

COMMONWEALTH OF MASSACHUSETTS

Civil Service Commission

Peter J. Walker,
Appellant

v.

G-02-805

Department of Correction,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Peter J. Walker (hereinafter "Appellant") appeals the decision of the Appointing Authority, Department of Correction (hereinafter "DOC"), to bypass him for a promotion from Correction Officer I to Correction Officer II, in alleged violation of Basic Merit Principles as defined by G.L. c. 31, §1. The appeal was timely filed. A full hearing was held on June 8, 2005 at the offices of the Civil Service Commission. One tape was made of the hearing. Both parties submitted post-hearing briefs. Eighteen (18) exhibits were stipulated to by the parties and entered into the record. The DOC submitted four (4) additional exhibits

(three prior Civil Service Commission decisions and a digest summary of a fourth case from the Massachusetts Civil Service Reporter (“MCSR”).) Appellant objected only to the DOC’s fourth proposed exhibit (the MCSR summary) on two grounds: it was not the complete decision; and it pre-dated the inception of the DOC’s Temporary Modified Work Program at issue herein. Over Appellant’s objection, the Commission admitted all four decisions.

FINDINGS OF FACT

Based upon the stipulated documents entered into evidence (Exhibits 1-22), and the testimony of the Appellant, Peter J. Walker and Jeffrey S. Bolger, Director of Employee Relations, Department of Correction, I make the following findings of fact:

1. The Department of Correction is the employer and appointing authority.
(Testimony)
2. On September 8, 1996, Appellant was hired by the DOC as a Correction Officer I. (Testimony, Exhibit 1)
3. On April 26, 2002, a Civil Service Promotional List for Correction Officer II, Requisition Number 2020036 (hereinafter “Certification”) was certified by the Human Resources Division (hereinafter “HRD”). (Exhibit 1)
4. Effective June 23, 2002, the DOC sought to make no less than eighty-four (84) promotions to Correction Officer II positions. (Exhibit 1)
5. A Correction Officer II is a key position in the staffing of the DOC. A Correction Officer II must provide first line supervision of Correction Officer I’s; must provide on the job training and periodic evaluations of performance to determine whether the Correction Officer I’s they supervise are properly, effectively and consistently carrying out their duties. Correction Officer II’s

must also demonstrate an ability to respond effectively in crisis situations, particularly those involving the safety and security of the institution, its staff and the inmates. Hence, it is essential that Correction Officer II candidates be able to perform the essential functions of the position. (Testimony).

6. The DOC and the Massachusetts Correction Officer Federated Union (hereinafter “Union”) agreed to use one Civil Service Certification in making the promotions to Correction Officer II. (Exhibit 1)
7. The certification list used in the promotions to the Correction Officer II positions was the Certification. (Exhibit 1)
8. It was agreed by the DOC and the Union that selections for the promotion would be based on the candidates’ respective Civil Service Score and Employment History in the Department, and that in the event of a tie score, the tiebreaker would be time served in the lower grade. (Exhibit 1)
9. The candidates identified on the Certification were ranked first by any settlement agreement and then alphabetically by examination score in descending order. (Exhibit 1)
10. In order to promote to the Correction Officer II positions, the DOC provided those employed in Correction Officer I positions (including Appellant) with a Form 2 on which the employee was to indicate a preference of locations (ranked numerically by preference from one (1) to sixteen (16)). (Exhibit 1)
11. On May 6, 2002, Appellant completed a Form 2 on which he indicated five (5) preferences as follows:
 - #1 Souza-Baranowski Correctional Center (“SBCC”)
 - #2 MCI Shirley
 - #3 North Central Correctional (“NCCI”)

- #4 MCI Concord
- #5 MCI Framingham

(Exhibits 1, 5, 6)

12. The DOC received Appellant's completed Form 2 on May 6, 2002 at 11:06 a.m. (Exhibit 1)
13. On June 17, 2002, the Certification was amended in order to make one hundred twenty (120) selections for the position of Correction Officer II. (Exhibit 1, Exhibit 2)
14. Effective June 23, 2002, the DOC promoted 120 employees from Correction Officer I to Correction Officer II. (Exhibit 1)
15. In making these promotions, no additional employees were added to the DOC's total work force. (Exhibit 1)
16. The lowest Civil Service score with regard to the June 23, 2002 Correction Officer II promotions was 87. (Exhibit 1)
17. Appellant's Civil Service score on the Certification was 88. (Exhibit 1)
18. Appellant signed, but was not selected, and not promoted to Corrections Officer II from the Certification. (Exhibit 1)
19. Correction Officers I on the Certification with equivalent or lower Civil Service scores than Appellant were promoted to Correction Officer II positions in facilities chosen by Appellant on his Form 2. (Exhibit 1)
20. Appellant had been injured due to inmate violence and was on approved Industrial Accident effective June 27, 2001. (Exhibit 1)

21. As of June 23, 2002, Appellant was still on approved Industrial Accident leave. (Exhibit 1)
22. Appellant was on approved Industrial Accident leave until October 22, 2002, approximately four (4) months after the effective date of the Correction Officer II promotions. (Testimony)
23. Appellant testified that he was not able to return to work within thirty (30) days to perform the duties of a Correction Officer II position, as required by Paragraph 14(3) of the Personnel Administration Rules of HRD (hereinafter "PAR 14(3)"). (Testimony, Exhibit 1)
24. PAR 14(3) provides, in pertinent part:
- "No permanent employee shall be regarded as promoted within the requirements of these rules unless he is actually employed in the position to which he is promoted within thirty days from the date of receipt of notice."
- (Exhibit 1)
25. Appellant provided the DOC with a Continuing Disability Claim Form dated March 12, 2002 which indicated that he was not expected to return to work for more than six (6) months. (Testimony, Exhibit 11)
26. With respect to "Restrictions", the March 12, 2002 Continuing Disability Claim indicated that Appellant "may not use left hand independently or for bimanual work". (Exhibit 11)
27. With respect to "Limitations", the March 12, 2002 Continuing Disability Claim indicated that Appellant "cannot guard prisoners, write, shoot a weapon, or fight". (Exhibit 11)

28. With respect to “Prognosis for Recovery”, the March 12, 2002 Continuing Disability Claim indicated that Appellant “has not recovered with medical RX. (cast & OT). ? surgery”. (Exhibit 11)
29. Appellant’s physician provided the DOC with a Physician’s Report dated March 12, 2002 that indicated that Appellant was unable to perform his duties, and included a “?” as to when Appellant would be able to return to full duty. Additionally, the Physician’s Report indicated that Appellant could not:
- “SIT more than 8 hours/day
 - STAND/WALK more than 8 hours/day
 - CARRY/LIFT more than 10 lbs.
 - PUSH more than 10lbs.
 - PULL more than 10 lbs.
 - DRIVE VEHICLE”
- (Testimony, Exhibit 12)
30. Thereafter the DOC received another Continuing Disability Claim form based on a physical examination of Appellant by his treating physician on June 19, 2002, four (4) days prior to the effective date (June 23, 2002) for the Correction Officer II promotions. In that form, Appellant indicated that he was “presently unable to return to work”. (Testimony, Exhibit 13)
31. The June 19, 2002 Continuing Disability Claim Form indicated that Appellant was not expected to return to work for more then six (6) months. (Testimony, Exhibit 13)
32. With respect to “Restrictions”, the June 19, 2002 Continuing Disability Claim indicated that Appellant “cannot guard prisoners, write, shoot a weapon, or fight”. (Exhibit 13)

33. With respect to “Prognosis for Recovery”, the June 19, 2002 Continuing Disability Claim indicated “don’t know, pending evaluation by hand surgeon for ? UCL repair”. (Exhibit 13)
34. Appellant provided the DOC with another medical note dated August 15, 2002, in which his physician indicated that Appellant was unable to return to work at that time. (Testimony, Exhibit 14)
35. Appellant was bypassed and not promoted to Correction Officer II because he was on Industrial Accident leave. (Exhibit 1)
36. Had Appellant not been on Industrial Accident leave on June 23, 2002, he would have been promoted to Correction Officer II. (Exhibit 1)
37. In bypassing Appellant, the DOC assumed Appellant would not meet the thirty (30) day requirement of PAR 14(3). (Exhibit 1)
38. In addition to Appellant, several other candidates were bypassed for promotion to Correction Officer II because they were not readily available to assume the duties in accordance with PAR 14(3). (Testimony, Exhibit 3)
39. As of June 17, 2002, Nicole E. MacDonald was a female Correction Officer I employed by the DOC who had signed and was selected from the Certification for a Correction Officer II position. (Exhibit 1).
40. By letter dated May 28, 2002, Ms. MacDonald was informed that she had been selected for a promotion to Correction Officer II effective June 23, 2002. Ms. MacDonald was further informed by said letter that if she was unable to return from industrial accident leave within thirty (30) consecutive days of June 23, 2002, her promotion would be rescinded effective July 23, 2002. (Testimony, Exhibits 1, 9)

41. No evidence (documentary or testimonial) was presented to establish that the severity of Ms. MacDonald's injury, and the amount of time she was expected to remain on medical leave beyond the June 23, 2002 effective date of the promotion, was comparable to that of Appellant.
42. Effective June 1, 2001, the DOC revised a Temporary Modified Work Program applicable to all employees of the DOC, to provide employees with an opportunity to return to work after a work-related injury, where a limited period of modified duty (up to 120 days) is required for medical reasons. (Testimony, Exhibits 1, 8)
43. The offer of Temporary Modified Work Program to any employee is voluntary on the part of the DOC, as is the acceptance or rejection by any such employee to whom the program is offered. There is no statutory duty to offer Temporary Modified Work Program to any DOC employee. Further, where an individual is not expected to return to regular, full time duty for six (6) or more months, the DOC generally will not offer the Temporary Modified Work Program to an employee. (Testimony)
44. Appellant was offered a Temporary Modified Work Program by the DOC in November 2001. Appellant declined to accept the offer. (Testimony, Exhibit 17)
45. Between November 2001 and October 22, 2002 (the date Appellant returned from Industrial Accident leave to his regular position), Appellant did not contact the DOC and request another offer of a Temporary Modified Work Program. (Testimony)
46. Thereafter, Appellant timely filed an appeal of the bypass decision.

47. At hearing, Mr. Bolger credibly testified as to the certification and selection process with respect to all candidates (including Appellant), the implementation and administration of the Temporary Modified Work Program, and to the fact that only legitimate and relevant factors were considered in making the decision to bypass Appellant.

48. Appellant credibly testified in a forthright manner as to his medical condition during the relevant time period, his understanding of the Temporary Modified Work Program, and the modified work assignments he believed he could have assumed had he been offered same by the DOC.

CONCLUSION

In the context of reviewing a bypass decision by an Appointing Authority, the role of the Civil Service Commission is to determine “whether 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, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when it is “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.” City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

Basic merit principles, as defined in G. L. c. 31, §1, require that applicants be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration, and that they be protected from arbitrary and capricious action. Tallman v. City of Holyoke, et al., G-

2134, and compare Flynn v. Civil Service Commission, 15 Mass. App. Ct. 206, 444 N.E.2d 407 (1983).

Nevertheless, it is recognized that an appellant's "expectation of [selection] based on 'his position on a civil service list' does not rise to the level of a 'property interest' entitled to constitutional protection." Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991). Candidates simply have certain expectations that are substantially diminished by the ability of the appointing authority under state law to consider subjective factors in addition to the written examination score. Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980). Those factors must adhere to the intent of the civil service system. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300 (1997).

Civil Service law traditionally affords management a considerable degree of latitude in making selection decisions. "The appointing authority...may select, in the exercise of broad discretion, among persons eligible...or may decline to make an appointment." Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660 (1971), citing Commissioner of the Metropolitan District Commission v. Director of Civil Service, 348 Mass. 184 (1964).

In order to show that an Appointing Authority's decision was not justified, an Appellant must demonstrate that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons. MacPhail v. Montague Police Department, 11 MCSR 308 (1998) *citing* Borelli v. MBTA, 1 MCSR 6 (1987). In the task of selecting public employees of skill and integrity, moreover, appointing authorities are invested with broad discretion. City of Cambridge at 304-5; Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660 (1971). This tribunal cannot "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge. at 304. In light of these standards and the evidence in this case, the appeal must be denied.

It is the conclusion of this Commission that the Respondent has met its burden of proving that there was a reasonable justification for bypassing Appellant for the position of Correction Officer II. Specifically, the evidence proffered by the Respondent is sufficiently reliable to warrant a reasonable mind to find that the Appellant (who had been on Industrial Accident leave since June 27, 2001, and, as of four (4) days prior to the effective promotion date, filed a continuing disability claim form which included his treating physician's opinion that he would be unable to return to work for at least six (6) additional months) would not be able to assume the duties attendant to the Correction Officer II position within thirty (30) days, as required by Personnel Administration Rule 14(3). *See McCarthy v Haley*, 4 MCSR 236, Suffolk Superior Court C.A. 90-5027, June 28, 1991 (Superior Court affirmed bypass for medical reasons justified where officer had been medically incapacitated for more than one year and treating physician had submitted a report one month before the promotion decision stating it was unknown when, if ever, officer would be able to return to his duties); *Nahorniak v. City of Springfield*, 5 MCSR 1025 ("Appointing Authority has no obligation to hire or promote an applicant for employment who is unable to physically perform the duties of the position he seeks."); *Appeal of Robert F. McCarthy*, G-1659, 6/25/90; *Appeal of Paul Smachetti*, A-550, 1/26/89 (appellant's knee injury rendering him incapable for an indeterminate period of performing the essential functions of the job, justifies his bypass for selection as a firefighter).

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness' testimony. *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112, 120 (1978). *Doherty v. Retirement Board of Medicine*, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. *Herridge v. Board of Registration in Medicine*, 420 Mass. 154, 165 (1995). Here, the Commission finds that the testimony of all witnesses to be highly credible. Mr. Bolger credibly testified as to the certification and selection process with respect to all candidates (including Appellant), the implementation and administration of the Temporary Modified Work Program, and to the fact that only legitimate and relevant factors were considered in

making the decision to bypass Appellant. Similarly, Appellant credibly testified in a forthright manner as to his medical condition during the relevant time period, his understanding of the Temporary Modified Work Program, and the modified work assignments he believed he could have assumed had he been offered same by the DOC.

Indeed, given the veracity of the testimony from all witnesses, it is evident, based on Appellant's candid testimony with respect to his medical condition, that the Respondent's bypass decision was based upon adequate reasons, sufficiently supported by credible evidence. Respondent failed to submit any objective, credible evidence to suggest that the bypass decision was a result of political considerations, favoritism or other bias. Indeed, Appellant's allegation of "reverse discrimination" (that a female Correction Officer I with a slightly lower score (Nicole MacDonald), who was also out on medical leave at the time the promotions were effective, was offered a provisional promotion to Correction Officer II in conjunction with Temporary Modified Work Program) is of no moment; as the uncontroverted testimony of Mr. Bolger established, the DOC was under no legal obligation to offer Appellant the Temporary Modified Work Program. Additionally, the testimony established that where an individual is not expected to return to regular, full time duty for six (6) or more months, the DOC generally will not offer the Temporary Modified Work Program to an employee. Notably, when Appellant was previously offered a Temporary Modified Work Program approximately one (1) year earlier by the DOC, he refused same. Additionally, Appellant failed to present any evidence (documentary or testimonial) to establish that the severity of Ms. MacDonald's injury, and the amount of time she was expected to remain on medical leave, was comparable to that of Appellant. Rather, the evidence supports the conclusion that the DOC's decision to bypass Appellant was appropriately based on objective factors.

In sum, this case is a classic example of an appointing authority exercising its lawful discretion and choosing from among a group of candidates on the basis of legitimate and relevant factors. The Commission cannot substitute its judgment for that of the Appointing Authority in such a case.

For all of the above stated reasons, it is found that the Respondent has established by a preponderance of the reliable and credible evidence in the record that that it had just cause to bypass Appellant for the position of Correction Officer II. Therefore this appeal (Docket No. G-02-805) is *dismissed*.

Civil Service Commission

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Taylor, Guerin, Bowman and Marquis; Commissioners) on January 25, 2007.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to G.L. c. 31, s. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under G.L. c. 30A, s. 14 in the Superior Court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice To:

Ilene Titus, Esq.
Richard Greene