

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL S. CAMACHO

Appellant

v.

CASE NO: G1-13-212

**MASSACHUSETTS ENVIRONMENTAL
POLICE,**

Respondent

Appearance for Appellant:

Michael S. Camacho, Esq., Pro Se.

Appearance for Respondent:

Barbara Nobles Crawford
Assistant Secretary of Human Resources
Executive Office of Energy and
Environmental Affairs
100 Cambridge Street – Suite 900
Boston MA 02114

Commissioner:

Paul M. Stein

DECISION

The Appellant, Michael S. Camacho, duly appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), from the decision of the Massachusetts Environmental Police (MEP) to bypass Mr. Camacho for original appointment to the position of Environmental Police Officer. A full hearing was held on March 3, 2014 at the offices of the Commission and was digitally recorded. By agreement of the parties, the Appellant was permitted to appear and testify via an audio conference link. Twenty-four (24) exhibits were entered into evidence and three (3) other documents marked for identification. MEP called three (3) witnesses and Mr. Camacho testified on his own behalf. The witnesses were not sequestered. Only the Appellant submitted a post-hearing proposed decision.

FINDINGS OF FACT

Based upon the Exhibits and the testimony of the Appellant, MEP Col. Aaron Gross, MEP Major Will Grey and MEP Major Len Roberts,¹ and inferences reasonably drawn from that evidence as I find credible, I make the following findings of fact:

The Appellant's Background

1. The Appellant, Michael S. Camacho, is a Massachusetts resident, born and raised in the New Bedford area. He holds an Associates Degree from Bristol Community College, a B.A. in Political Science from Columbia University and a J.D. from Tulane Law School. (*Exhs. 8, 10 & 19; Testimony of Appellant*)

2. Mr. Camacho has worked for numerous employers in the maritime industry. He holds a Master of Vessels license, which authorizes him to captain ships up to 500 tons, including those that carry up to 750 passengers. (*Exhs. 7, 8, 10 & 19; Testimony of Appellant*)

3. In May 1997, Mr. Camacho entered in the United States Coast Guard. He achieved the rank of E-5, was awarded the Coast Guard Good Conduct Medal. In February 2001, his enlistment was extended "at the request and for the convenience of the government." He was honorably discharged in February 2002. (*Exhs. 4, 10, 14 & 19; Testimony of Appellant*)

4. In November 2000, while on active duty in California with the Coast Guard, Mr. Camacho was charged with driving under the influence of alcohol (DUI), a misdemeanor offense under California law. He admits he was found asleep in his parked vehicle in a state of intoxication, placed on probation, had his license restricted for three months, and completed a

¹ The Commission also heard testimony from Barbara Nobles Crawford concerning MEP's conclusion, after exhausting all available resources (including up to the level of the Chief Technology Officer of the EOEEA and the Governor's Office) that the MEP could not comply with the Commission's order to arrange for a video conference link (Skype) to conduct this hearing in a manner that would enable the Appellant to view the proceedings remotely. Although this conclusion complicated the logistics of the hearing, it did not materially impact the Commission's Decision.

“First Offender Alcohol Program”. The offense is not a “Conviction” on his criminal record. (*Exhs. 2, 3, 10, 13 & 27; Testimony of Appellant*)

5. As a result of the DUI charges, Mr. Camacho appeared before a “Captain’s Mast”, which is a military procedure conducted pursuant to Article 15 of the Uniform Code of Military Justice (UCMJ) held by a service member’s commanding officer to inquire into minor offenses allegedly committed by a member of the command. The Captain’s Mast may result in “non-judicial punishment” if the commander finds that “an offense has been committed”. In the case of Mr. Camacho, his commanding officer found no military offense had been committed and no punishment was imposed. (*Exhs. 5, 15 & 26; Testimony of Appellant, Col. Gross, Maj. Gray, Maj. Roberts*)

Appellant’s Application for Appointment as Environmental Police Officer

6. Mr. Camacho took and passed the civil service examination for the position of Environmental Police Officer A/B (EPO A/B) administered on November 19, 2011 by the Massachusetts Human Resources Division (HRD). His name appeared on Certification #00008 requisitioned by MEP and issued on or about August 2012 among the candidates for appointment to the position of EPO A/B. Ultimately, five (5) candidates were selected, including others ranked below Mr. Camacho on the Certification. (*Exhs. 20, 21 & 24*)

7. MEP’s process of consideration of candidates involves a multi-step process that begins with the submission of a detailed employment application form, an interview before a panel of MEP officers, and a thorough background investigation. (*Exhs. 10 through 12, 15, 19 & 22; Testimony of Maj. Gray*)

8. In response to questions about his driving and criminal records in the employment application, Mr. Camacho provided a detailed explanation of his 2000 DUI arrest, including the docket number of the criminal case. (*Exh. 10*)

9. Mr. Camacho answered “NO” in response to another question in the application concerning his Military record: “Was any type of disciplinary action taken against you in the Service including court martial?” He was forthcoming with the background investigator when he was asked if his DUI had resulted in a “Captain’s Mast”, immediately acknowledging that had occurred, but indicated that he was not found to have committed any offense under the UCMJ and was not disciplined in any way. (*Exhs. 10, 15 & 22; Testimony of Appellant & Maj. Gray*)

10. A computer check of Mr. Camacho’s criminal history by the background investigator noted his California DUI as “no issue – see Highlighted Area of BOP.” His prior employment and personal references were uniformly positive. The background investigator reported:

Each person I spoke with, whether family, friend or acquaintance, deemed Mike a great candidate for this career. Each person listed as a reference or otherwise contacted, quickly referenced Mike’s intelligence, and how fast of a learner he is . . .Mike is energetic, is very friendly, presents himself very well while working, full of great ideas and could bring a great deal of legal knowledge to the Massachusetts Environmental Police Department.

The background investigation also noted his volunteer work with helping homeless people. (*Exhs. 12, 15 & 19*)

11. One of the persons interviewed by the background investigator was an elderly woman who lived near Mr. Camacho’s mother’s home. Mr. Camacho’s mother complained to Maj. Gray about what she believed was unprofessional conduct by the investigator. Maj. Gray recalled the complaint but did not consider it worthy of further investigation and did not report it to any of his superiors. (*Testimony of Appellant & Maj. Gray*)

12. The interview panel consistently rated Mr. Camacho as “good” or “very good” in all categories, which included “Resume”, “Background Package”, “Overall Appearance”, “Verbal/Non-Verbal Communication”, “Posture”, “Friendly/Presentable”, and “Overall Ability to Answer Questions”. Major Gray commented: “Interviews extremely well. Presented well. Answered Tough Questions Well.” (*Exh. 22*)

13. By letter dated March 7, 2013, Col. Gross wrote to advise HRD that he had decided to bypass Mr. Camacho, among others. The reasons for the bypass decision were stated as follows:

“Michael S. Camacho had a prior OUI that he failed to disclose along with military discipline. Prior OUI and military discipline for OUI are public safety concerns for hiring police officers.”

(*Exh. 21*)

14. Major Roberts explained that he attempted to get more information about the Captain’s Mast incident from the Coast Guard, but was not successful. Both Major Roberts and Major Gray believed that merely being summonsed to attend a Captain’s Mast was “disciplinary action, by definition”. (*Testimony of Maj. Roberts & Maj. Gray*)

15. Mr. Camacho had personally represented personnel at Captain’s Mast proceedings. When he answered the question about disciplinary action on his employment application, he responded in the negative because he believed a “Captain’s Mast” was not “by definition” discipline. Rather, based on his personal experience, he construed the process of being called to a Captain’s Mast as an investigatory procedure that may or may not result in “disciplinary action” being “taken against” a person. (*Exhs. 5 & 26; Testimony of Appellant*)

16. Col. Gross acknowledged that Mr. Camacho did disclose his DUI record and the Captain’s Mast during the application process. He believed the MEP should not hire a person who “had an OUI” as a police officer because his record could be used against him by a defense attorney if he were called to testify in court and who might have a problem with alcohol abuse.

Col Gross did take into account the time elapsed since the DUI incident had occurred.
(*Testimony of Col. Gross*)

17. By letter dated July 18, 2013, HRD notified Mr. Camacho that it had approved MEP's reasons for bypassing him for appointment to the position of EPO A/B. This appeal duly ensued.
(*Exh. 20*)

Applicable Standard of Review

The authority to bypass a candidate for permanent appointment to a civil service position derives from 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], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have met the requirements for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. The appointing authority's reasons for “bypassing” a candidate higher on the list in favor of hiring a lower ranked candidate must be “reasonably justified”, based on a “thorough review” and supported by a preponderance of the evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. See, e.g., Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006) and cases cited; Beverly v. Civil Service Comm'n 78 Mass.App.Ct. 182 (2010); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). See also Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“discretionary acts of public officials . . . must yield to the statutory command that [they] produce ‘sound and

sufficient' reasons" consistent with basic merit principles and protected from arbitrary and capricious actions).

In reviewing a bypass decision, "[t]he 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) Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (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"); MacHenry v. Civil Service Comm'n, 40 Mass.App.Ct. 632, 635 (1995), rev.den., 423 Mass. 1106 (1996) (duty to "review, and not merely formally to receive bypass reasons" and evaluate them "in accordance with basic merit principles"). See also Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65, 748 N.E.2d 455, 462 (2001) ("The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses . . . in accordance with basic merit principles. . . .[T]he commission acted well within its discretion."); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (Commission must not substitute its judgment for a "valid" exercise of appointing authority discretion, but civil

service law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”)

The Commission must take account of all credible evidence in the entire administrative 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) In the event of a failure of proof, the commission has the power to reverse the bypass decision. Id. 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

The MEP has failed to meet its burden to establish a reasonable justification for its decision to bypass Mr. Camacho. The evidence clearly showed that MEP’s claim that Mr. Camacho failed to disclose his prior DUI was not true. In fact, he had fully disclosed the incident in his application form and took complete responsibility for his actions. There is no evidence of any subsequent misconduct involving alcohol other than this single offense that is now over fourteen (14) years old. The MEP’s contention that he might be a risk for alcohol abuse or be damaged goods in a court because of this stale, first offense, is not supported by any credible evidence. Moreover, this explanation was only first raised at the Commission hearing and was not included in the reasons stated for the bypass, as required by civil service law and rules.

As to the failure to disclose his record of military “discipline”, I give MEP the benefit of the doubt that the question about “disciplinary action taken against” him was intended to be broad

enough to encompass a Captain's Mast, even if it did not result in any punishment. I am equally persuaded, however, that Mr. Camacho's personal view of what a Captain's Mast meant and how he construed the question involved, particularly given his credible, personal experience in these matters, also was a perfectly reasonable one. Mr. Camacho had been completely forthcoming about the underlying DUI incident and, when asked specifically about the Captain's Mast, he was equally forthcoming about that as well. I can find no basis to conclude that his response to the application question about having a record of military discipline was motivated by any intention to be untruthful or misleading.

In sum, none of the reasons provided for bypassing Mr. Camacho have been established by a preponderance of evidence to be accurate and do not justify his bypass.

There are two additional areas of concern raised by the evidence presented that bear notice as they are relevant to consideration by the MEP of Mr. Camacho (or other candidates) for future appointment to a position of Environmental Police Officer.

First, the MEP's stated reasons provided to Mr. Camacho for bypassing him did not specifically include the fact that he had a 12-year old OUI offense on his record. Col. Gross's testimony at the Commission hearing, however, suggested that he also believes that merely having such a record, per se, was an additional justifiable disqualifying condition, and the lapse of time since the incident and the applicant's intervening record was not necessary relevant.

The Commission's decisions have indicated, however, that using a criminal record, without a thorough review of all the circumstances, particularly a single, stale offense that does not suggest a pattern of misconduct, can be a problematic reason to disqualify an otherwise qualified candidate, both in terms of basic merit principles under civil service law and with respect to

recent sweeping changes in the CORI law. Specifically, on May 4, 2010, chapter 6 of the General Laws was amended by chapter 256 of the Acts of 2010:

In connection with any decision regarding employment ... a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession ... prior to questioning the applicant about his criminal history... . If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession

A person who annually conducts 5 or more criminal background investigations, whether criminal offender record information is obtained from the department or any other source, shall maintain a written criminal offender record information policy providing that, in addition to any obligations required by the commissioner by regulation, it will: (i) notify the applicant of the potential adverse decision based on the criminal offender record information; (ii) provide a copy of the criminal offender record information and the policy to the applicant; and (iii) provide information concerning the process for correcting a criminal record.

G.L.c.6, §171A. St. 2010, c. 256.

On January 11, 2008, the Governor issued Executive Order Number 495, Regarding the Use and Dissemination of Criminal Offender Record Information by the Executive Department:

... WHEREAS, the existence of a criminal record should not be an automatic and permanent disqualification for employment, and as the largest single employer in the Commonwealth, state government should lead by example in being thoughtful about its use of CORI in employment decisions;

WHEREAS, enabling public and private employers and housing providers to interpret CORI accurately and to understand their statutory and regulatory obligations with respect to CORI will improve the fairness of the employment and housing processes;...

WHEREAS, educating individuals about their legal rights regarding their court records will improve their prospects for employment and housing; ...

NOW, THEREFORE, I, Deval L. Patrick, Governor of the Commonwealth of Massachusetts, by virtue of the authority vested in me by the Constitution, Part 2. c. 2, § 1, Art. 1, do hereby order as follows:

Section 1. It shall be the policy of the Executive Department with respect to employment decisions that a criminal background check will only occur, and its results will only be considered, in those instances where a current or prospective employee shall have been deemed otherwise qualified and the content of a criminal record is relevant to the duties and qualifications of the position in question. Such instances will include, without limitation, those in which a criminal conviction

creates a statutory disqualification for the position, or the position requires interaction with vulnerable populations and a criminal background check is necessary to ensure that the applicant does not pose a public safety risk.

In implementing this policy, the employer should consider the nature and circumstances of any past criminal conviction; the date of the offense; the sentence imposed and the length of any period of incarceration; any reasonably available information concerning compliance with conditions of parole or probation, including orders of no contact with victims and witnesses; the individual's conduct and experience in the time since the offense, including, but not limited to, educational or professional certifications obtained since the time of the offense or other evidence of rehabilitation; and the relevance of the conviction to the duties and qualifications of the position in question. Charges that did not result in a conviction will be considered only in circumstances in which the nature of the charge relates to sexual or domestic violence against adults or children, consistent with Executive Order No. 491, Establishing a Policy of Zero Tolerance for Sexual Assault and Domestic Violence, or otherwise indicates that the matter has relevance to the duties and responsibilities of the position in question.

Exec. Order No. 495 (Jan. 11, 2008) (*emphasis added*).

803 CMR 2.00 promulgates procedures for accessing CORI for evaluating applicants for employment or professional licensing, as well as CORI complaint procedures, including the iCORI system, the internet-based system used in the Commonwealth to access CORI and to obtain self-audits, in order to access criminal records. 803 CMR 2.00 applies to *all* users of the iCORI system including employers, governmental licensing authorities, and individuals with a criminal history. The steps for a “reasonably thorough review” are included in 803 CMR 2.17

Adverse Employment Decision Based on Criminal Offender Record Information (CORI):

Before taking adverse action on an employment applicant's application for employment based on the employment applicant's CORI, an employer shall:

- (1) comply with applicable federal and state laws and regulations;
- (2) notify the employment applicant in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse employment action;
- (3) provide a copy of the employment applicant's CORI to the employment applicant;
- (4) provide a copy of the employer's CORI Policy, if applicable;
- (5) identify the information in the employment applicant's CORI that is the basis for the potential adverse action;
- (6) provide the employment applicant with the opportunity to dispute the accuracy of the information contained in the CORI;

- (7) provide the employment applicant with a copy of DCJIS information regarding the process for correcting CORI; and
- (8) document all steps taken to comply with 803 CMR 2.17.

803 CMR 2.17 (issued pursuant to G.L.c.6, §§167A, 172 & G.L.c.30A) See, e.g., Gore v. Department of Correction, 27 MCSR 582 (2014), citing, Conner v. Department of Correction, 27 MCSR 556 (2014) (DALA Magistrate’s decision, adopted by the Commission, analyzing the requirements of a “reasonable review” of criminal record, with specific reference to changes in the CORI law and regulation, including the Governor’s Executive Order applicable to public employment) . See also, Rodrigues v. Department of Correction, 26 MCSR 574 (2014) (no automatic disqualification for five year old larceny arrest); Leguerre v. Springfield Fire Dep’t, 25 MCSR 549 (2012) (no automatic disqualification); Hardnett v. Town of Ludlow, 25 MCSR 286 (2012) (single decade-old conviction); Monagle v. City of Medford, 23 MCSR 275 (2010) and cases cited (discussing parameters that distinguish justified reliance on a pattern of continuing misconduct evidenced by a recent incident, from unjustified reliance on “past indiscretions” that are outweighed by “redeeming factors [that] must be given added weight”)

Second, the MEP’s employment application includes a section entitled “Physical Data” which makes extensive inquiry about a candidate’s physical and mental health history, including history of impairments, diagnoses of specific diseases and conditions and reasons for receiving workers’ compensation or disability benefits. (See Exh.10) It appears that Mr. Camacho’s medical history was made available to the interview panelists and background investigators. The interview notes contain notations about his medical history. Although Mr. Camacho’s bypass was not expressly based on any of this medical history, the solicitation and evaluation of a candidate’s medical history prior to the extension of a conditional offer of employment is prohibited by state and federal law and wholly unacceptable under basic merit principles of civil

service law.² See generally, Boston Police Department v. Kavleski, C.A. 2009SUCV4978 (August 14, 2014, Lauriet, J.) (discussing parameters of appropriate pre-offer screening and post-offer medical fitness examinations) Although I do not find overt evidence of bias against Mr. Camacho as he alleged, the paucity of evidence to support Mr. Camacho's bypass on the merits, the unusual coincidence of a strong interview and generally stellar background investigation does, at least, raise an eyebrow, and suggests that the alleged reasons for his bypass were not only unsubstantiated but may, indeed, have been influenced, either consciously or unconsciously, by another ulterior, pretextual motive based on an unlawful solicitation of information about his medical record. The MEP must take care to ensure that its employment application, investigation and screening procedures, both with respect to Mr. Camacho, and all other candidates, comply in the future with the applicable law.

Relief to be Granted

For all of the above reasons, the appeal of the Appellant, Michael S. Camacho, under Docket No. G1-14-173, is *allowed*

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the name of the Appellant, Michael S. Camacho, shall be placed at the top of all future certifications for original appointment to the position of Environmental Police Officer A/B for the Massachusetts Environmental Police until he is selected for appointment or bypassed. If and when Mr. Camacho is selected for appointment, his civil service records shall be retroactively adjusted to show, for civil service seniority purposes only, as his starting date, the same date of other persons appointed from Certification #00008.

² The Commission has exercised discretion to designate the exhibits containing Mr. Camacho's medical information, which have no bearing on this appeal, as confidential information.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on January 8, 2015.

A true record. Attest:

Commissioner

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.

Notice to:

Michael S. Camacho Esq. [Appellant]
Barbara Nobles Crawford [for Respondent]
John Marra, Esq. [HRD]