

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DONALD NAVE,
Appellant

v.

G2-08-174

DEPARTMENT OF CONSERVATION
AND RECREATION,
Respondent

Appellant's Attorney:

Pro Se
Donald Nave

Respondent's Attorney:

Frank E. Hartig, Esq.
Assistant General Counsel
Dept. of Conservation and Recreation
251 Causeway Street: Suite 600
Boston, MA 02114-2136

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant, Donald Nave (hereinafter "Nave" or "Appellant") seeks review of the Personnel Administrator's (HRD) decision to accept the reasons of the Department of Conservation and Recreation (hereinafter "Appointing Authority" or "DCR"), bypassing him for original appointment to the position of Maintenance Equipment Operator II (MEO II). A full hearing was held on January 7, 2009 at the offices of the Civil Service Commission (hereinafter "Commission"). One (1) CD was made of the proceedings and it is retained by the Commission.

FINDINGS OF FACT:

Five (5) exhibits were entered into evidence at the hearing. Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Peter Church, South Region Director, DCR;
- Robert McKenzie, Blue Hills District Manager, DCR;

For the Appellant:

- Donald Nave, Appellant;

I make the following findings of fact:

1. The Appellant has been a Laborer II for DCR for the past ten (10) years in the Blue Hills district of the South Region and has worked for the agency for approximately twenty-three (23) years. (Testimony of Appellant)
2. The position of Motor Equipment Operator II (MEO II) is a “labor service” title under the civil service law, as opposed to an “official service” title. (G.L. c. 31, §§ 1, 28 and 29)
3. The “labor service” is defined as: “the composite of all civil service positions whose duties are such that a suitable selection for such positions may be made based upon registration pursuant to section twenty-eight, rather than by competitive examination.” (G.L. c. 31, § 1)
4. In the official service, candidates are ranked according to their score on a qualifying examination. (G.L. c. 31, § 26)
5. In the labor service, candidates are placed on a register “in order of the dates on which they file their application on the registers for the titles for which they apply and qualify”, except that: 1) veterans shall be placed ahead of non veterans; and 2) special licenses or qualification may be a prerequisite. (G.L. c. 31, §§ 28 and 29; See also PAR.19(2))
6. Individuals remain on the labor service register for five (5) years. (G.L. c. 31, § 28)

7. Appointing Authorities, when making an original appointment to a labor service position, must meet the standards of G.L. c. 31, § 27 by limiting selection to the first “2n +1” candidates who are qualified and willing to accept appointment (with “n” equal to the number of positions available) and by providing selection reasons for selected candidates whose names appear lower than a non-selected candidate. (PAR.19 (2)(e) stating that labor service appointments must comply with the provisions of PAR.09) (See also Crowther v. City of Melrose, 7 MCSR 64,65 (1994); Searjac v. City of Marlborough and DPA, 7 MCSR 254, 255 (1994).
8. On or about February 15, 2008, HRD issued DCR Labor Service Certification 378 in response to DCR’s request to fill the MEO II position through an original appointment. (Stipulated Fact)
9. The Appellant’s name was ultimately listed first among the three (3) qualified candidates willing to accept appointment to the 1 MEO II position at DCR, based on when he signed the labor service register and his veteran status. (Stipulated Fact)
10. The candidate selected for appointment was listed third among those qualified candidates on the labor service certification willing to accept appointment. (Stipulated Fact)
11. DCR submitted positive reasons for selecting the third candidate as well as negative reasons for not selecting the Appellant to HRD. (Stipulated Fact)
12. HRD approved DCR’s reasons for non-selection and the Appellant filed a timely appeal of that decision with the Commission. (Stipulated Fact)
13. The two (2) negative reasons proffered by DCR to HRD regarding the Appellant stated: 1) “candidate is a problematic employee, prone to verbal outbursts of insubordination and

disrespect for supervisors”; and 2) “candidate...scored lower during the interview process than [the] recommended candidate.” (Exhibit 3)

14. The positive reasons proffered by DCR to HRD regarding the selected candidate included the selected candidate’s superior interview performance which DCR believed showed his greater experience, knowledge and understanding of heavy equipment operation. (Exhibit 3)

Problematic employee prone to outbursts of insubordination and disrespect for supervisors

15. Peter Church has been the South Region Director for DCR since December 2005 and has worked for the agency for approximately nineteen (19) years. The MEO II position in question would work in the South Region and would ultimately report to Mr. Church via managers and supervisors that report directly or indirectly to Mr. Church. (Testimony of Church)

16. During his testimony before the Commission, Mr. Church stated that he had never seen the document submitted to HRD by DCR listing the reasons for non-selection, which was signed by DCR’s Director of Administration and Finance. (Testimony of Church)

17. Mr. Church, who established the interview panel to review all MEO II candidates and made a recommendation to appoint the selected candidate, did not list as a negative reason that the Appellant was a problematic employee prone to outbursts of insubordination and disrespect for supervisors. He does not know where DCR’s Director of Administration and Finance, who did not testify before the Commission, got this information. (Testimony of Church)

18. When Mr. Church contacted the Appellant’s supervisor for a reference, he was told that the Appellant was an “adequate” employee. According to Mr. Church, the Appellant’s supervisor, during their phone call regarding the reference, never described the Appellant as

a problematic employee that was prone to outbursts of insubordination and disrespect.

(Testimony of Church)

19. Mr. Church testified that while the Appellant's supervisor had, sometime in the past, brought issues to his attention regarding problems with the Appellant, Mr. Church was unable to specifically identify what the issues were or when they occurred. (Testimony of Church)
20. Robert McKenzie has been the Blue Hills District Manager at DCR since September 2007 and has worked for the agency for approximately twenty-four (24) years. He chaired the three-member interview panel that reviewed the candidates. He was familiar with the Appellant as an employee in the Blue Hills district. (Testimony of McKenzie)
21. Mr. McKenzie never spoke to Mr. Church about the Appellant's prior job performance and never told Mr. Church, as part of this selection process, that the Appellant was a problematic employee subject to outburst of insubordination. (Testimony of McKenzie)
22. Mr. McKenzie testified that he has received "negative feedback" in the past about the Appellant from the Appellant's supervisors, including one incident last winter when the Appellant got his truck hung up while plowing "Big Blue"; left his assignment; and, according to supervisors, became "very upset". (Testimony of Mr. McKenzie)
23. The Appellant testified before the Commission that four or five years ago he tried to go up "Big Blue" and his truck started sliding backwards because the hill was a solid sheet of ice. According to the Appellant, he did not abandon the truck. (Testimony of Appellant)
24. In regard to any outbursts he may have had during his tenure at DCR, the Appellant testified that there was an incident that occurred regarding a flat tire two years ago involving a mechanic at DCR. According to the Appellant, one of the tires on a truck he was driving was damaged. The Appellant subsequently found out that a mechanic was speaking badly about

him because of the incident. The Appellant testified that, in response, he (the Appellant) confronted the mechanic and told him that if he had something to say to him, he should say it to him directly. During this confrontation, the Appellant testified that he (the Appellant) threw his jacket off and told the mechanic “here I stand”. According to the Appellant, he was hoping the mechanic would strike him after he took his jacket off. (Testimony of Appellant)

Poor Interview Performance

25. As referenced above, Robert McKenzie was appointed by Mr. Church to lead a three-member interview panel to interview all of the candidates interested in the MEO II position. (Testimony of Church and McKenzie)

26. All of the candidates were asked the same five (5) questions from a “Knowledge, Skills and Abilities” (KSA) rating sheet that was developed by DCR in conjunction with HRD. (Exhibit 5)

27. The five questions from the KSA worksheet were:

1. What are some of the pieces of equipment you have operated? What type of tasks have you completed while operating such equipment?
2. Explain the meaning of the terms: Swing, Boom, Stabilizers, Dig Safe, Hydraulic Pistons.
3. List the safety and preventative maintenance tasks that must be accomplished on a daily basis. What is required by the state for a loader to be operated on public roads?
4. What is a circle inspection? When it is performed? Why is it done? And what does it entail?
5. Please explain what a 3 point hitch is and what it is used for. Also explain the use of the P.T.O. unit and what it does. (Exhibit 5)

28. All three interview panelists took notes regarding the individual candidates on the KSA worksheets and gave them a weighted score. Exhibit 5 is a copy of the KSA worksheets, with scores and comments from each panelist, regarding the Appellant and the selected candidate. (Exhibit 5)

29. From a total of 60 possible points, the panelists scored the Appellant and the selected candidate as follows:

	Selected Candidate	Appellant
Panelist 1 (McKenzie)	55	34
Panelist 2	56	49
Panelist 3 (Exhibit 5)	54	38

30. Mr. McKenzie testified that the selected candidate provided clear, concise answers that demonstrated his knowledge and experience regarding heavy equipment, while the Appellant did not. According to Mr. McKenzie, the selected candidate had experience operating all of the heavy equipment that was required of the chosen candidate, while the Appellant did not. (Testimony of McKenzie)

31. Mr. McKenzie testified that he was particularly concerned that the Appellant was not familiar with and did not have experience driving a tractor and that the Appellant did not know what a three point hitch was. According to Mr. McKenzie, a three point hitch is found on most tractors and it levels and tows numerous pieces of equipment. (Testimony of McKenzie)

32. During his testimony before the Commission, the Appellant acknowledged that he has no experience driving a tractor and did not know what a three point hitch was. The Appellant testified that he thinks the selected candidate, who has served as a permanent seasonal employee at DCR for several years, had a leg up on him because he was offered more opportunities for training and experience than himself. (Testimony of Appellant)

CONCLUSION

The role of the 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.” Cambridge v. Civ. Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997).

Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971). G.L. c. 31 § 2(b) requires that bypass cases be determined by a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civ. Serv. Comm'n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31 § 43.

Appointing Authorities are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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). However, personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Commission to act. Cambridge at 304.

DCR provided two (2) negative reasons for not selecting the Appellant for the MEO II position which is the subject of this bypass appeal. In regard to the first negative reason, that the

Appellant is a problematic employee subject to insubordinate outbursts, they have not provided the Commission with enough credible evidence to support this negative reason. Neither of DCR's witnesses, one who chaired the interview panel and another who ultimately recommended the selected candidate, were even aware that this reason was provided to HRD as justification for non-selection of the Appellant. While the Appellant provided some insight during his testimony as to how DCR ultimately came to this conclusion, the Commission has not been provided with sufficient evidence to support this negative reason.

DCR has, however, provided sufficient evidence that the Appellant did not have a good interview performance and that this interview showed that he had less knowledge and experience regarding the operation of heavy equipment than the selected candidate. Robert McKenzie, the Blue Hills District Manager, and chairman of the interview panel, was a credible witness whose primary concern was choosing the most qualified and experienced candidate for this position. He offered credible and specific testimony that the selected candidate performed better during the interview, showing that he was more knowledgeable and experienced. Specifically, Mr. McKenzie testified about a well-founded concern that the Appellant was not experienced driving a tractor, which is a requirement of the job, and was not familiar with a device called a three point hitch, which is used in leveling and carrying various types of equipment.

The above referenced negative reason, related to the interview performance, and the corresponding positive reason related to the selected candidate's interview performance, knowledge and experience, is sufficient to justify the bypass of the Appellant.

This decision does not alter the Appellant's standing on the labor service registration in question and does not prevent him from being considered for appointment to an MEO II position the future. I would urge DCR to explore providing the Appellant with more opportunities for

training and experience with heavy equipment and I would urge the Appellant to keep his emotions in check when dealing with his co-workers, thus improving his chances of being selected for this position some day in the future.

For all of the above reasons, the Appellant's appeal filed under Docket No. G2-08-174¹ is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 15, 2009.

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. 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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:

Donald Nave (Appellant)
Frank Hartig, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)

¹ This appeal was incorrectly docketed with a "G2" prefix, which is used for promotional bypass appeals. As this involves an original appointment, it should have been docketed using a "G1" prefix.