

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RAYMOND MASON,
Appellant

v.

Case No. G2-12-6

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Brian V. Jansen, Esq.
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Milford, MA 01757

Appearances for Respondent:

Earl Wilson, Esq.
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Commissioner:

Paul M. Stein¹

DECISION

Procedural History

Pursuant to G.L. c. 31, § 2(b), the Appellant, Mr. Raymond Mason (“Appellant” or “Mr. Mason”), filed a timely appeal with the Civil Service Commission (“Commission”) on December 30, 2011, contesting the decision of the Massachusetts Department of Correction (“DOC” or “Appointing Authority”) to bypass him for a promotional appointment to the position of Correction Officer II. A pre-hearing conference was held on February 7, 2012, at the offices of the Commission. A full hearing was held at the same location on May 9, 2012.

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the parties were provided with copies of the hearing. The parties submitted post-hearing briefs on June 18, 2012.

Summary

The DOC has failed to meet its burden of proving by a preponderance of the evidence that it had reasonable justification to bypass Mr. Mason, based solely upon an investigation that has been pending against him since September 2010.

FINDINGS OF FACT

Based on the exhibits entered into evidence², the stipulations of the parties, the testimony of:

Called by the DOC:

- Mr. James O’Gara, Personnel Officer II, DOC;

Called by Mr. Mason:

- Mr. Raymond Mason, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Mason was appointed to the position of permanent Correction Officer I by the DOC on July 8, 2001, and has been assigned to the Souza-Baranowski Correctional Center (“SBCC”) since his employment with the DOC began. (Testimony of Mr. Mason)
2. On or about April 28, 2007, Mr. Mason took the promotional exam for Correction Officer II. He passed the exam with a score of 77%. (Ex. 3)

² Twenty-three (23) exhibits were entered into evidence at the hearing and two (2) additional exhibits were received after the hearing.

3. The eligible list was established on September 24, 2007. The certification (No. 4100025) was created on August 2, 2010 to fill 159 vacancies. Mr. Mason's name appeared on the list. Seventy-four candidates ranked below Mr. Mason on the list were selected for promotion. (Ex. 3)
4. On or about August 29, 2010, Mr. Mason confiscated tattoo paraphernalia from a prison cell while on duty at the SBCC. After confiscating the items, two inmates approached Mr. Mason and his partner. One of the inmates then swung at Mr. Mason and hit him with a closed fist while the other inmate attacked his partner. Later that same day, Mr. Mason prepared and filed a DOC incident report concerning the matter. The incident report was signed off by Mr. Mason's supervisor and shift commander. (Testimony of Mr. Mason; Ex. 5)
5. The next day, on or about August 30, 2010, the inmates involved in the tattoo contraband incident were interviewed by members of the Inner Perimeter Security ("IPS") team. During this interview, one of the inmates admitted that he punched Mr. Mason in the mouth. The inmate also alleged that on the previous day, he heard Mr. Mason tell his partner to "close the bitches cell." An investigative file, Intake Number 12957 ("Intake"), was opened on or about September 2, 2010, following the inmate's complaint of verbal abuse and names Mr. Mason as the "Employee Accused of Misconduct." The file was sent out to the DOC's Internal Affairs Unit ("IAU"), but the IAU returned the file to the facility for investigation and resolution as a lower level incident. (Ex. 4)
6. As set forth in IAU 103 DOC 522 ("IAU Policy"), § 522.01, Category I complaints are defined as "[c]omplaints investigated by the superintendent/division head, which allege *less serious* infractions of the rules, regulations, policies, or post orders." In contrast, Category

II complaints are investigated by the IAU and “allege *more serious* infractions of the rules, regulations, policies, post orders, or federal, state or local laws.” *Id.* (Ex. 24)

7. The investigation involving Mr. Mason is classified as a Category I investigation, which is the least serious of the investigative categories. (Testimony of Mr. O’Gara, Mr. Mason; Exs. 4 & 24)
8. When considering candidates for promotion, standard DOC practice is to review each candidate to determine if there has been recent discipline, pending discipline, any pending investigation, extended leaves of absence, or pending industrial accident claims. (Testimony of Mr. O’Gara)
9. It is the DOC’s practice not to consider candidates who are the subject of a pending investigation that might result in disciplinary action for promotion. Neither the nature of the alleged misconduct that is the subject of investigation nor the designation of an investigation as Category I or Category II is considered in determining whether to bypass a candidate. All candidates who are the subject of an open investigation will be bypassed. (Testimony of Mr. O’Gara)
10. Once it is determined that a candidate has a pending investigation, the DOC does not consider that candidate’s skills, knowledge, job performance, or any other factors in deciding to bypass that candidate. Anyone with a pending investigation will be bypassed for promotion. (Testimony of Mr. O’Gara)
11. The DOC continuously updates information received during the period between receipt of the certification list and the date that promotions are actually implemented. (Testimony of Mr. O’Gara)

12. The promotions from the list upon which Mr. Mason's name appeared were effective December 4, 2011. As of that time, the investigation concerning Mr. Mason was still pending. (Ex. 23; Testimony of Mr. O'Gara)
13. Pursuant to IAU Policy § 522.09 (B), "Category I investigations shall normally be completed within ninety (90) days of assignment" unless a written request for an extension is granted. (Ex. 24)
14. On or about October 26, 2011, after learning of others receiving promotional offers to Correction Officer II, Mr. Mason spoke with Mr. O'Gara. During this conversation, Mr. Mason learned about the pending investigation for the first time. Mr. O'Gara suggested that Mr. Mason talk to his Superintendent regarding the pending investigation, as Mr. O'Gara did not have personal knowledge regarding the specific details of the investigation. (Testimony of Mr. Mason)
15. After speaking with Mr. O'Gara, Mr. Mason contacted his Superintendent concerning the pending investigation. In response, the superintendent indicated that he was not aware of the matter. (Testimony of Mr. Mason)
16. Later that same day, on or about October 26, 2011, Mr. Mason spoke with the Superintendent's investigator, who confirmed the existence and nature of the allegation and investigation. The conversation was not a formal interview and was about the existence of the investigation. At this point nearly fourteen (14) months had elapsed since the time the allegation and investigation arose. (Testimony of Mr. Mason; Ex. 4)
17. On or about January 5, 2012, Mr. Mason was notified by written letter from the DOC that he was being bypassed for promotion to Correction Officer II due to "pending discipline," which, in this instance, meant a pending investigation. (Ex. 1; Testimony of Mr. O'Gara)

18. Over twenty (20) months elapsed from the time the allegation and investigation arose to the date of Mr. Mason's bypass hearing, and he still had not been interviewed by the DOC regarding the allegation. (Testimony of Mr. Mason; Ex. 4)
19. Mr. Mason was the only person with an open Category I investigation who was bypassed for promotion from certification number 4010025. All other persons bypassed with open investigations were designated Category II. (Testimony of Mr. O'Gara; Ex. 23)
20. Mr. Mason has received thirteen (13) letters of commendation throughout his career with the DOC. The most recent letter is dated November 26, 2010, and was received nearly three (3) months after the allegation against Mr. Mason arose. (Exs. 6-18)
21. In February 2011, the Superintendent of the SBCC appointed Mr. Mason to the facility's IPS team. The IPS team is charged with investigating inmate related matters such as violence, contraband, and gang issues. Mr. Mason was the eleventh officer added to the IPS team. (Testimony of Mr. Mason)
22. On or about May 3, 2011, approximately eight (8) months after the allegations against him arose, Mr. Mason was awarded a Certificate of Recognition for his outstanding job performance. (Ex. 19)
23. In his yearly performance reviews, Mr. Mason never received a rating of "below expectations." In his reviews, Mr. Mason consistently "meets" or "exceeds" expectations. (Ex. 21; Testimony of Mr. Mason)
24. As of the time of the Commission's hearing, Mr. Mason's investigation was still pending and he had yet to be formally interviewed about the incident. (Testimony of Mr. Mason)

25. Mr. Mason was bypassed as a result of the pending investigation into the allegation made against him. No consideration was given to his yearly employee reviews, work history, or letters of commendation. (Ex. 1; Testimony of Mr. O’Gara)
26. On at least two occasions, the Superintendent’s investigator, assigned to investigate the allegation against Mr. Mason, made derogatory comments about Mr. Mason. The first comment was made in or about June 2011, when the investigator negatively commented about Mr. Mason’s presence at the scene of a hit-and-run accident and whether Mr. Mason had caused the fatality³. The second incident occurred in or about October 2011, when the investigator commented that he had informed supervisory parties that Mr. Mason was not trustworthy. (Testimony of Mr. Mason; Ex. 25)
27. Both Mr. O’Gara and Mr. Mason answered all questions clearly and without hesitation. I find them both to be credible witnesses.

LEGAL STANDARD

The authority to bypass a candidate for original appointment to a permanent civil service position is set forth in G.L. c. 31, § 27, which states, in pertinent part:

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 is 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 was not highest.

³ According to the incident report, Mr. Mason was driving home from work at approximately 11:30 at night when he noticed a body on the road near an intersection. Mr. Mason stopped his vehicle and attempted to perform CPR on the man and had another bystander call for emergency personnel. When the ambulance arrived on scene, Mr. Mason assisted them in transporting the body, and the extent of the victim’s trauma became evident. The victim appeared to have been dragged approximately 200 or more feet and there were body parts and personal items from the victim on the ground and around Mr. Mason’s vehicle. Mr. Mason stayed with the officers on the scene and assisted them in identifying objects and was allowed to leave the scene at approximately 1:30 in the morning. (Ex. 25)

Upon an appeal, the appointing authority has the burden of proving by a preponderance of the evidence that the reasons stated for the bypass are justified. *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 241 (2006). Reasonable justification is established when such an action 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.” *Comm’rs of Civil Serv. v. Municipal Ct.*, 359 Mass. 211, 214 (1971) (quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 485 (1928)). An appointing authority may use any information it has obtained through an impartial and reasonably thorough independent review as a basis for bypass. See *City of Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 189 (2010).

“In its review, the commission is to find the facts afresh, and in doing so, the [C]ommission is not limited to examining the evidence that was before the appointing authority.” *City of Beverly*, 78 Mass. App. Ct. at 187 (quoting *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” *Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 823 (2006). The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether 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, 334, *rev. den.*, 390 Mass. 1102 (1983). As a result, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown.” *City of Beverly*, 78 Mass. App. Ct. at 188.

“In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions” *City of Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102 (1997) (*citing Murray v. Second Dist. Court of E. Middlesex*, 389 Mass. 508, 514 (1983); *Kelleher v. Personnel Adm’r of the Dept. of Personnel Admin.*, 421 Mass. 382, 387 (1995); *Police Comm’r of Bos. v. Civil Serv. Comm’n*, 22 Mass. App. Ct. 364, 370, *rev. den.*, 398 Mass. 1103 (1986)). “When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.” *City of Cambridge*, 43 Mass. App. Ct. at 304. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” *City of Cambridge*, 43 Mass.App.Ct. at 304 (*citing Sch. Comm’n of Salem v. Civil Serv. Comm’n*, 348 Mass. 696, 698-99 (1965); *Debnam v. Belmont*, 388 Mass. 632, 635 (1983); *Comm’r of Health & Hosps. of Bos. v. Civil Serv. Comm’n*, 23 Mass. App. Ct. 410, 413 (1987)).

ANALYSIS

The sole reason for Mr. Mason’s bypass was that he had an open investigation against him that could result in discipline. It is the DOC’s consistent practice not to consider a candidate for promotion if he or she is the subject of a pending investigation that may result in discipline. The DOC relies on the Commission’s prior decision in *Gonsalves v. Dep’t of Correction* for the proposition that such a practice is permissible. *Gonsalves v. Dep’t of Correction*, G2-07-67 (March 4, 2008). The DOC correctly points out that the Commission upheld the bypass in *Gonsalves* on the basis of a pending investigation in that case; however,

“this does not mean that the DOC is free to act on the basis of an ongoing investigation without *diligently proceeding to conclude the investigation* and then acting appropriately according to the outcome of the investigation.” *Peck v. Dep’t of Correction*, G2-12-206 (April 5, 2013) (emphasis added).

The incident that initiated the investigation against Mr. Mason occurred on or about August 29, 2010. Despite the fact that the investigation was opened shortly thereafter, on or about September 2, 2010, as of the date of the Commission’s hearing, over twenty (20) months had elapsed and Mr. Mason had yet to be formally interviewed. According to IAU Policy § 522.09 (B), “Category I investigations shall normally be completed within ninety (90) days of assignment.” The DOC attempted to minimize the significance of the time guidelines set forth in IAU Policy with the conclusory statement that it is “clearly not a compulsory standard,” despite the use of the word “shall,” which is commonly construed as obligatory or mandatory. *See e.g., United States Gypsum Co. v. Exec. Office of Env’tl. Affairs*, 69 Mass. App. Ct. 243, 250 (2007). For investigations that require a longer period of time, IAU Policy provides that “[e]xtensions of time may be granted by the Chief of OIS, upon written request stating sufficient grounds for the request.” IAU Policy, § 522.09 (B). However, the DOC declined to offer any evidence that any such an extension request had been granted and did not provide any reasons as to why the investigation had yet to be initiated, let alone concluded, within this period of time or prior to the hearing.

By refusing to consider Mr. Mason’s ability, knowledge, and skills, and basing his bypass solely on reasons related to administrative efficiency, the DOC acted in a manner inconsistent with basic merit principles, as defined in G.L. c. 31, § 1. In addition, the DOC failed to diligently conduct a fair and impartial investigation into the allegations made against

Mr. Mason. For these reasons, Mr. Mason's appeal under Docket Number G2-12-6 is hereby *allowed*. The Commission, consistent with its authority under G.L. c. 31 and Chapter 310 of the Acts of 2003, hereby *orders* that Mr. Mason's name shall be placed at the top of current and future certifications for the position of Correction Officer II until such time as he is promoted or bypassed. In addition, Mr. Mason may not be bypassed for the same reasons for which he was bypassed in this matter.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on May 16, 2013.

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:

Brian V. Jansen, Esq. (for the Appellant)
Earl Wilson, Esq. (for the Respondent)