

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ANDRE H. DASILVA,
Appellant
v.

Docket No.: G1-14-145

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Andre H. DaSilva
Pro se

Appearance for Respondent:

Earl Wilson, Esq.
Department of Corrections
P.O. Box 946
Norfolk, MA 02056

Commissioner:

Cynthia Ittleman¹

DECISION

On June 24, 2014, the Appellant, Andre DaSilva (“Mr. DaSilva” or “Appellant”), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (“Commission”) from a decision by the Department of Corrections (“DOC”) bypassing him from employment in the position of Correction Officer (“CO”) I. A prehearing conference was held in this case on July 22, 2014 at the offices of the Commission. A full hearing was held at the Commission on September 24, 2014. The witnesses were not sequestered as the Appellant provided no other witnesses than himself and DOC called only one witness.² The hearing was digitally recorded; the parties were provided

¹ The Commission acknowledges the assistance of Law Clerk Craig E. Reeder in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

copies of the recording and the Commission retained a copy of the recording.³ The parties submitted recommended decisions. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Eleven (11) exhibits were entered into evidence at the hearing. Based upon these exhibits, the testimony of the following witnesses:

Called by DOC:

- James O’Gara, Personnel Analyst III

Called by Appellant:

- Andre DaSilva, Appellant

and taking administrative notice of all matters filed in the case, including the parties’ submissions prior to the full hearing, pertinent statutes, regulations, caselaw and policies, a preponderance of the credible evidence and reasonable inferences therefrom, establishes the following findings of fact:

1. Mr. DaSilva arrived in the U.S. from Brazil in 2000 when he was nineteen years of age. He has an Associates degree in business management from Bristol Community College, where he studied from 2010 to 2014. Currently, he is a sales representative at TLC Supply, a landscaping supplies store in Quincy. Prior to that, he worked at Resin Technology from 2000 to 2011, at North Star Distribution for approximately one-half year, at Company A for approximately one year, and he worked again for Resin Technology for another period of time.

Mr. DaSilva is married and has one child. (Testimony of DaSilva)

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion.

2. Mr. DaSilva took and passed the Civil Service Examination for the position of Correction Officer I on March 24, 2012. (Stipulation of Fact)
3. On January 15, 2014, DOC submitted a requisition to the state's Human Resources Division ("HRD"). In response thereto, HRD issued Certification 01474. (Stipulation)
4. Mr. DaSilva was ranked 52nd on Certification 01474. (Stipulation of Fact)
5. Mr. O'Gara is one of two Personal Analyst IIIs at DOC. His main responsibility is to supervise the hiring process for civil service positions within DOC for correction officers. Prior to his current employment, Mr. O'Gara worked as a correction officer in Rhode Island for one year, from which he was promoted to the position of correction counselor, in which position he worked for six or seven years. Thereafter, DOC hired Mr. O'Gara as a Personnel Analyst, which is when he started to work on the hiring process in the DOC human resources office. He has been trained at DOC regarding the hiring process, including conducting CORI background checks. He supervises one CO II and eight other staff persons. He is responsible for maintaining personnel files and he has reviewed thousands of applications. (Testimony of O'Gara)⁴

⁴ At the Commission hearing, DOC asked that Mr. O'Gara's testimony be considered expert testimony. I indicated to the parties that they could address this matter in their post-hearing recommended decisions but that, in the interim, I would allow Mr. O'Gara's testimony to be entered into evidence but not as an expert witness, and give it the weight it is due. A factfinder has broad discretion in determining whether a witness is an expert. Letch v. Daniels, 401 Mass. 65, 66 (1987). I find that while Mr. O'Gara, who works in the DOC human resources office, is certainly well-informed of his employer's hiring practices, the testimony he provided was information about the functions he performs generally and in regard to Mr. DaSilva's appeal but does not constitute expertise. Even if Mr. O'Gara was deemed to be an expert, experts' conclusions are not binding on the trier of fact, who may decline to adopt them in whole or in part. *See, e.g. Turners Falls Ltd. Partnership v. Board of Assessors*, 54 Mass.App.Ct. 732, 737-78, *rev. den.*, 437 Mass. 1109 (2002).

6. As a result of the hiring process following the 2012 CO I exam, DOC hired sixty-six (66) candidates for the CO I position, of which thirty-five (35) were ranked below the Appellant. (Stipulation)

DOC's Hiring Process

7. The DOC's hiring process for Correction Officer I begins when the DOC submits a requisition to HRD for a Certification of eligible candidates. HRD sends notice to eligible candidates to report to the DOC in order to sign the Certification to indicate their willingness to accept the position if hired. As the candidates sign the Certification, Mr. O'Gara and his assistants meet the candidates and issue the candidates three (3) documents. The first document is the background waiver, which, when signed, allows the DOC to conduct a background investigation, including criminal history and driver histories. The second document requires the candidates to provide their contact information. The third document is generated by HRD, which is a form requesting general information, including education and/or licensing, to ensure that each candidate meets the minimum requirements to be eligible for the position. The candidates also receive a form that informs them how to obtain DOC's application if they successfully pass the background check and what additional documents that the candidates will need to provide to the DOC. Another document the candidates receive when they sign the Certification is the Physician Release form, which allows a doctor to examine each candidate to ensure that they can take the physical abilities test. (Testimony of Mr. O'Gara)

8. After the candidate submits the completed documents to the DOC on the day they sign the Certification, Mr. O’Gara and staff begin conducting background checks of the candidates, which includes reviewing the candidates’ criminal history records and the candidates’ driving records. DOC contacts candidates if there are any issues pertaining to their driver history, allowing the candidate to remedy any problem. When the criminal history checks are complete, Mr. O’Gara reviews them and makes any notations on the criminal records, if needed. If Mr. O’Gara makes any such notations, they are forwarded to his supervisor, Erin Gotovich, the Acting Director of the DOC Human Resource Operations office. Ms. Gotovich makes an initial determination of a candidate’s suitability and she forwards the candidate information to Deputy Commissioner of Administration DiPaulo, who makes a final hiring determination on behalf of the DOC Commissioner (who is the Appointing Authority). (Testimony of Mr. O’Gara)
9. When a candidate’s background check is accepted, DOC sends a notification to inform the candidate indicating when the candidate should to report to the training facility wearing physical abilities attire to perform the physical abilities test. The notification also informs the candidate to bring formal business attire to change into for a formal interview if the candidate passes the physically abilities test. The candidate is also instructed to bring the completed application and all pertinent documents. Before the formal interview, Mr. O’Gara and his staff perform obtain the fingerprints of each candidate. The candidates are informed that if they are hired, there will be a nine (9) month probationary period. (Testimony of Mr. O’Gara)

10. Prior to the interviews, Mr. O’Gara and his staff review with each candidate Attachment Q.⁵ Attachment Q is read to the candidates. If the candidate successfully passes the interview, the candidate undergoes a full background investigation. The background investigator receives all of the information submitted by the candidate. The full background investigation includes: going to the police stations where the candidate lives, verifying diplomas, checking military history, checking references, verifying employment history, neighborhood checks and home visits to the candidates. During the home visit, the investigator explains to candidates the duties and obligation of being a correctional officer and explains that the home visit will be the last time for the candidate to ensure that she or he has been truthful about their application.

(Testimony of Mr. O’Gara)

11. After the investigator completes the candidates’ investigations, the investigator produces a background history report for each candidate. Mr. O’Gara reviews the background history report and all documents submitted by the candidate. If Mr. O’Gara finds any issues of concern he makes notations in that regard. Those notations are reviewed by Ms. Gotovich and Deputy Commissioner DiPaulo.

(Testimony of O’Gara)

Mr. DaSilva’s Application Process

12. On January 17, 2014, Mr. DaSilva reported to the DOC to sign the Certification to indicate his willingness to accept employment as Correction Officer I, if hired.

(Exh. 4; Testimony of O’Gara and DaSilva)

⁵ Although Mr. O’Gara refers to the document as Attachment “O,” the document is labeled Attachment Q.

13. Mr. DaSilva submitted to DOC a background history waiver, his contact information and other required general information. (Exhs. 4 and 6; Testimony of O’Gara and DaSilva)
14. By letter dated January 19, 2014, Mr. DaSilva was notified, *inter alia*, “We are pleased to inform you that the Department of Correction is able to extend you a *conditional officer* of employment as a Correction Officer I.” (Ex. 11)(emphasis in original) The same letter indicated that the Appellant had passed the initial background check and that he was to report to the DOC training facility on February 19, 2014. (Exh. 11; Testimony of O’Gara)
15. Mr. DaSilva reported to the training facility on February 19, 2014 and passed both the Physical Abilities Test (“PAT”) and interview. Mr. DaSilva turned in his completed employment application at the training facility. (Exh. 6; Testimony of O’Gara)
16. The application asked if DOC could contact the applicant’s previous employers. Company A was one of the Appellant’s previous employers. The Appellant was employed at Company A from December 2011 to November 2012. Company A conducted a background check of the Appellant prior to hiring him. In the course of Company A’s background check, there was a question regarding the Appellant’s immigration status but it was resolved in the Appellant’s favor and Company A hired him. (Testimony of Mr. DaSilva; Exhs 5 and 9)
17. When the Appellant filled out the DOC application and submitted it on February 19, 2014, in response to a question asking if DOC may contact his former employers, the Appellant wrote that DOC could contact all of his prior listed

- employers with the exception of Company A. Under the section of the application asking “reason for leaving”, with regard to Company A the Appellant wrote “differences (not work related)”. (Exh. 5; *see also* Exh. 6) The Appellant did not indicate on the application that Company A had terminated his employment because he was concerned that it would be a “red flag” and DOC would not hire him. (Testimony of Mr. DaSilva)
18. Mr. DaSilva also wrote in his application that he had received unemployment benefits in the past 12 months. (Exh. 6)
19. On the Employment History Addendum to the DOC employment application, the applicant is asked whether she or he has been formally disciplined by an employer and the Appellant indicated that he had “never been formally disciplined by an employer.” (Exh. 6)
20. Page two of DOC’s employment application states, “FALSE OR MATERIALLY INACCURATE INFORMATION ON THIS APPLICATION WILL BE CAUSE FOR EMPLOYMENT OR DISMISSAL AT ANY TIME AFTER EMPLOYMENT.” (Exh. 6)(emphasis in the original)
21. On page 6 of the DOC application it states, “I certify under the pains and penalties of perjury...*I understand that any false statements, omissions or answers made by me on this application can result in my immediate termination.*” Mr. DaSilva signed page 6 indicating that he read and understood what he signed. (Exh. 6)(emphasis added)
22. When Mr. DaSilva was at the training facility on February 19, 2014, he received Attachment Q. Question 2 on Attachment Q asks, “Are you aware that you can be

- terminated or denied employment for any omissions or false statements made on your application?” Mr. DaSilva checked ‘yes.’ Mr. DaSilva also signed Attachment Q. (Exh. 8; Testimony of O’Gara)
23. Mr. DaSilva’s application was assigned to Investigator Higgins on February 24, 2014 for an investigation. (Exh. 5; Testimony of O’Gara)
24. On February 27, 2014, Investigator Higgins conducted the home visit of Mr. DaSilva. Investigator Higgins explained the duties of being a Correction Officer I and answered questions that Mr. DaSilva had. Mr. DaSilva told Mr. Higgins about an incident at Company A involving a fellow employee but he did not say that he (the Appellant) had been terminated from Company A. (Exhs. 5 and 7; Testimony of Appellant) The Appellant knew that Mr. Higgins would meet with Company A representatives after the home visit. (Testimony of Appellant)
25. On February 28, 2014, Investigator Higgins spoke with Company A’s President. The President told Investigator Higgins that Mr. DaSilva was terminated from Company A “for poor quality of work” and “rated the applicant’s honesty and integrity as being low”, adding that the Appellant “knew that another employee was an ex-felon and did not tell management.” (Exh. 5) The Company A President also stated to Investigator Higgins that “[the Appellant] had a problem with following and understanding directions and taking ownership of his actions, often saying he was being targeted due to being born in another country.” (Exh. 5)
26. After speaking with the Company A President on February 28, 2014, the Investigator also spoke with the Company A Operations Manager that day. The

Company A Operations Manager also told Mr. Higgins that the Appellant was terminated for “poor performance”, which was not stated on the Appellant’s application. (Exh. 5) She also stated that the Appellant ““had a stable relationship with coworkers but had issues with supervisors.”” (Exh. 5) She stated further that the Appellant ““did what was good for his family and himself, but not for the greater good.”” (Exh. 5) In addition, she stated that the Appellant ““had information about another employee being incarcerated and never told management.”” (Exh. 5) She did not think that the Appellant was mature and asserted that he “made no positive contributions”. (Exh. 5) She further alleged that the Appellant received no service awards or promotions the year he worked there and that the Appellant was working under the table while receiving unemployment benefits. (Exh. 5)

27. Investigator Higgins completed Mr. DaSilva’s background investigation report on March 3, 2014. The report states that the Company A President also stated that the Appellant ““had no disciplinary record, had no issues with on-the-job safety, took [no] company property for personal use or ever indicated racial, ethnic, religious, sexual harassment or religious prejudice while employed[.]”” and that the Operations Manager agreed that the Appellant had no disciplinary record prior to his termination. (Exh. 5) In his report, Investigator Higgins wrote, “Be advised, there is no supporting documentation” regarding the allegation that the Appellant worked under the table while receiving unemployment payments. In addition, the report concludes that the Appellant’s positive employment aspects were “excellent attendance record[,], multilingual capabilities[,], considered

hardworking by all employers”. (Exh. 5) For negative employment aspects, Mr. Higgins wrote that Mr. DaSilva was “[t]erminated from a previous employer and not listing it on application”. (Exh. 5; *see also* Exh. 10)

28. In a letter to the Appellant from the Company A President dated December 12, 2011, the Company A President wrote, in part,

We are pleased to confirm our offer of employment at will with [Company A]. As we discussed, the terms and conditions of acceptance are as listed below.

1. Position Mixing Technician-I – Full time ...
2. Knowledge Req. Familiarity with operating, inspecting and maintaining equipment
 Understanding of the major activities performed in a laboratory and manufacturing site
 Knowledge of analysis, testing principles and practices
 Ability to conduct chemical tests and analyses ...
4. Compensation Compensation will be paid at an hourly rate of \$18.50. The first 90 days will be considered an introductory period and performance will be evaluated during that time. **Performance evaluations determining merit increases will be performed each December. ...**
5. Hire Date December 12, 2011⁶
(Exh. 9)(emphasis added)

DOC did not have this letter when it decided not to hire the Appellant and the Appellant did not disclose the termination letter to DOC in the application process. (Administrative Notice)

29. In the Company A biweekly pay period from December 4, 2011 to December 17, 2011, the Appellant was paid \$18.50 per hour for 40 hours of regular pay and \$27.75 per hour for 9.25 hours of overtime pay for a total net pay of \$844.46, reflecting that he was hired December 12, 2011. (Exh. 9) DOC did not have this pay period information when it decided not to hire the Appellant. (Administrative Notice)

⁶ That the Appellant actually began employment in December, 2011 was confirmed by Company A.

30. In the Company A pay period from October 21, 2012 to November 3, 2012, the Appellant was paid \$19.25 per hour for 73.50 hours of regular pay (for the two-week period) for a total net pay of \$1,103.60. (Exh. 9) Prior to this Company A pay period, the Appellant trained another employee at Company A's request. (Testimony of Mr. DaSilva) DOC did not have this information when it decided not to hire the Appellant. (Administrative Notice)

31. The Company A employee that the company asked the Appellant to train was Mr. A. Mr. A told the Appellant that many years earlier, he had been involved in a criminal matter. The Appellant believed that since Company A had checked the Appellant's background before it hired him, that Company A had also checked Mr. A's background and hired Mr. A despite the criminal matter. Company A then fired Mr. A and Mr. A told Company A that the Appellant knew about the criminal matter in his past. On November 9, 2012, Company A called a meeting of employees and said that the Appellant's failure to disclose Mr. A's criminal past put everyone at risk. The Appellant promptly went home. The Company A President called the Appellant at home.⁷ Within a couple of days, the Appellant received a letter from Company A dated November 9, 2012 stating that the Appellant was fired as follows: "Released due to inability to meet performance standards[]" and the letter provided certain health insurance and unemployment insurance information. (Exh. 10; Testimony of Mr. DaSilva) The Appellant subsequently applied for and obtained unemployment benefits based on his employment at Company A. The Appellant told Investigator Higgins about the events relating to Mr. A, knowing that Mr. Higgins would soon meet with

⁷ The Appellant asserts that during this phone call he told the Company A President that he quit.

- Company A representatives. At the Commission hearing, the Appellant testified that he quit Company A, rather than having been fired. The Appellant feared that if he wrote on his DOC employment application that Company A had fired him that it would be a “red flag” and DOC would not hire him. (Testimony of Mr. DaSilva)
32. Prior to the Appellant’s employment at Company A, the Appellant applied for a Correction Officer I position at DOC and was admitted into the academy for training. However, the Appellant withdrew from the academy stating that he was unable to continue at that time because of an ankle injury he incurred immediately prior to the academy and because he was enrolled in college at the time. (Exh. 6)
33. When Mr. O’Gara received Mr. DaSilva’s background report and application, Mr. O’Gara was concerned that (1) Mr. DaSilva did not want the DOC to contact Company A and (2) Mr. DaSilva noted that his reason for leaving Company A was “differences (not work related)” (Exh. 6; Testimony of O’Gara)
34. Mr. O’Gara presented his concerns to Ms. Gotovich. Ms. Gotovich made a determination that Mr. DaSilva was not a suitable candidate because he was untruthful on his application by not disclosing his termination. (Testimony of O’Gara)
35. After Ms. Gotovich makes her initial decision, she takes all of the supporting documents and presents them to Deputy Commissioner DiPaulo. Mr. DiPaulo made a final recommendation that Mr. DaSilva was not suitable to work for the DOC because he was untruthful in his application. (Exh 3; Testimony of O’Gara)

36. Truthfulness and accuracy are important aspects to being a correctional officer.

(Exhs. 6, and 7; Testimony of O’Gara)

37. By letter dated June 9, 2014, DOC informed Mr. DaSilva, inter alia, “Please be advised that you were not considered for appointment to the June 1, 2014

Academy due to one of the following reasons: ...Background Investigation:

3/31/14-Failed Background Investigation Based on Prior Work History at

[Company A] and Untruthfulness on Application. ... You have a right to appeal

this determination by filing your appeal, in writing, within sixty calendar days of

receipt of this notice, with the Civil Service Commission” (Exh.

2)(emphasis in original); Testimony of Mr. O’Gara)

DISCUSSION

Applicable Law

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. Mun. 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 commission is not limited to examining the evidence that was before the appointing authority.” *Id.* 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). Further, “[t]he commission does not act without regard to the previous decision of the appointing authority, but rather decides 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.” *Id.* at 824 (quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983)).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. Beverly at 188. An appointing authority “should be able to enjoy more freedom in deciding whether to appoint someone as a new... officer than in disciplining an existing tenured one.” *See* City of Attleboro v. Mass. Civil Serv. Comm’n, C.A. BRCV2011-00734 (MacDonald, J.), citing Beverly at 191. The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Mass. Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, at 259 (2001). “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.” *Id.* (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)).

The Commission is also mindful of the standard of conduct expected of officers of the law. “An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Serv. Comm’n, 38 Mass. App. Ct. 473, 474 (1995). “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.” Attorney General v. McHatton, 428 Mass. 790, 793 (1999).

Analysis

The Department of Correction has established, by a preponderance of the evidence, that it had reasonable justification to bypass Mr. DaSilva based on his failure to disclose the Company A termination letter but not based on the allegations concerning his work history at Company A as they were unsupported and, in fact, were contradicted by Company A’s own actions.

Mr. DaSilva was informed multiple times that he had to be truthful and complete on his application. He signed multiple documents stating that failure to disclose information to the DOC will result in termination at any time. Although Mr. DaSilva avers that he quit employment at Company A and that he was not terminated from the company, he received a letter stating that he was terminated, which letter he did not disclose to DOC. Instead, on his application the Appellant wrote that the reason he left Company A was “differences (not work related)”. While this does indicate that there were difficulties of some kind, not specifically related to the tasks to which he was assigned, it does not disclose the termination letter in which, accurate or otherwise,

Company A stated that the Appellant was “released due to inability to meet performance standards”.⁸ The Appellant testified that he did not want to indicate on his application that he had been terminated from Company A because it would raise a “red flag” and likely preclude him from being hired. Further, Mr. DaSilva stated on his application to the DOC that he claimed unemployment benefits during the previous twelve (12) months. Mr. DaSilva acknowledged in his testimony that he claimed and received unemployment benefits based his termination from Company A. Truthfulness and accuracy require complete disclosure; they are essential characteristics of being a corrections officer because of their responsibilities. Mr. DaSilva did not disclose the termination letter to DOC prior to his appeal to the Commission, he did not tell DOC that he was terminated when he had ample time and multiple reminders to be fully forthcoming. Because Mr. DaSilva failed to disclose that the termination letter from a previous employer, DOC was justified in bypassing him.

DOC failed to establish by a preponderance of the evidence that it had reasonable justification to bypass the Appellant based on poor performance at Company A. As Investigator Higgins’ report indicates, all of the Appellant’s other employment history was quite positive. In addition, DOC’s reliance upon the Appellant’s “prior work history at [Company A]” as another reason to bypass the Appellant is based on information provided to DOC by Company A representatives who, despite that fact that they both reported that the Appellant had *not been the subject of any discipline*, alleged, *inter alia*, that his work performance was poor, he was immature, he did not respond to direction and he was taking payment under the table while on unemployment. Investigator Higgins

⁸ As Company A is a private sector employer, the Commission has no authority to determine if termination of the Appellant’s employment for not disclosing Mr. A’s criminal background would be appropriate.

specifically reported that the latter allegation was unsupported. In addition, Company A had asked the Appellant to train another employee, hardly something an employer would ask an employee to do if the employee's performance was as bad as Company A alleged. Further, Company A raised the Appellant's pay prior to the annual December salary reviews mentioned in Company A's letter to the Appellant, which also critically undermines Company A's allegations about the Appellant's performance.

Furthermore, the sequence of events in DOC's hiring process undermined DOC's reliance upon the Appellant's purported unfavorable work history at Company A in addition to bypassing him for not disclosing the termination letter from Company A. Specifically, the Appellant was interviewed the day before Investigator Higgins was to interview the Company A representatives. Consequently, the Appellant did not have an opportunity to be aware of, and respond to the allegations. For these reasons, DOC has not established, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant based on his alleged prior work history at Company A in addition to bypassing him for having failed to disclose the termination letter.

Conclusion

For the reasons stated herein, the appeal filed under Docket No. G1-14-145 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on May 28, 2015.

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:

Andre H. DaSilva (Appellant)

Earl Wilson, Esq. (for Respondent)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

ANDRE H. DASILVA,
Appellant

v.

G1-14-145

DEPARTMENT OF CORRECTION,
Respondent

CONCURRING OPINION OF CHRISTOPHER BOWMAN & PAUL STEIN

We concur with the well-reasoned analysis of Commissioner Ittleman and her conclusion that DOC had reasonable justification to bypass Mr. DaSilva. Having reviewed the entirety of the record, however, we reach that conclusion with great reluctance.

By almost all accounts, Mr. DaSilva is a decent, hard-working man. Born in Brazil, he is now a United States citizen living in Taunton with his wife, child and mother-in-law. He graduated from Taunton High School and received an Associates degree from Bristol Community College. He worked at Resin Technology for eleven (11) years between 2000 and 2011 and was then re-employed there. The Production Manager at Resin describes Mr. DaSilva as someone who “gets along with everyone including his supervisors” and who “has a lot of energy and ... follows directions / instructions to a T.” The General Manager at the same facility describes Mr. DaSilva as “dependable, hard-working and well respected in this company.”

The Operations Manager at a former employer, North Star Distribution, described Mr. DaSilva as “a well-liked guy” who made positive contributions to the company by “always showing up and working until the job was done.”

Mr. DaSilva also worked for eleven (11) months at a manufacturer in Wareham between December 2011 and November 2012. As noted in the decision, Mr. DaSilva, while employed at the Wareham company, received a pay increase and was asked to train a new employee, both indicia of someone who has the confidence of his employer. Then, it is undisputed, that the trainee mentioned to Mr. DaSilva that he (the trainee) had a criminal record dating back twenty (20) years ago. Knowing that the company conducts background investigations of all employees, Mr. DaSilva understandably concluded that this was simply none of his business, likely assuming that the company, after vetting the trainee’s background, had concluded that the trainee’s criminal record did not disqualify him from employment.

Based on the statements to the DOC investigator by company officials, and Mr. DaSilva’s testimony, it appears to be undisputed that the company was not aware of the trainee’s record; and that the trainee was subsequently fired.

To Mr. DaSilva’s astonishment, company officials, in front of other employees, then questioned Mr. DaSilva’s “honesty and integrity” for failing to tell management about the trainee’s disclosure to him. From that point forward, Mr. DaSilva’s professional career has been put in turmoil.

When contacted by a DOC investigator, the same company officials who granted Mr. DaSilva a pay raise and assigned him a trainee, now described Mr. DaSilva as someone who:

- “had a problem with following and understanding directions and taking ownership of his actions, often saying he was being targeted because he was born in another country”;
- “violated this company’s non-compete disclosure by working for a competitor, and collecting unemployment benefits while working under the table”;
- “did what was good for his family and himself, but not for the greater good”.

If these statements weren’t clear (and personal) enough, the Operations Manager, while speaking with the DOC investigator, then questioned Mr. DaSilva’s “morality and maturity.”

Those are damning and potentially career-ending comments that will follow Mr. DaSilva for a lifetime, particularly in regard to his pursuit for a career in law enforcement. As stated in Commissioner Ittleman’s decision, the evidence does not support the allegations regarding Mr. DaSilva’s alleged poor performance and the DOC investigator found no evidence to support the allegations regarding unemployment insurance fraud.

There is a question as to whether Mr. DaSilva, after being caught up in this tornado of events, quit or was terminated. It is not disputed, however, that company officials sent Mr. DaSilva a letter stating in relevant part, “ ... your employment is hereby terminated. Please note that your termination will be considered ... under the following category: Released due to inability to meet performance standards.”

When asked on his DOC application to list the “reason for leaving” this company, Mr. DaSilva hand-wrote, “differences (not work related)”. In the background investigation,

DOC cited “negative employment aspects” regarding Mr. DaSilva as having been “terminated from a previous employer and not listing it on application.”

In deciding to bypass Mr. DaSilva, DOC listed the following two (2) reasons: 1) Prior work history; and 2) Untruthfulness on Application.

As referenced in Commissioner Ittleman’s decision, and for the reasons stated above, the “prior work history” is not a valid reason for bypass. That leaves the damning allegation of “untruthfulness on Application”.

Frankly, in the context of what occurred here, we do not find the words “differences (not work related)”, to be untruthful. According to Mr. DaSilva, his reason for leaving was not related to his work performance, the same conclusion reached in the Commission’s decision. As such, we do not find his written words on the application regarding his reasons for leaving to be untruthful. Further, there is no “check-box” of terms (i.e. – termination) listed on the DOC application. Rather, the applicant is asked to write, in his /her own words, the “reason for leaving.”

However, during his testimony before the Commission, Mr. DaSilva stated that part of his reasons for not stating that he was terminated was that he knew it would raise a “red flag” to DOC investigators. That is problematic, particularly considering that Correction Officers, as part of their duties and responsibilities, are routinely required to draft incident reports that must reflect an accurate reflection of events that occurred, regardless of whether it raises a “red flag” or paints the Correction Officer in a potentially bad light.

Applied here, Mr. DaSilva, from the outset, should have disclosed that he received a notice of termination from the company and fully explained his version of events to the

DOC investigator. By omitting that he received a notice of termination, and by not being as forthcoming as he should have been from the outset, Mr. DaSilva provided DOC with a valid reason to bypass him. Solely for that reason, we voted, with great reluctance, to deny Mr. DaSilva's appeal.

/s/ Christopher Bowman

/s/ Paul Stein

Dated: May 28, 2015