CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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

ANTHONY FERRARA,
Appellant

v.

G1-12-65

DEPARTMENT OF CORRECTION,
Respondent

Appellant (Pro Se): Anthony Ferrara

Respondent's Representative: Kerry Rice
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner: Cynthia Ittleman[1]

DECISION

Pursuant to the provisions of G.L. c. 31, section 2(b), the Appellant, Anthony Ferrara (hereafter "Ferrara" or "Appellant"), is appealing the decision of the Massachusetts Department of Correction (hereinafter "Department" or "DOC"), as the Appointing Authority, to bypass him for original appointment to the position of Correction Officer. The Appellant filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on February 21, 2012. A pre-hearing was held on April 3, 2012. A full hearing was held on June 19, 2012. At the full hearing, I took the time to explain the proceeding to him in detail and offered to any questions he may have throughout the hearing. The hearing was digitally recorded. The parties'

[1] The Commission acknowledges the assistance of Law Clerk Mary B. Flaherty in preparing this decision.

recommended decisions were due July 17, 2012. The Respondent filed a recommended decision but the Appellant did not. The Appellant was also given the opportunity to submit further records identified at the hearing but he failed to do so. For the reasons indicated herein, the Appellant's appeal is denied.

FINDINGS OF FACT:

Nine (9) exhibits were entered into evidence by the Appointing Authority at the full hearing. Three (3) exhibits were entered into evidence by the Appellant at the full hearing. Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Alexandra McInnis, DOC, Director of Personnel

For the Appellant:

- Anthony Ferrara, Appellant

and taking administrative notice of all matters filed in this case, as well as any and all pertinent statutes, regulations, caselaw, and policies, a preponderance of the evidence establishes the following facts:

1. The Appellant is a forty-eight (48) year old male residing in Taunton with his wife and two children. (Testimony of Appellant)
2. The Appellant possesses both a Class A drivers' license and a Class M drivers' license. Previously, the Appellant worked as a tractor-trailer driver for Warner Enterprises for about a year but was terminated when he refused to operate a problematic truck. Prior to that, the Appellant held a temporary job through a call center but was laid off after one and a half months. Prior to that, the Appellant worked at a dry cleaner. More recently, the Appellant has been unable to find stable employment due to layoffs and a bad economy. He has been

an elected trustee at Mass. Bay Community College, where he worked on his Associates Degree but fell a few classes short of earning his degree, and he had volunteered at a food service at a local church in Wareham for years prior to moving to Taunton. The Appellant is seeking a position as a Correction Officer I in order to achieve employment stability. (Testimony of Appellant)

3. The Appellant took and passed an open examination for the position of Correction Officer I on September 26, 2009. The resulting list was established by the state's Human Resources Division (hereinafter "HRD") on February 8, 2010 and revoked on February 9, 2012. (Letter from HRD)
4. The Appellant also took and passed an open examination for the position of Correction Officer I on March 20, 2010.[2] The resulting eligible list was established on July 14, 2010 (Certified list #4011045). He scored a 91% on this examination. (Stipulated Facts; Letter from HRD)
5. HRD sent the Certification of eligible candidates for the 2010 examination to the Appointing Authority on September 28, 2011. That list was created to fill two hundred and eight (208) Correction Officer I vacancies at the DOC. (Stipulated Facts)
6. Of the two hundred and eight (208) candidates selected for the positions, one hundred and twenty (120) were ranked below the Appellant. (Stipulated Fact)
7. On January 18, 2012, DOC sent a letter to the Appellant indicating that he was being bypassed for the position of Correction Officer I. Specifically, the January 18, 2012 letter was a form letter with boxes to check to indicate the reason for bypassing a candidate. On the form letter, the Appointing Authority checked the box indicating "You have failed to

[2] The pertinent letter from HRD states that the exam was given on March 20, 2010 although the parties earlier believed that the date was March 10, 2010.

meet the eligibility criteria for the position of Correction Officer I:" and inserted thereafter that it was bypassing the Appellant for appointment due to an "unsatisfactory Criminal Offender Record Information" ("CORI"). (Exhibit 2; Stipulated Fact)

8. Alexandra McInnis has been employed at the DOC as Director of Personnel for seven years, since May 2005. In that capacity, Ms. McInnis oversees the DOC hiring process in all eighteen (18) facilities in all job levels. Her duties include, but are not limited to, the processing of civil service lists, overseeing the keeping of records, the processing of weekly personnel transactions and the payroll system, as well as overseeing a handful of employee benefit programs and retirement processing. (Testimony of McInnis)
9. The Appointing Authority's process for hiring Correction Officers consists of requesting a list from HRD when vacancies become available, sending cards to the candidates whose names are on the Certification list, inviting those candidates to sign forms at the Department of Correction, including a background waiver form to conduct a CORI check, and reviewing those forms along with the CORI records. Those candidates who qualify based on the initial background check and review are then interviewed, administered a physical abilities test, and given a full background check in which a representative of the Appointing Authority meets the candidates' prior employers and references and the selected candidates undergo drug testing. Candidates who clear all of these requirements are then offered a job. (Testimony of McInnis)
10. The Appointing Authority concluded, after consideration of the Appellant's application and initial background check, which included the Appellant's CORI and driver records, that the Appellant did not qualify for appointment based on his unsatisfactory CORI and he was not invited to an interview in the next phase of the hiring process. Specifically, the DOC

bypassed the Appellant based on the CORI it obtained indicating that the Appellant was convicted of larceny under $250 and possession of burglary tools in 1982. (Testimony of McInnis) The form bypass letter that DOC sent to the Appellant on January 18, 2012 stated that he was bypassed because of "Unsatisfactory Criminal History report (CORI)" (Exhibit 2) but it did not state that it was based on the Appellant's reported 1982 convictions. (Administrative Notice)

11. The Appellant's CORI was obtained through the state Criminal Justice Information System ("CJIS"). On August 9, 1982, the Appellant was charged with possession of burglary tools and larceny under $250. On September 2, 1982, the Appellant admitted to sufficient facts regarding the criminal charges, the case was continued without a finding for one year, ordering payment of $100 and $50 for court costs, and ordering the Appellant to perform forty hours (40) of community service. The Appellant defaulted on November 8, 1982 and the default was removed on December 3, 1982. The charges were dismissed on August 30, 1983 and January 10, 1983, respectively. The Appellant was not convicted of, and incarcerated for larceny under $250 and possession of burglary tools. (Exhibits 6, 10 and 12; Testimony of Appellant)
12. The Appellant's CORI also includes criminal charges in 1999 and 1992 of which he was not convicted and, pursuant to a nolle prosequi, the cases were not prosecuted. The Appellant's driving record, also obtained through CJIS, includes a number of motor vehicle-related violations and payment defaults from 1983 to 2007, only some of which the Appellant successfully appealed. (Exhibits 5 – 12) [3]

[3] The Appellant objected to the inclusion of Exhibit 12, a more recent printout of his CORI offered by the Appointing Authority, arguing that since the Appointing Authority did not have the information in Exhibit 12 available when it bypassed him it should not be admitted. The exhibit was admitted with an indication that it would be given limited or appropriate weight. Since it corroborates the Appellant's testimony that the 1982 offenses were

13. Even without having been incarcerated for one year for the 1982 criminal charges, the Appointing Authority would have concerns about the Appellant's candidacy for the position of Correction Officer I because of the questions his record raises about his character and his respect for law enforcement. (Testimony of McInnis)
14. The Appellant filed a timely appeal at the Commission of the Appointing Authority's decision to bypass him for appointment to the position of Correction Officer I. (Administrative Notice)

LEGAL STANDARD

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct. at 304. "Basic merit principles" means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, section 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the

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ultimately dismissed, I give the exhibit some weight. Its weight is otherwise limited in view of the fact that it is a three-page document in which the first page is dated 2011, the CORI appears to include certain driving violations, and the second and third pages are dated 2012, suggesting that the pages are from reports generated on different dates, although they all appear to be the Appellant's records.

action taken by the appointing authority." Cambridge at 304. Reasonable justification means the Appointing Authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

Bypass cases are decided based on a preponderance of the evidence. A "preponderance of the evidence test requires the Commission to determine whether, on a basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Comm'n, 31 Mass.App.Ct. 315 (1991); G.L. c. 31, section 43.

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited therein.

CONCLUSION

The Appellant appeared at the full hearing pro se, properly attired, and he made a serious effort to present appropriate evidence and argument in support of his appeal, apologizing when he made procedural errors or was unfamiliar with these legal proceedings. The Appellant provided what he believed to be sufficient evidence to support his appeal. Specifically, he provided documentation (Exhibits 10 and 11) that, when combined with a review of the DOC documentation, supported his assertion that he was not incarcerated following the 1982 criminal charges against him, rendering his testimony in this regard credible. With regard to other aspects of his CORI, the Appellant did not deny that there were other criminal charges against him but he asserted, and the documentation showed, that they had been dismissed or disposed of otherwise in his favor, rendering this aspect of his testimony in this regard credible as well. The Appellant did contest the considerable and long term list of motor vehicle infractions relied upon by DOC (Exhibit 8). In support of his argument in this regard, he produced a purported copy of his driving record (Exhibit 9) that listed far fewer motor vehicle infractions and he asserted that he had successfully appealed some of the infractions. However, the record that the Appellant produced was an "Unattested Driving Record" and, therefore, is not reliable. For this reason, the Appellant's testimony in this regard was not credible. In light of the foregoing, the Appellant was, overall, relatively credible.

Ms. McInnis provided professional, straight forward and detailed testimony regarding the practices and procedure of the DOC's hiring process. Her answers to questions were prompt, direct and reflected her considerable knowledge about DOC's hiring policies. In addition, she readily admitted when she did not have information regarding certain aspects of the Appellant's application, including whether or not he was initially called back for an interview and why, or

whether the CORI check could produce varying results at different times and why, and thus testified that she could not explain such matters. For these reasons, Ms. McInnis was a very credible witness.

Upon review of the testimony of these two witnesses and the documents presented in this matter, the DOC has proven by a preponderance of evidence that there were sound and sufficient reasons to bypass the Appellant. The Appellant took and passed the civil service examination twice for the position of Correction Officer I. DOC informed the Appellant of his bypass by a form letter dated January 18, 2012, in which a box is checked indicating, "You have failed to meet the eligibility criteria for the position of Correction Officer I," following which is inserted, "Unsatisfactory Criminal History report (CORI)". (Exhibit 2) Specifically, DOC bases its decision to bypass the Appellant because he was convicted of, and sentenced for criminal convictions in 1982, asserting that G.L. c. 125, section 9 prohibits DOC from hiring the Appellant. The Appellant produced evidence that he was not convicted of the 1982 charges and not sentenced therefor. Further, the Appellant testified that G.L. c. 125, section 9 could not have been a bar to hiring him because the DOC called him for an interview following the establishment of the first Certification List, which he was unable to schedule due to work he was doing on his home. According to the Appellant, when he later called back to schedule the interview, he was told that it was too late and that he would have to wait to be considered for employment in the next exam and hiring cycle. After the next exam, the DOC did not invite the Appellant to an interview but instead informed him that they were bypassing him. Ms. McInnis testified at the hearing that she was unaware that a representative called the Appellant in at all and could not explain why that would have happened. She stated that the 1982 charges on the Appellant's CORI would have appeared as a conviction and one-year confinement on his CORI

check following both the 2009 and 2010 examinations, and the DOC would have bypassed him for that same reason both times. The only possible explanation, she suggested is that the Appellant received a call for an interview previously and that it was a mere oversight or clerical error.

The DOC bypassed the Appellant due to an unsatisfactory CORI. (Exhibit 6) Specifically, DOC argued that in 1982, thirty years ago, the Appellant was charged with larceny under $250 and possession of burglary tools. The Appointing Authority relies on Exhibit 6 as proof that the Appellant was convicted of a felony and/or a misdemeanor with a one-year jail sentence, thereby precluding the DOC from hiring the Appellant under G.L. c. 125, section 9. Section 9 of G.L. Chapter 125 provides,

> "[n]o person who has been convicted of a felony or who has been convicted of a misdemeanor and has been confined in any jail or house of correction for said conviction, shall be appointed to any position in the department of correction unless the commissioner certifies that such appointment will contribute substantially to the work of the department; provided, however, that no such person shall be appointed to the position of correction officer, superintendent, deputy superintendent, assistant superintendent, or any position involving the regulation of state or county correctional facilities." (M.G.L. c. 125, section 9)

However, Exhibit 6 indicates, regarding the 1982 charge involving larceny, "DISPOSITION [CONVICTED; CONVICTED – 1Y CONFINEMENT, 9-2-82 CWF 1Y $100 CWF $50 40 HRS CS". With regard to the 1982 possession of burglary tools charge, the CORI indicates, "DISPOSITION (CONVICTED; CONVICTED – CNTS FOR DISPOS&SENT UNK-0". I take administrative notice that "CWF" is an abbreviation for "continued without a finding" and that "40 HRS CS" is an abbreviation for 40 hours of community service. Exhibit 10, introduced by the Appellant, is a copy of a Quincy District Court docket sheet stamped and attested to by a

Clerk Magistrate, indicating, with regard to one of the 1982 charges[4], that the Appellant admitted to sufficient facts to a finding of guilty and that the case was continued without a finding, with a $100 court cost fine and 40 hours of community service ordered, that the Appellant defaulted during the case but that the default was removed, and that the case was dismissed August 30, 1983.[5] Exhibit 10 does not indicate that the Appellant was convicted of the first charge and whether the charge was a felony or a misdemeanor. With regard to the other 1982 charge[6], Exhibit 10 also indicates that the Appellant admitted to sufficient facts to a finding of guilty and that the case was continued without a finding with a $50 court cost fine, that the Appellant defaulted but the default was subsequently removed, and that the case was dismissed January 10, 1983. Exhibit 10 does not indicate that the Appellant was convicted of the second charge and whether the charge was a felony or a misdemeanor. Thus, the Appointing Authority's CORI for the Appellant provides conflicting information: the Appellant was convicted, he admitted to sufficient facts to a finding of guilty, he was to be confined for one year, and the case was continued without a finding and dismissed one year later. Exhibit 10, a copy of a court docket relating to the 19982 charges, does not indicate that the Appellant was convicted and confined to prison and confirms that the cases were continued without a finding and dismissed one year later. I conclude, therefore, that a preponderance of the evidence shows that the Appellant was not convicted of the 1982 charges, he was not sentenced to a house of correction or prison, and he

[4] Although it is not clear, it appears that the first charge listed is the charge of possession of burglary tools. (Exhibit 10) See G.L. c. 266, section 49, indicating that the charge can be punishable as a misdemeanor (with a jail sentence) or a felony (with a state prison sentence).
[5] In reference to Exhibit 10, the DOC indicated at the hearing that it had phoned Quincy District Court to obtain information about the 1982 charges against the Appellant and was told, apparently in error, that the record had been destroyed in a flood. Since Exhibit 10 is stamped and signed by a Court Clerk Magistrate, it appears to be valid.
[6] Although it is not clear, it appears that the second charge listed is the charge of larceny. (Exhibit 10) See G.L. c. 266, section 30, indicating that the charge for larceny under $250 (as Exhibit 6 indicates the Appellant was charged) is punishable as a misdemeanor (with a one year jail sentence.

did not serve time in a house of correction or prison. For these reasons, G.L. c. 125, section 9 is not applicable and that the Appointing Authority is not barred from hiring the Appellant.

Exhibit 6 also references further criminal charges against the Appellant on which DOC did not rely in its decision to bypass the Appellant. Specifically, in 1999, the Appellant was charged with additional crimes. Exhibit 6 does not indicate their disposition. However, Exhibit 11, introduced by the Appellant and stamped by a Framingham District Court Clerk Magistrate, indicates that the 1999 charges against the Appellant were disposed of in 2000 pursuant to a nolle prosequi, indicating that the cases would not be prosecuted and, therefore, there were no convictions regarding the 1999 charges. This is confirmed by the information in Exhibit 12.[7] According to Exhibit 12, the Appellant was also charged with additional crimes in 1992. However, the 1992 charges were also disposed of pursuant to a nolle prosequi, indicating that the cases would not be prosecuted and, therefore, there were no convictions regarding the 1992 charges.

Notwithstanding the lack of a conviction and incarceration for the 1982 charges, the Appellant's records are a matter of concern because the Appellant admitted there were sufficient facts for a trier of fact to find that the Appellant was guilty of the 1982 charges and the court defaulted the Appellant during the 1982 proceedings before they were ultimately dismissed in 1983. Furthermore, there appear to be additional criminal charges against the Appellant in 1999 and 1992, although the additional charges were disposed of by nolle prosequi, meaning that they were not prosecuted. McInnis testified that even without the Appellant's incarceration, the Appointing Authority would have had concerns about the Appellant's candidacy because of the questions the other charges and the driving record raised about his character and respect for law enforcement. In hiring a Correction Officer, the DOC is especially concerned that its employees

[7] See footnote 3, with regard to the weight give to Exhibit 12.

will uphold the law as well as pertinent DOC rules, policies and regulations. Therefore, even though the Appointing Authority is not statutorily barred from hiring the Appellant, the Appellant's criminal record provided the Appointing Authority with sound and sufficient reasons to bypass the Appellant. The Appellant also has an extensive record of motor vehicle violations occurring between 1983 and at least 2007, only some of which were disposed of favorably to the Appellant following successful appeals. However, a driving record of civil motor vehicle infractions is not, by definition, a criminal record and the DOC did not rely on it to bypass the Appellant.

For all of the above reasons, the Appellant's appeal filed under Docket Number G1-12-65 is hereby ***dismissed.***

I take note that the form bypass letter that DOC sent to the Appellant on January 18, 2012 indicates that he was bypassed because of an "Unsatisfactory Criminal History report (CORI)" (Exhibit 2) but the letter did not state that it was based on the Appellant's reported 1982 convictions and a jail sentence reportedly served therefor. (Administrative Notice) The DOC's reliance on the 1982 reported convictions was not revealed to the Appellant until he filed an appeal at the Commission, which is too late. Bypass letters sent to candidates must provide sufficient detail to indicate the basis of DOC's determination, and not simply that the candidate has an unsatisfactory criminal history, so that the bypassed candidate can determine whether he or she should appeal the DOC's decision.

Civil Service Commission

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Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on August 23, 2012.

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, section 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L.c.30A, section 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:
Anthony Ferrara (Appellant)
Kerry Rice (for Department of Correction)
John Marra, Esq. (HRD)