

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

**ROBERT M. WHELAN,
JR.**

Appellant

v.

**DEPARTMENT OF
CORRECTION,**

Respondent

Case No.: G1-14-177

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Department of Correction to bypass Mr. Whelan for appointment as a Correction Officer I is affirmed and Mr. Whelan's appeal under Docket No. G1-14-177 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 19, 2015.

Civil Service Commission

/s/ Christopher C. Bowman

Christopher C. Bowman

Chairman

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)(1), 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:

Robert M. Whelan, Jr. (Appellant)

Andrew McAleer, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Robert M. Whelan, Jr.,
Petitioner

Docket No. CS-14-529
(G1-14-177)

v.

Department of Correction,
Respondent

Appearance for Appellant:

Robert M. Whelan, Jr., *pro se*

Appearance for Appointing Attorney:

Andrew S. McAleer, Esq.
Department of Correction
P.O. Box 946, Industries Drive
Norfolk, Massachusetts 02056

Administrative Magistrate:

Bonney Cashin

Summary of Recommended Decision

The Department of Correction provided a reasonable justification to bypass the Appellant for original appointment as a Correction Officer I. The Appellant was bypassed because of a failed background check based on police reports. The Appellant offered no evidence that the Department's reasons for this bypass were untrue, apply equally to the selected candidates and the bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.

RECOMMENDED DECISION

Introduction

The Petitioner, Robert M. Whelan, Jr., timely appealed under G.L. c. 31, § 2(b) the June 9, 2014 decision of the Department of Correction (“DOC”) to bypass him for original appointment as a Correction Officer I. The bypass was based on a failed background check based on police reports. I held a hearing on October 6, 2014 at the Division of Administrative Law Appeals and recorded the hearing digitally.

I accepted 15 documents into evidence.¹ James O’Gara, a Personal Analyst III with DOC, testified for DOC. Mr. Whelan testified for himself. The record closed on November 19, 2014 after the parties filed their proposed decisions.

Findings of Fact

Based upon the testimony and other evidence in the record and the reasonable inferences from them, as well as my assessment of witness credibility, I make the following findings of fact:

1. Mr. Whelan is a veteran who currently is employed by Med Star Ambulance as an Emergency Medical Technician-Basic. (Whelan Test., Exs. 6, 11).
2. On March 24, 2012, Mr. Whelan took the civil service examination for the position of permanent Correction Officer I and scored a 96. (Bypass Stipulated Facts, HRD letter dated August 8, 2014).
3. On August 7, 2012, the Human Resources Division (“HRD”) created an eligibility list for the Correction Officer I position, and Mr. Whelan was ranked 20th of the candidates who

¹ After Exhibit 15 was admitted into the record, DOC pointed out that one of its pages appeared to be missing. I ordered Mr. Whelan to supply the missing page, but he did not do so. The exhibit remains in the record. Its incompleteness goes to the weight of the evidence it represents. In any event, I have not relied on it in this recommended decision.

indicated they would accept an appointment. (Bypass Stipulated Facts, HRD letter dated August 8, 2014).

4. DOC selected 62 candidates for the position who were ranked below Mr. Whelan on the certification list. (Bypass Stipulated Facts).

5. On January 15, 2014, HRD established a certification list No. 01474 for 150 vacancies. (Bypass Stipulated Facts, HRD letter dated August 8, 2014).

6. On February 19, 2014, Mr. Whelan completed a Background Information Request and Waiver Form, which permitted DOC to run a background check. (O’Gara Test., Ex. 5).

7. On February 19, 2014, Mr. Whelan submitted an application to DOC for the Correction Officer I position. (O’Gara Test., Ex. 11).

8. Mr. Whelan’s pre-employment background check was completed on March 7, 2014. (O’Gara Test., Ex. 6).

9. Mr. Whelan has worked at Med Star Ambulance since December 2005; his supervisor and co-workers recommended him for the CO I position, and described him as calm and reliable under pressure. (Whelan Test., Exs. 6, 11).

10. The DOC investigator found no negative background concerns. (Whelan Test., Ex. 6).

11. The Criminal Justice Information Services reported that Mr. Whelan was arraigned on three occasions; two of which concerned assault and battery charges for incidents in which restraining orders also were issued.² (O’Gara Test., Whelan Test., Ex. 10).

12. Mr. Whelan’s bypass was based on the police reports of the two assault and battery charges. (O’Gara Test., Whelan Test., Exs. 2, 3).

² The third arraignment concerned an operating after suspension charge, which the DOC did not refer to as a reason for its bypass of Mr. Whelan.

13. The first assault and battery charge and the first restraining order concerned an incident between Mr. Whelan and his first wife on February 16, 1998. (O’Gara Test., Whelan Test., Exs. 8, 10, 14).

14. The police incident report of the Shirley, Massachusetts Police Department reported the following: while Mr. Whelan and his wife were separated, he came to her home for visitation with their daughter where they argued about that year’s income tax filing; he left his wife to retrieve their daughter from the bathroom; his wife heard noises in the bathroom; and when she asked him to leave “he became irate and grabbed her by the arms and threw her to the ground.” (Ex. 8).

15. Mr. Whelan was not present when the police arrived. (Whelan Test., Ex. 8).

16. The responding police officer advised Mr. Whelan’s wife of her ability to request a restraining order and she did so. (Ex. 8).

17. Mr. Whelan was served with the restraining order when he returned their daughter to his wife’s home at around 6:00 p.m. that evening. (Whelan Test.)

18. The first restraining order, issued by the Ayer District Court, was in effect from February 17, 1998 until March 25, 1998. (Ex. 10).

19. The assault and battery charges against Mr. Whelan in connection with the incident with his first wife were dismissed for failure to prosecute. (Whelan Test., Exs. 6, 14).

20. The second assault and battery charge and the second restraining order concerned an incident between Mr. Whelan and his second wife on December 17, 2008. (O’Gara Test., Whelan Test., Exs. 7, 10, 13).

21. Mr. Whelan called the police department. (Whelan Test.).

22. According to the Fitchburg Police Department Arrest Report, Mr. Whelan and his second wife were present (Mr. Whelan was at their apartment and his wife was at a downstairs neighbor's door) when the officers arrived at the scene, Mr. Whelan's wife told police that she and her husband had been arguing "constantly" lately, she had been out and when she returned home Mr. Whelan began yelling and arguing with her, he grabbed her right wrist while her cell phone was in her right hand, pushed her torso with his torso while raising her right hand in the air causing the cell phone to fall and break on the floor. (Ex. 7).

23. A responding officer observed redness on her wrist, but believed it would not bruise. (Ex. 7).

24. According to the Fitchburg Police Department Arrest Report, Mr. Whelan stated that he and his wife were fighting and she hit him with her cell phone; the officer observed a red mark on his forehead where he said he was struck. (Ex. 7).

25. Mr. Whelan retains a scar on his forehead from the incident. (Whelan Test.).

26. In response to his statement, Mr. Whelan's wife stated that he may have struck himself when he raised her arm. (Ex. 7).

27. Mr. Whelan acknowledged at the hearing that he grabbed his wife's wrist and when her phone fell to the ground, he stepped on it. (Whelan Test.).

28. The police officer determined that Mr. Whelan was the aggressor and placed him under arrest. (Whelan Test., Ex. 7).

29. The responding police officer advised Mr. Whelan's wife of her ability to request a restraining order and she did so. (Ex. 7).

30. The second restraining order, issued by the Fitchburg District Court, was in effect from December 18, 2008 until April 14, 2009. (Whelan Test., Ex. 10).

31. The assault and battery charges against Mr. Whelan in connection with the incident with his second wife were dismissed on April 17, 2009 at the Commonwealth's request. (Whelan Test., Exs. 6, 10, 15).

32. The DOC obtained and reviewed the Shirley police report and the Fitchburg police report before its decision to bypass Mr. Whelan. (O'Gara Test., Ex. 3).

33. The DOC did not question Mr. Whelan about the incidents reported in the Shirley and Fitchburg police reports. (O'Gara Test., Whelan Test.).

34. DOC does not employ a rigid rule about how far back in time it will consider an applicant's criminal history. (O'Gara Test.).

35. DOC is most concerned with an applicant's criminal history in the five years prior to the application to become a Correction Officer, but it will consider older information to determine if there is a pattern of behavior, if the charges are serious or numerous, or if they concern behaviors that reflect adversely on an applicant's judgment and ability to perform the key responsibilities of a Correction Officer. (O'Gara Test.).

36. DOC has a "zero tolerance" policy toward domestic violence. (O'Gara Test.).

37. The primary function of a Correction Officer is the care, custody, and safekeeping of male and female inmates. (O'Gara Test., Ex. 12).

38. On April 3, 2014, Paul DiPaulo, Deputy Commissioner of DOC's Administrative Services Department, and DOC's ultimate hiring authority, approved Mr. Whelan for "nonselection" as a Correction Officer I. (O'Gara Test., Exs. 2, 3).

39. By letter dated June 9, 2014, DOC notified Mr. Whelan that he did not obtain appointment to the June 1, 2014 Academy, and that he had been bypassed. (Stipulated Facts, O'Gara Test., Ex. 2).

40. The Civil Service Commission received Mr. Whelan's appeal on July 28, 2014. (Ex. 1).

Discussion

The authority to bypass a candidate for a permanent promotion or appointment to a civil service position is governed by G. L. c. 31, § 27, which provides:

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name appears highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name is not highest.

An appointing authority has broad discretion in "selecting public employees of skill and integrity" and, as a result, the Civil Service Commission (or DALA) cannot "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by the appointing authority." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304-305 (1997). Substantial deference is particularly appropriate when considering the appointment of public safety officers. *See City of Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 188, 189 (2010).

When an applicant appeals an appointing authority's decision to bypass him for a position, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons for the bypass are justified. G. L. c. 31, § 2(b). The appointing authority must show a "reasonable justification" for its decision. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006); *City of Cambridge*, 43 Mass. App. Ct. at 303. Reasonable justification means the decision is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law." *Id.* at 304 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass.

477, 482 (1928)). The Commission's review is *de novo* and looks to the "circumstances found by [it] to have existed when the appointing authority made its decision." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) (citations omitted).

If an appointing authority presents purported justifications for the bypass, an applicant must demonstrate that the reasons offered for the bypass were untrue, apply equally to the selected candidate and the bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons. *Borelli v. MBTA*, 1 MCSR 6 (1988).

DOC bypassed Mr. Whelan because police reports revealed two incidents of domestic violence, one in 1998 and another in 2008. Both incidents lead to charges for assault and battery and the issuance of restraining orders. An appointing authority is justified in bypassing candidates who are perpetrators of domestic violence incidents, whether or not those incidents result in arrest or conviction. *Minoie v. Town of Braintree*, 27 MCSR 216, 219 (2014) and cases cited therein.

Mr. Whelan disputes the police report's account of the 1998 incident. He testified credibly several times that he did not touch his first wife. (Whelan Test.). The responding officers did not speak with him, and the report recounts only what his then wife told them. While DOC concluded that, in its view, Mr. Whelan exhibited a pattern of behavior based on similarities in the incidents as described in the police reports, no pattern would exist if the 1998 incident did not happen as reported.

The DOC is justified, however, in relying on the 2008 incident alone to bypass Mr. Whelan. It is not necessary to delve further into the 1998 incident.

DOC has a zero tolerance policy toward domestic violence. (Finding of Fact No. 38). The primary function of a Correction Officer is the care, custody, and safekeeping of male and

female inmates. (Finding of Fact No. 39). DOC is justified in its concern about Mr. Whelan's ability to carry out this key function and abide by its policy. Moreover, an appointing authority has more freedom in deciding whether to appoint someone to an original position than in disciplining an existing tenured one. *Beverly*, 78 Mass. App. Ct. at 191.

Mr. Whelan believes he was treated unfairly because DOC based its bypass of him on incidents that occurred more than five years before his application. He relies on statements of the DOC investigator. She interviewed Mr. Whelan and his wife in their home. When Mr. Whelan raised his criminal background with her, she replied that he was all set; it was more than five years ago. (Whelan Test.). A DOC investigator, however, does not decide which candidates successfully complete a background check. As Mr. O'Gara explained, DOC looks at all of the information about a candidate, but especially events within the past five years.

The parties also disagreed about how to measure the five-year period. DOC argued that Mr. Whelan's 2008 arrest and restraining order were within the five year period because his case was dismissed within five years of his application date, albeit by a few months. Mr. Whelan argues that the incident is outside the five year period because his arrest is outside that window, again, by a few months.

The way that DOC measures the five year period is not always consistent. *Compare Pimental v. Dep't. of Correction*, 26 MCSR 304 (2013) (looks to incident within five years of application) and *Gleba v. Dep't. of Correction*, 26 MCSR 251 (2013) (looks at five year period before CJIS search). The last date of court involvement, whether that is when a case is dismissed or when probation ends, is referenced in several decisions. *Manca v. Dep't. of Correction*, 25 MCSR 525 (2012); *Collett v. Dep't. of Correction*, 21 MCSR 523 (2008).

However the five year period is measured, it does not affect the outcome here. DOC looks at all of the information about an applicant, not only the past five years.

Given that DOC showed a reasonable justification for bypassing Mr. Whelan, the burden shifted to him to demonstrate that the reason offered for bypass were untrue, apply equally to the selected candidates and the bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons. *See Borelli v. MBTA*, 1 MCCR 6 (1998). Mr. Whelan offered no such evidence.

Conclusion

DOC has provided a reasonable justification for its decision to bypass Mr.

Whelan for appointment as a Correction Officer I. The decision to bypass Mr. Whelan is allowed and his appeal under Docket Number G1-14-177 is denied.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Bonney Cashin
Administrative Magistrate

DATED: