tributsyn. Her testimony fully corroborated the detailed accounts that she had previously given to DOC, but which DOC overlooked or chose to ignore. For his part, Mr. Tributsyn's letter of explanation to DOC, together with his consistent testimony before me, and the complete dearth of any evidence of employment issues anywhere else, leaves no room to question that he was a satisfactory CAB employee and the undeserving victim of a rogue supervisor's wrath that Ms. Chance described.

The DOC claimed that the letter Mr. Trubitsyn wrote in 2012 to explain his CAB employment showed disrespect for authority and a disregard for the chain of command that would be required in a paramilitary infrastructure like the DOC's. The evidence showed otherwise. In fact, both in his letter and in his testimony before the Commission, Mr. Trubitsyn demonstrated the highest level of thoughtful reflection and respect for his superiors at CAB, even expressing gratitude for the learning experience that it had provided him. Moreover, this unwarranted assertion is consistently belied by Mr. Trubitsyn's other employment and background records that were overwhelmingly positive and universally discussed his stable relationships with supervisors, subordinates, and colleagues.

II. Detailed Analysis/Review by Appropriate Authority

The DOC's evidence in support of the bypass of Mr. Tributsyn was based solely on the testimony of Mr. O'Gara, who is two steps removed from the decision-maker, as well as a one-page form evidencing that that actual decision-maker approved the recommended bypass, which I find problematic as the basis for showing "reasonable justification" for a bypass of this nature.

This is not the case where the evidence is, on its face, disqualifying, such as a recent criminal felony conviction. In such a situation, it would be plausible to rely on a "check the box" form and a subordinate staff member to credibly justify such a decision. Rather, this bypass requires a higher-level of "sound judgment" that is required to weigh an extensive substantive record containing a wealth of positive factors as well as one allegedly negative one. Here, this record included multiple examples of specific, solid and satisfactory work in the field of corrections.

While each appeal is to be considered on a case by case basis, ordinarily, in order to find that the DOC has "reasonable justification" to rely on one negative factor in an otherwise acceptable employment record, the Commission is entitled to expect some percipient evidence of the basis

for that exercise of judgment **by the actual decision-maker** that is fairly subject to “de novo” review at the Commission hearing. In particular, when determining whether or not one ambiguous, isolated employment situation “reasonably” outweighs an otherwise positive employment history, a generic “check the box” list will not suffice to show the “thorough review” of the relevant facts and exercise of “sound judgment” necessary to support reasonable justification for a bypass. Fairness requires the actual decision-maker to set forth in specific terms the documents and/or information reviewed and what substantive analysis led the decision-maker to find that the negative information outweighed the positive recommendations and become determinative. In sum, basic merit principles require evidence that the decision-maker was fully aware of all relevant facts, made a thorough review and considered decision, and articulated a valid reason for the bypass based on the record as a whole.

III. Untruthfulness

DOC first raised the issue of untruthfulness at the hearing regarding the bypass of Mr. Trubitsyn. However, the bypass notice did not list “untruthfulness” as a stated reason for the bypass. Under the Personnel Administration Rules, PAR.08(4):

No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission.

As such, because the DOC did not justify the bypass through untruthfulness – and indeed, had retracted that contention in 2012 – DOC cannot now claim it as a reason before the Commission.

Moreover, I find that Mr. Trubitsyn’s statements about why he left CAB were not an untruthful attempt to conceal the circumstances of his termination of employment from DOC. He did, in fact, report the “termination” in the appropriate block in his 2012 application, indicating he would “like to discuss in person”, and his letter of explanation followed in which

he explained his version of events as being “forced to leave” for reasons attributable to the “intolerable” friction between him and Ms. W. Having provided this detailed explanation in 2012, he did not again refer to his departure from CAB as a “termination” in his 2014 application. He acknowledged that it might have behooved him to have been consistent in both applications, but I find his testimony that, well before his “termination” he had decided to leave CAB and “pursue other opportunities” due to the intolerable situation there. I also note that the actual “termination” notice was never produced by either side. Taking into account all of the evidence in the record, I find no sign of any obfuscation on his part.

RELIEF TO BE GRANTED

Accordingly, for the reasons stated above, DOC has not provided reasonable justification for its decision to bypass Mr. Trubitsyn for appointment as a Correction Officer I. Mr. Trubitsyn is entitled under basic merit principles of the civil service law to another opportunity to be considered fairly and fully for appointment as a DOC Correction Officer. The decision to bypass Mr. Trubitsyn is overturned and his appeal under Docket No. G1-14-136 is hereby *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the state’s Human Resources Division or DOC in its delegated capacity shall:

- Place the name of Anton Trubitsyn at the top of any current or future Certification for the position of Correction Officer I.
- If Mr. Trubitsyn is appointed as a Correction Officer I, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00974. This retroactive civil service date is not intended to provide Mr. Trubitsyn with any additional pay or benefits, including creditable service towards retirement.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman, Ittleman, McDowell, and Stein, Commissioners) on June 25, 2015.

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:

Anton Trubitsyn (Appellant)

Andrew McAleer, Esq. (for Respondent)

John Marra (for Human Resource Division)