

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

ELLISON REYES,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: G1-13-291

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. The Appellant submitted written objections and the Respondent submitted a reply to those objections.

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. Reyes is affirmed and his appeal under Docket No. G1-13-291 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on July 24, 2014.

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:

Joseph Cabrera, Jr., Esq. (for Appellant)

Earl Wilson, Esq. (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Ellison A. Reyes,
Petitioner

v.

Docket Nos. CS-14-116;
(G1-13-292, Civil Service Commission)

Department of Correction,
Respondent

Dated:

Appearance for Appellant:

Joseph Cabrera, Jr., Esq.
274 Hampton Road
East Longmeadow, MA 01028

Appearance for Appointing Authority:

Jeffrey S. Bolger
Human Resources Division
Department of Correction
P.O. Box 946, Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Sarah H. Luick, Esq.

Summary of Tentative Decision

The Department of Correction (DOC) had a reasonable justification to bypass the Petitioner for hire as a Correction Officer (CO) I. The Petitioner was terminated from a prior job as a laborer in a warehouse. He pushed a co-worker under circumstances that were found to violate company policy. The coworker had provoked him. No criminal charges resulted. The Petitioner has no criminal history. The Petitioner was in his first job after graduating from high school and had worked at the job for about a year. The DOC found that this job action had occurred within five years of applying for the CO I position and involved conduct that could be expected to occur with inmates provoking and physically challenging a CO I in a DOC facility, justifying the bypass of the Petitioner at this time. The hiring process and standards of review followed for the Petitioner were the same ones followed for all the CO I job candidates. I recommend that DOC's bypass decision be affirmed by the Civil Service Commission.

TENTATIVE DECISION

Pursuant to G.L. c. 31, § 2(b), the Petitioner, Ellison A. Reyes, is appealing the November 13, 2013 decision of the Respondent (Appointing Authority), the Department of

Correction (DOC), bypassing him for appointment to the position of CO I. (Ex. 2.) The appeal was timely filed December 27, 2013. (Ex. 1.) A hearing was held for the Civil Service Commission on March 21, 2014 at the offices of the Division of Administrative Law Appeals, One Congress Street, 11th Floor, Boston, MA 02114.

Various documents are in evidence. (Exs. 1 – 11.) The Petitioner offered the decision providing him with unemployment benefits relating to the matter for which he was terminated by his prior employer. This was only marked for identification and not taken into evidence. (Ex. B.) The hearing was digitally recorded. The Petitioner filed a pre-hearing memorandum. The Respondent filed a pre-hearing memorandum and a post hearing brief. (Ex. A.) The parties entered into a stipulation of facts at the pre-hearing conference held February 4, 2014, and those stipulations were read into the record at the hearing. (Ex. 10.) The Respondent presented the testimony of DOC Human Resources Division Personnel Officer James O’Gara. The Petitioner testified on his own behalf and presented no other witnesses. Both parties made arguments on the record. The record closed April 21, 2014.

FINDINGS OF FACT

Based on the stipulations, documents entered into evidence, the testimony presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Ellison A. Reyes took and passed a civil service examination for the position of CO I on March 24, 2012. On August 7, 2012, a list (#00947) of eligible candidates for appointment to CO I was established by the Commonwealth’s Human Resources Division. DOC was needing a list to use for hiring at least one hundred fifty CO I appointees. Mr. Reyes was on the list and signed that he would accept the position. He was ranked sixty along with others on the certification list. One hundred eighty-two candidates were selected. (Stipulation. Ex. 10. Testimony of O’Gara.)

2. On July 10, 2013, Mr. Reyes, along with other job candidates, received orientation information about the hiring process and what was expected of a CO I candidate in

providing information to DOC. Mr. Reyes signed the Entrance Requirement Verification Form 527 providing basic profile information and contact data, education, any special licenses, and current job information. He also completed on July 10, 2013, as required of all the candidates to go forward in the hiring process, the Background Information Request And Waiver form that allows DOC to gain access to Mr. Reyes' CORI and driving record as well as to allow DOC to interview his character references. Mr. Reyes passed his CORI check and no issues to stop him continuing on in the hiring process arose in regard to his driving record. (Exs. 3, 8 & 9. Testimony of O'Gara.)

3. Next in the hiring process, Mr. Reyes received the form letter issued by the DOC Human Resources Division dated July 19, 2013, informing Mr. Reyes that he was to proceed in the hiring process by appearing at the Shirley Training Academy for the physical abilities testing. He was told to come with various documents, including a physician's release form to engage in the testing, his employment application, his driver's license, his education diploma(s), any special licenses, his birth certificate, his social security card, and any other documents pertinent to the information he provided in the application such as any court or military service documents. Mr. Reyes satisfied these requirements in terms of proceeding to this testing. He passed the testing. (Ex. 6. Testimony of O'Gara & Reyes.)

4. Included in documentation Mr. Reyes had to answer and sign on July 24, 2013 was the form, Pre-Employment Background Investigation Initial Interview Check List for Correction Officer. Mr. Reyes answered and signed the form. Among the form questions, Mr. Reyes answered that he had not previously sought employment at any DOC facility, was at least nineteen years of age, had no felony or misdemeanor criminal record, had never worked using a different name, was a US citizen, had no military experience, and recognized that he might have to work as a CO I nights, weekends and holidays. He answered that his current employer could be contacted, and that he could be terminated if appointed, or not

appointed, if he made any omissions or false statements on his job application. (Ex. 5.

Testimony of O’Gara.)

5. On his job application that he signed July 18, 2013, Mr. Reyes noted that he had no currently incarcerated family members within a DOC facility. He revealed that he graduated in 2009 from Chicopee High School and that he received an associate’s degree in criminal justice in 2013. He listed three references; his algebra teacher, a sales representative for a textbook company, and a Correction Officer. He listed his employment history with the dates of work, the job performed, a supervisor’s name, and the kind of duties he performed. For his prior jobs, he listed the reason for leaving the job. His work experience was doing physical labor and tow truck driving. He listed his status for purposes of affirmative action as Hispanic. He answered that he is able to speak Spanish well. (Ex. 7.)

6. Mr. Reyes’ job application listed his current job as a loader for Pepsi Bottling Group out of Rochester, NY. He listed his duties as “select product, organize it on a pallet and wrap it, then load onto the truck.” He started this job in December 2012. He listed his just prior job as Reyes Towing out of Rochester, NY, being a tow truck operator from June 2011 to November 2012. He noted he left this job for a better work opportunity. He listed his next prior job as C & S Wholesalers out of Hatfield, MA, being a selector/partner. He listed his duties as “select product and organize on pallet and wrap it. Also clean aisles.” He listed his dates of work as December 2009 to December 2010. He listed that he left the job because he was “wrongfully terminated.” He explained what happened in an Employment History Addendum sheet. He noted a date of discipline of December 23, 2010 and that he was suspended and then terminated because he “pushed another employee that was in my face to keep personal space.” Mr. Reyes also listed a prior job that was seasonal of doing laborer work for Rick’s Landscaping out of Chicopee, MA between July and September 2008. (Ex. 7. Testimony of Reyes.)

7. Mr. Reyes reached the next step in the hiring process of having a background investigation done by a CO who had experience doing such investigations of job candidates, Mark Brennan. A red flag issue CO Brennan investigated was the termination from employment at C & S Wholesalers in December 2010. He contacted the employer but was unable to learn anything beyond what Mr. Reyes revealed on his application. He reached the legal department that informed him that the only way to gain access to more information about the termination was to have a subpoena issued for the records on the incident. The DOC did not subpoena this information. No other red flag issues were found in the candidate's background. (Ex. 3. Testimony of O'Gara.)

8. CO Brennan learned from contacting Pepsi Bottling Group that Mr. Reyes has not been disciplined and that no further information could be provided as it is against company policy to speak about an employee. CO Brennan contacted Reyes Towing and learned that Mr. Reyes

is a respectful person that gets along with everybody whether it was other staff or clients ... the type of person that will do whatever needs to be done to complete the job, without complaint ... always presented himself in a professional manner whether it was at work or off duty ... no disciplinary issues ... at no time witness[ed] ... using any type of drug or alcohol ... the applicant ... always wanted to get into Law Enforcement.

(Ex. 3.) CO Brennan contacted Rick's Landscaping and learned that Mr. Reyes

was a respectful kid ... willing to do anything asked of him ... no negative issues with the applicant at any time ... was a good kid.

(Ex. 3.)

9. CO Brennan contacted the three references Mr. Reyes listed in his job application. The high school algebra teacher who had known Mr. Reyes for eight or nine years told CO Brennan that he was also his basketball coach and that Mr. Reyes had been the captain of the team. He found Mr. Reyes to have been

a very hard working individual in his studies (math did not come easy to him) as well as his sports ... has a very good work ethic (not giving up), and knows when it's better to ask for help than to suffer and not finish the task ... is a person that has a selfless attitude, who helps others without expecting any type

of reimbursement other than the satisfaction of helping someone that needed it ... had known ... [Mr. Reyes] was interested in Law Enforcement and believes ... [he] would do well.

(Ex. 3.) The sales representative for the textbook company who had known Mr. Reyes for about thirteen years remarked how “hard working” Mr. Reyes is “with a clear head on his shoulders.” He noted having found Mr. Reyes someone who

always completed everything placed in front of him, ... some setbacks but ... [he] always ... [was] able to overcome the odds and succeed ... the type of person that can be counted on to help anyone, to complete anything set in front of him ... has always shown interest in the field of Law Enforcement and ... this would be a good opportunity for ... [him].

(Ex. 3.) The Correction Officer reference who had known Mr. Reyes for five years

described ... [Mr. Reyes] as a ‘fighter’ meaning he would work his hardest to get the task completed ... had a rough childhood and there were many opportunities for him to do the wrong thing but he wouldn’t, he would work hard to make sure he came out on top ... is definitely a hard working individual with a good head on his shoulders ... knew ... [he] was very interested in Law Enforcement and was happy for ... [him] to be given this opportunity.

(Ex. 3.) CO Brennan completed his investigation report on August 18, 2013. He did not provide any personal opinion on the worth of Mr. Reyes’ candidacy. (Exs. 3 & 4.)

10. Mr. Reyes acknowledged that when he pushed the co-worker out of his personal space that there was a workplace policy at C & S Wholesalers against any workplace violence of any kind. He just felt that he did the best he could under the circumstances. He had been working his regular duties that involved using a pallet after he had examined it to determine if it was working properly as required. He was using it for his full tour of duty as required. He had already used it for transporting some materials. He left it to secure his next assignment. When he returned to where he had left it he found it missing. It was not proper procedure for anyone to simply take over a co-worker’s pallet. Mr. Reyes tracked down the location of the pallet and found the co-worker with it. He went to the co-worker explaining that it was the pallet he’d been using. The co-worker reacted with anger toward Mr. Reyes and came off the pallet over to him right in front of him saying words that included, “Fuck you bitch.” Mr. Reyes did not know this person. This co-worker remained in Mr. Reyes’

“personal space” and provocatively challenged Mr. Reyes about his demand for a return of the pallet. He was about the same size as Mr. Reyes but somewhat older. Mr. Reyes felt he had no other option at this time than to push the co-worker out of his personal space and did just that. He did not say anything to the co-worker when he did this. His push caused the co-worker to take a step back. The co-worker did not lose his footing and fall. The co-worker continued to swear at Mr. Reyes who simply stared back at the co-worker, and he did not engage the co-worker in any further discussion or physical touching although he felt the co-worker wanted to start to fight. The co-worker never touched Mr. Reyes. The encounter lasted a minute or so. Mr. Reyes went to his pallet and continued his work. This co-worker reported to his supervisor about having been pushed by Mr. Reyes. Mr. Reyes was called to the office. He acknowledged having pushed the co-worker. He was suspended and sent home. He accepted this discipline. He was subsequently terminated because of violating the company policy against any workplace physical confrontations or violence. He wanted to learn from his employer what happened to the co-worker but could not find out. He felt wrongfully terminated and asked his supervisors if they would examine a surveillance camera to watch what happened. Mr. Reyes never recalls receiving a written letter concerning his termination and the reasons for it. Mr. Reyes understood the company rule was not to engage in any horseplay or to engage in any physical confrontations. Because he felt wrongfully terminated Mr. Reyes sought unemployment benefits and secured them. (Ex. 11. Testimony of Reyes.)

11. The DOC Human Resources Division’s James O’Gara, a Personnel Officer II in charge of and the monitoring of this CO I hiring process, reviewed Mr. Reyes’ application documents and the investigation report. At this point in the hiring process, he made a recommendation to the Human Resources Director about Mr. Reyes’ candidacy. She makes the final decision on whether candidates can move onto the next stages in the hiring process or are denied an appointment at this stage. Mr. O’Gara and the Human Resources Director

discussed Mr. Reyes' candidacy. This is the process they followed on each of the candidates reaching this stage in the hiring process. The result of this discussion was the Director's decision, in agreement with Mr. O'Gara's recommendation including for the reasons he explained to her, to bypass Mr. Reyes' appointment. This was based on Mr. Reyes' discipline at C & S Wholesalers that ended his employment for pushing his co-worker against company policy. This kind of conduct, having occurred within five years of Mr. Reyes' seeking the CO I position, was viewed as sufficient to show he should not be hired at this time due to the same kind of unprovoked, unpredictable, and unjustified confrontations that can be faced by CO Is with inmates, and due to the DOC policy also against any workplace violence of any kind. That is the kind of circumstance Mr. O'Gara and the Human Resources Director felt Mr. Reyes had found himself confronting with the co-worker. To Mr. O'Gara, himself a former CO I, the key factor was not that Mr. Reyes was terminated but that he had engaged in the touching of the co-worker to remove him from his personal space while the co-worker was trying to provoke him and was swearing at him. Mr. Reyes acknowledged he had at least technically violated his company's policy against engaging in any physical confrontations with co-workers even though he felt he had acted as carefully and measured as he could under the circumstances. This was sufficient to Mr. O'Gara and the Human Resources Director to support a bypass of Mr. Reyes. Eighty-two candidates were chosen who ranked below Mr. Reyes. (Exs. 2 & 10. Testimony of O'Gara & Reyes.)

12. By letter to Mr. Reyes November 13, 2013, the DOC Human Resources Division informed him that he was not being "considered for appointment" because of the background investigation that revealed he had a negative work history at C & S Wholesalers. He was provided with his rights to appeal this decision to the Civil Service Commission. He was given the telephone number for Mr. O'Gara to contact with any questions. Mr. Reyes filed a timely appeal on December 27, 2013. (Exs. 1 & 2. Testimony of O'Gara.)

Conclusion and Recommendation

I recommend that the DOC's bypass decision be affirmed. The findings show that the DOC was not arbitrary in bypassing Mr. Reyes because of the reason he was terminated from employment with C & S Wholesalers. Mr. Reyes testified credibly that he pushed the co-worker to regain his personal space and due to concerns for his own safety because he felt the co-worker was threatening to fight with him. He explained that this was his first job after graduating from high school, and that he did not know this particular co-worker at all. He felt he was wrongfully terminated and explained how he had asked his employer what was going to happen to the co-worker and received no answer. Whatever he did that the employer determined was sufficient to have violated the company policy against any workplace violence or physical confrontations, was not revealed by the employer. The DOC did not take the additional step to subpoena the company to secure documentations about the incident. Nevertheless, the DOC's reasoning for the bypass is justifiable and based on not only this conduct occurring within five years of the application to be a CO I, but because the conduct involved the kind of confrontations that a CO I would face in the job dealing with provocative and violent inmates where the CO I could never exhibit any workplace violence in the way Mr. Reyes did, particularly toward another CO he might have a dispute with.

Mr. Reyes' candidacy ended with DOC having treated his candidacy in the same way each candidate was evaluated. The DOC applied its routine protocol, that when a candidate is found to have an unacceptable profile in terms of prior work history, he is found to be disqualified from securing the CO I position and does not advance to future aspects in the hiring process. This is what Mr. O'Gara's credible testimony explained.

G.L. c. 31, § 1 defines basic merit principles in pertinent part as follows:

(a) recruiting, selecting ... employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are

protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

When an Appointing Authority/Respondent bypasses an otherwise eligible candidate it must provide both a reasonable justification for doing so, as well as proof that such a justification could be applied fairly to all potential candidates. *Brackett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). In hearing bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has “sustained its burden of proof that there was reasonable justification for the action taken.” *Cambridge v. Civil Serv. Commission*, 43 Mass. App. Ct. at 304. Reasonable justification requires that the Appointing Authority based its actions on adequate reasons, supported by credible evidence, guided by common sense, and weighed by an unprejudiced mind. *See Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Serv. Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b).

Appointing Authorities/Respondents are rightfully granted wide discretion when choosing individuals from a certified list of eligible candidates. The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority. The Civil Service Commission’s role is to “protect against overtones of political control ... and assure neutrally applied public policy.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 303. The Civil Service Commission reviews the legitimacy and reasonableness of the Appointing Authority’s grounds for bypassing an Appellant. *Beverly v. Civil Service Commission*, 8 Mass. App. Ct. 182, 187 (2010). So long as the Appointing Authority provides a sound and sufficient reason for the bypass and applies its policies equally, the Civil Service Commission should not intervene.

The Civil Service Commission should not overturn the DOC’s assessment of Mr. Reyes’ prior job discipline. There needs to be evidence of arbitrary action in disqualifying

Mr. Reyes, and no such evidence has been shown. Rather, Mr. O’Gara credibly explained how after an experienced DOC Investigator has produced his report on the candidate, a discussion occurs between himself and the Human Resources Director to decide whether or not there are solid grounds to disqualify the candidate. Although information from C & S Wholesalers was missing, there is sufficient proof presented to show the kind of conduct Mr. Reyes engaged in so that the DOC’s reliance on that evidence is enough to support a justification for bypassing him for the CO I position despite his otherwise good background for the position based in particular on his supportive recommendations and no other work discipline and a criminal justice associate’s degree.

For these reasons I recommend that the Civil Service Commission affirm the DOC’s bypass determination.

DIVISION OF ADMINISTRATIVE
LAW APPEALS

Sarah H. Luick, Esq.
Administrative Magistrate

DATED: