

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

RAYMOND BERTONE,
Appellant

v.

Case No.: G1-13-261

**DEPARTMENT OF
CORRECTION,**
Respondent

DECISION

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

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

After careful review and consideration, the Commission, pursuant to 801 CMR 1.01 (11) (c) (2) voted to *not* accept the Magistrate's conclusion that the Department of Correction (DOC) has not shown reasonable justification to bypass Mr. Bertone for appointment as a Correction Officer I (CO I).¹

In City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182 (2010), a candidate for police officer was bypassed for appointment because he was terminated from his previous employer for serious misconduct – the unauthorized access of the voicemail accounts of other employees. A three-person majority of the Commission concluded that the City “failed to prove that [the candidate] illegally accessed voicemails of employees ... the reason given for his bypass, and accordingly did not support the reason by the necessary preponderance of the evidence.”

That decision was subsequently vacated by the Superior Court. Agreeing with the Superior Court, the Appeals Court stated, “Instead of focusing on whether the city had carried its burden of demonstrating a ‘reasonable justification’ the commission focused on whether the city had proven that [the candidate] in fact engaged in the misconduct. We believe the commission erred as a matter of law in placing such an added evidentiary burden on the city. In simple terms, neither [the candidate] nor the commission has presented a convincing argument that the Legislature intended to force an appointing authority to hire a job applicant for such a sensitive position unless it is able to prove to the commission’s satisfaction that the applicant in fact engaged in the serious alleged misconduct for which he was fired.”

¹ We reach this conclusion without disturbing the witness credibility assessments of the Magistrate.

Applied here, we believe that the Magistrate erred by effectively requiring DOC to prove that Mr. Bertone twice failed to properly apply restraints on an offender at a DYS facility where he is currently employed and that he had “boundary issues” with offenders. DOC’s burden is not to prove that these performance issues occurred, but, rather, that they conducted a reasonably thorough review that resulted in a valid reason for bypass. Here, by speaking directly with the Director of the DYS facility regarding Mr. Bertone’s performance issues, we believe that DOC has met their burden of conducting a reasonably thorough review.

Further, even Mr. Bertone acknowledges that he “froze up” on at least one occasion when he was directed to apply restraints on an offender. The Magistrate correctly concluded that “A Correction Officer is also required to place inmates in restraints, so DOC is justified in its concern.” (emphasis added)

This was not the only concern that DOC had about Mr. Bertone. They also investigated an incident which occurred within five (5) years of Mr. Bertone’s application to be a Correction Officer. In 2009, while Mr. Bertone was a senior in high school, he was charged with assault and battery for punching another student in the face. Mr. Bertone does not dispute that this incident occurred and the police officer’s incident report, which references a review of a video tape of the interaction, leaves no doubt that Mr. Bertone was the physical aggressor.

These two concerns, Mr. Bertone’s recent job performance at a DYS facility and his criminal conduct in 2009, coupled with DOC’s reasonably thorough review of each matter, is sufficient to establish reasonable justification to bypass Mr. Bertone.

While we respect the Magistrate’s concern that DOC may have incorrectly concluded that Mr. Bertone was the aggressor (as opposed to the victim) in a subsequent violent incident, it does not change our conclusion that the two concerns referenced above are valid reasons to bypass Mr. Bertone for appointment.

For these reasons, DOC’s decision to bypass Mr. Bertone is affirmed and Mr. Bertone’s appeal under Docket No. G1-13-261 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on October 16, 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:

Jeffrey R. Mazer, Esq. (for Appellant)

Jeffrey S. Bolger (for Respondent)

John Marra, Esq. (HRD0

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Raymond K. Bertone,
Appellant

Docket No. CS-14-95
(G1-13-261)

v.

Department of Correction,
Appointing Authority

Appearance for Appellant:

Jeffrey R. Mazer, Esq.
Mazer Law Group, LLC
5 Broadway, Suite 101
Saugus, Massachusetts 01906

Appearance for Appointing Authority:

Jeffrey S. Bolger
Department of Correction
P.O. Box 946, Industries Drive
Norfolk, Massachusetts 02056

Administrative Magistrate:

Bonney Cashin

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Summary of Recommended Decision

The Department of Correction lacked reasonable justification to bypass the Appellant for appointment as a Correction Officer I. The Appellant did not initiate an assault in which he was identified as the victim. The Appellant did not fail to establish boundaries with offenders at the DYS facility where he works. He failed to assist another worker in placing restraints on one occasion when a new employee, but his background otherwise shows him to be sufficiently

mature and competent, and thus I recommend that the Civil Service Commission allow his appeal.

RECOMMENDED DECISION

Introduction

The Petitioner, Raymond K. Bertone, timely appealed under G.L. c. 31, § 2(b) the November 13, 2013 decision of the Department of Correction to bypass him for an appointment as a Correction Officer I, which was based on two police incident reports and his work history at a Division of Youth Services facility. I held a hearing at the Division of Administrative Law Appeals and recorded the hearing digitally.

I accepted nine documents into evidence. I marked for identification proposed Exhibit A, which I did not accept into evidence. James O’Gara, a personnel officer with the Department of Correction, testified for the DOC, and Mr. Bertone testified for himself. The parties filed proposed decisions and the record closed on April 10, 2014.

Findings of Fact

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

1. On March 24, 2012, Mr. Bertone took the Civil Service Exam for the position of permanent Correction Officer I. (Stipulation, O’Gara Test.).
2. Mr. Bertone’s name appeared on a Human Resources Division eligibility list, assigned Certification Number 00974 dated July 2, 2013, on which he was ranked 60th of the 289 candidates who indicated they would accept an appointment. (Stipulation).
3. HRD issued the certification on June 26, 2013. (HRD letter dated January 6, 2014).

4. Mr. Bertone graduated from Sandwich High School in 2009 and now attends the University of Massachusetts at Dartmouth where he is working toward a degree in criminal justice. (Bertone Test.).

5. On July 14, 2013, Mr. Bertone submitted an application to the DOC for the position of Correction Officer I. (Ex. 8).

6. On July 9, 2013, and again as part of his application on July 14, 2013, Mr. Bertone submitted a Background Information Request and Waiver form that allowed the DOC to run a background check, including any criminal history. (Exs. 3, 8).

7. Mr. Bertone does not have an adult criminal record, according to a CORI report. (O'Gara Test.)

8. Investigator Lt. John Haskell conducted a background investigation of Mr. Bertone that included obtaining information about his driving record, police incidents, employment history, and criminal history. (O'Gara Test., Ex. 4).

9. The Sandwich Police Department issued one verbal warning and three citations to Mr. Bertone for speeding between April 23, 2010 and March 17, 2012. (Ex. 5).

10. DOC expressed no particular concern about Mr. Bertone's driving record. (O'Gara Test.).

11. On March 11, 2009, when Mr. Bertone was a senior in high school, he hit another student on the side of his head when they passed each other in the hallway. (Bertone Test., Ex. 6).

12. This incident occurred following a series of exchanges between December 2008 and March 2009 between Mr. Bertone and the other student on "Myspace," a social media website, about the student's harassment of Mr. Bertone's girlfriend. (Bertone Test., Ex. 6).

13. Mr. Bertone used some rough and disrespectful language toward the other student in one of his posts in December 2008; the investigating officer, however, acknowledged that one should refer to the printout of the exchange because it was confusing to follow. (Ex. 6).

14. As a result of the incident, Mr. Bertone was charged with misdemeanor assault and battery, a charge that was dismissed on April 7, 2009, with an order that Mr. Bertone “stay away” from the student he hit. (Bertone Test., Exs. 5, 6).

15. On June 10, 2011, Mr. Bertone was the victim of an assault at East Sandwich Beach. (Bertone Test., Ex. 7).

16. Mr. Bertone knew the assailant and believed he had a grudge against him, and so the assailant tried to engage Mr. Bertone in a fight. (Bertone Test., Ex. 7).

17. When a police officer arrived on the scene, Mr. Bertone was bleeding, the back of his head was bruised and swollen, and he was moaning and appeared disoriented. (Ex. 7).

18. The assailant had “ground pounded” Mr. Bertone by slamming him against some rocks on the beach; the assailant was charged with felony assault and battery with a dangerous weapon (rocks). (Bertone Test., Ex. 7).

19. One witness told the police officer that Mr. Bertone did not provoke the attack; the assailant, who initially had fled the scene, told the officer when he returned that Mr. Bertone hit him first. (Bertone Test., Ex. 7).

20. Mr. Bertone did not provoke the attack. (Bertone Test.).

21. DOC relied on the assailant’s statement and did not consider the contradicting statement of the other witness. (O’Gara Test.).

22. Lt. Haskell interviewed Mr. Bertone's three former employers, two of whom had positive statements about Mr. Bertone's work ethic and performance, and recommended him for the Correction Officer I position. (Ex. 4).

23. A representative of Mr. Bertone's third former employer told Lt. Haskell that Mr. Bertone had no "issues" while he worked there, but company policy prevented him from providing any additional information in response to inquiries. (Ex. 4).

24. Mr. Bertone is employed at Eliot Community Human Services, a Department of Youth Services facility, as a Group Care Worker I. (Bertone Test., Ex. 4).

25. Lt. Haskell spoke with the Director at Mr. Bertone's current employment, who relayed her concerns about how Mr. Bertone handled "boundary issues" and his hesitancy in acting appropriately when an offender was placed in restraints. (Ex. 4).

26. At the time of her interview, Mr. Bertone had been employed at Eliot for about two and one half months, one month of which involved training that did not involve interactions with offenders at the facility. (Exs. 4, 8).

27. According to the Director, Mr. Bertone was counseled about boundary issues because on occasion he had joked with offenders, and on one occasion had not stopped offenders when they made fun of his girlfriend. (Ex. 4).

28. When Mr. Bertone asked Ramon, his direct supervisor, whether he had seen him joking with offenders, Ramon acknowledged that he may have confused Mr. Bertone with another worker. (Bertone Test.).

29. Mr. Bertone did not joke with offenders. (Bertone Test.).

30. On two or three occasions over two or three days, Mr. Bertone wrote up the offender who had joked about his girlfriend, a process that leads to a loss of privileges. (Bertone Test.).

31. The Director's concerns about Mr. Bertone's hesitancy arose because facility safety measures require that two staff place an offender in restraints, and on two occasions the Director said she had to assist another worker in placing restraints because Mr. Bertone hesitated to do so. (Ex. 4).

32. Mr. Bertone acknowledged that the first time he was called upon to place an offender in restraints he "froze up," and another worker had to step in and take his place. (Bertone Test.).

33. On the second occasion, Mr. Bertone initiated the restraint after an offender hit him with a fan, and two other workers were completing the restraint when the Director came into the room. (Bertone Test.).

34. Mr. Bertone had gone upstairs to clean up because he was bleeding. (Mr. Bertone).

35. The Director recognized that Mr. Bertone was willing to "do the right thing," and that her concerns may be because he was new to the position and needed time to adapt. (Ex. 4).

36. Mr. Bertone's position involves several sets of responsibilities, including safety and security, maintaining professional boundaries, and acting as a role-model and mentor for offenders. (Bertone Test., Ex. 9).

37. The Director would rehire Mr. Bertone and would recommend him for the Correction Officer I position in spite of her concerns. (Ex. 4).

38. As Mr. Bertone stated on his DOC employment application, he has never been formally disciplined by an employer. (O’Gara Test., Ex. 8).

39. Although authorized to do so, DOC undertook no additional investigation concerning the background investigation; it considered the information complete. (O’Gara Test.).

40. Mr. Bertone was not given an opportunity to explain the events set out in the police reports or mentioned by Eliot’s Director. (O’Gara Test., Bertone Test.).

41. Mr. O’Gara did not assign any particular weight to the events set out in the police reports or mentioned by Eliot’s Director, rather he looked to the “totality” of the information. (O’Gara Test.).

42. Mr. O’Gara does not decide which candidates will be bypassed, nor does he make a recommendation in that regard. (O’Gara Test.).

43. Mr. O’Gara’s supervisor is Erin Gotovich, Acting Director of HR Operations at DOC. (O’Gara Test., Ex. 2).

44. Ms. Gotovich obtained her information from Mr. O’Gara and believed that Mr. Bertone had thrown the first punch, and so she viewed the incident as “another incident of physical violence” that, when coupled with the high school incident, suggested a lack of maturity. (O’Gara Test.).

45. Ms. Gotovich viewed Mr. Bertone’s hesitancy at Eliot to use restraints as showing a lack of confidence. (O’Gara Test.).

46. Correction Officers at DOC are called upon to assist each other in placing restraints on prisoners. (O’Gara Test.).

47. On November 13, 2013, the DOC notified Mr. Bertone that he would not be considered for appointment to the November 2013 Academy, ie., that he had been bypassed, because of a “[f]ailed [b]ackground based on police reports and work history with the Division of Youth Services.” (Ex. 2).

48. Ms. Gotovich signed the letter notifying Mr. Bertone that he had been bypassed. (Ex. 2).

49. The Massachusetts Civil Service Commission received Mr. Bertone’s appeal on December 6, 2013. (Ex. 1).

Discussion

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

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

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

When an applicant appeals an appointing authority’s decision to bypass him for a position, the appointing authority has the burden of proving by a preponderance of the evidence

that the reasons for the bypass are justified. G. L. c. 31, § 2(b). Stated differently, the appointing authority must show a “reasonable justification” for its decision. *Brackett v. Civil Serv. Comm’n*, 447 Mass. 233, 241 (2006); *City of Cambridge*, 43 Mass. App. Ct. at 303. Reasonable justification means the decision is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” *Id.* at 304 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482, (1928)). The Commission’s review is *de novo* and looks to the “circumstances found by [it] to have existed when the appointing authority made its decision.” *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) (citations omitted).

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

DOC bypassed Mr. Bertone because of a failed background check based upon police incident reports and his work history at Eliot. DOC’s reliance on the background check, without more, is problematic for several reasons. Particularly troubling is DOC’s decision not to speak with Mr. Bertone about the investigation. Had it done so DOC would have learned that some of the conclusions it drew were incorrect.

First, it was unreasonable for DOC to determine, based on the police incident report alone, that Mr. Bertone instigated the attack at the beach because he threw the first punch. The report contained two contradictory statements about who started the fight. DOC had no basis to believe one version of what happened over the other. Yet DOC then conflated its version of what happened with the incident two years before when Mr. Bertone was in high school, to

conclude that Mr. Bertone's acts of physical violence showed a lack of maturity. In fact, the opposite is true. Mr. Bertone's refusal to allow his assailant to provoke him shows that he has matured since the incident in high school.

Second, DOC concluded that Mr. Bertone was not a suitable candidate to be a Correction Officer because his behavior while working at Eliot showed a lack of confidence. A Correction Officer must establish and abide by clear boundaries with inmates, and so a problem establishing boundaries when working with young offenders is cause for concern. Mr. Bertone did not fail to establish boundaries, though. In one circumstance, his supervisor likely confused him with another worker; in the other, he followed through with discipline by writing up the offender. Eliot's Director did not witness these events, and we do not know what she was told about them, or by whom.

Mr. Bertone admitted that during the first week or so after he completed training and was out on the floor, he hesitated when called upon to assist another worker in placing an offender in restraints. A Correction Officer is also required to place inmates in restraints, so DOC is justified in its concern. Mr. Bertone hesitated on one occasion, though, not two, as reflected in the background report. Eliot's Director did not witness the entire second event, and no doubt was mistaken about Mr. Bertone's role.

Mr. O'Gara's reliance on the totality of the background report rather than ascribing any particular weight to the events described in it makes it difficult to determine whether the reasons for the bypass were justified. Mr. O'Gara does not decide which candidates are bypassed, however. While he spoke with his supervisor about his concerns based the information in the background report, there is nothing in writing about their discussion. The record does not reveal whether Ms. Gotovich reviewed any of the documents from the investigation. There is no

evidence that she took into account the “totality” of the report. There is no evidence that she spoke with her superiors about the decision to bypass Mr. Bertone.

I note that the Commission has on several occasions expressed its concern about the insufficient review process at DOC. *Rousseau v. Dep’t of Correction*, G1-14-24, Decision (July 24, 2014); *Marino v. Dep’t of Correction*, 27 MCSR 247 (2014); *Moreira v. Dep’t of Correction*, 27 MCSR 251 (2014); *Rollee v. Dep’t of Correction*, 27 MCSR 254 (2014), all citing *Machnik v. Dep’t. of Correction*, 26 MCSR 21 (2013). In each case, Ms. Gotovich made the decision to bypass a candidate after a brief conversation with Mr. O’Gara. In each case, the Commission stated that “DOC, on a going forward basis should ensure that the Commissioner [of DOC] fulfills this important responsibility [of making final hiring decisions].” *Machnik* at 26 MCSR 22.

According to Mr. O’Gara, Ms. Gotovich’s concerns focused on two acts of physical violence and two failures to assist in placing restraints. As discussed above, the circumstances that led to her concerns did not occur as she understood them. Mr. Bertone did not commit a second act of violence at the beach; he showed restraint and maturity. Mr. Bertone did not fail on two occasions to assist in placing an offender in restraints; he did so once during his first week or two on the floor. I do not minimize the serious nature of Mr. Bertone’s assault on a fellow student or his failure to carry out an important job responsibility. Yet, he has demonstrated an ability to learn from his mistakes. *Rousseau v. Dep’t of Correction*, G1-14-24, Decision at 11.

Hitting another student on the side of the head in high school and one instance as a new employee of hesitating to perform a required duty are insufficient reasons to bypass a candidate whose background otherwise shows him to have gained sufficient maturity and work skills to

demonstrate his capacity to work as a correction officer. Mr. Bertone has not had any citations for speeding or other driving violations since March, 2012. There are no instances of using rough or disrespectful language after the exchange on Myspace in 2008, when Mr. Bertone was in high school. Mr. Bertone received positive reports from past employers. Two past employers and his current employer recommended him for the Correction Officer I position.

Conclusion

DOC has not shown reasonable justification for its decision to bypass Mr. Bertone for appointment as a Correction Officer I. The decision to bypass Mr. Bertone is overturned and his appeal under Docket Number G1-13-261 is allowed.

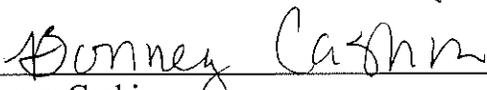
Pursuant to its authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division or the DOC in its delegated capacity shall:

Place the name of Raymond K. Bertone at the top of any current or future Certification for the position of Correction Officer I until he is appointed or bypassed.

If Mr. Bertone is appointed as a Correction Officer I, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00974.

This retroactive civil service seniority date is not intended to provide Mr. Bertone with any additional pay or benefits including creditable service toward retirement.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Bonney Cashin
Administrative Law Appeals

DATED: **AUG 27 2014**