

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

GISELLE RODRIGUEZ,
Appellant

v.

Case No.: G1-13-152

**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 written objections were received.

After careful review and consideration, the Commission voted to adopt the findings of the Tentative Decision of the Magistrate. Those findings, however, do not support the Magistrate's recommendation to dismiss the Appellant's appeal for the reasons referenced below. Therefore, we reject the conclusion of the Magistrate and vote to allow the Appellant's appeal.

The Commission is once again called upon to determine what constitutes a "reasonably through review that confirmed that there appeared to be a credible basis for the allegations." Beverly

In Beverly, after uncovering the undisputed fact that the Appellant had been fired for alleged serious misconduct by a previous employer, an experienced police captain: 1) met with the previous employer; and 2) sought the assistance of an IT professional to review certain information regarding the alleged misconduct. Finally, the Appellant was given two (2) opportunities to address his termination. The Appeals Court concluded that this was a reasonably through review that provided a credible basis for the allegations.

Here, DOC relied solely on a CORI report showing that Ms. Rodriguez was charged with Larceny Over \$250 by Single Scheme in 2007 that was dismissed upon the request of the victim in 2008.

The individuals responsible for making the bypass decision did not conduct any further investigation of the matter. They did not meet with the Appellant and give her an opportunity to address the criminal charge. They did not obtain a copy of the criminal complaint that was

filed, apparently by a security officer at Walmart who later withdrew the charge. Rather, it is clear that DOC has followed its standard practice of disqualifying any candidate who has any entry on his/her CORI report within the past five (5) years, without any further review. This practice is flawed and lends itself to decisions that are both illogical and illegitimate.

A single entry on a CORI report showing one criminal charge five (5) years ago that was dismissed at the request of the victim does not provide reasonable justification for bypass without some evidence of a further review by the Appointing Authority providing a credible basis for the allegation.

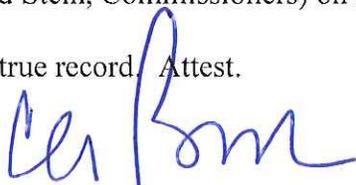
For this reason, the Appellant's appeal is hereby *allowed*.

Pursuant to Chapter 310 of the Acts of 1993, the Commission hereby orders that the Human Resources Division (HRD) or DOC in its delegated capacity:

- Place the name of Giselle Rodriguez at the top of the current or next Certification for the position of Correction Officer I at DOC until she has been appointed or bypassed.
- In the event that Ms. Rodriguez is appointed as a result of this additional consideration, she shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00415.
- This retroactive seniority date is for civil service purposes only and is not intended to provide the Appellant with any additional pay or benefits including creditable service toward retirement.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on December 19, 2013.

A true record. Attest.



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)(I), 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:

Giselle Rodriguez (Appellant)

Jeffrey Bolger (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Giselle Rodriguez,
Appellant

v.

Docket No. G1-13-152
DALA No. CS-13-433

Department of Correction,
Respondent

Appearance for Appellant:

Giselle Rodriguez, *pro se*
[REDACTED]
[REDACTED]

Appearance for Respondent:

Jeffrey S. Bolger
Department of Correction/DHR
PO Box 946
Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Maria A. Imparato

RECEIVED
2013 OCT 25 P 3:22
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

SUMMARY OF TENTATIVE DECISION

In accordance with Civil Service Commission precedent, the bypass of the Appellant for original appointment as a Correction Officer with the DOC based solely on the fact that she was charged with larceny over \$250 and a warrant was issued, even though the warrant was withdrawn, the complaint was withdrawn, and the case was dismissed, should be upheld.

TENTATIVE DECISION

Giselle Rodriguez filed a timely appeal under M.G.L. c. 31, s. 2(b) of the decision of the Department of Correction (DOC) to bypass her for original appointment to the position of Correction Officer.

I held a hearing on August 30, 2013 at the office of the Division of Administrative Law Appeals, One Congress Street, 11th floor, Boston, Massachusetts.

I admitted eight documents into evidence. (Exs. 1 – 8.) I heard the testimony of James O’Gara, Personnel Officer II in the DOC Division of Human Resources, on behalf of DOC. Giselle Rodriguez testified on her own behalf. The hearing was digitally recorded.

FINDINGS OF FACT

1. Giselle Rodriguez scored 94 on a Civil Service examination administered on March 24, 2012. On February 12, 2013, the Human Resources Division (HRD) sent certification #00415 to the DOC. Ms. Rodriguez’s rank on the certification was 17th among those willing to accept employment. Ms. Rodriguez is a Veteran. (Ex. 2.)
2. By letter of July 1, 2013, Ms. Rodriguez was informed that she had been bypassed for original appointment as a Correction Officer because “Negative Criminal History – Failed CJIS¹ – Larceny more 4/27/07.” (Ex. 2.)
3. Ms. Rodriguez signed a Background Information Request and Waiver on September 25, 2012, that allowed the DOC to run a CJIS background check that includes a Board of Probation (BOP) criminal history check, a check for Massachusetts warrants, an out-of-state criminal history check, a wanted or missing persons check, a Massachusetts driver’s license check and a driving history check. (Exs. 4, 5; Testimony, O’Gara.)
4. Once the CJIS check is complete, Mr. O’Gara, a Personnel Officer II in the Human Resources department of the DOC, reviews any issues that are discovered. The BOP check revealed that Ms. Rodriguez had been charged on April 27, 2007 in the Springfield District Court with “larceny over \$250 by a single scheme.” A warrant was issued and

¹ Criminal Justice Information System.

- withdrawn. The case was dismissed and closed on June 6, 2008. (Exs. 6, 9; Testimony, O’Gara.)
5. Mr. O’Gara and his supervisor, Erin Godovich, decided to bypass Ms. Rodriguez for appointment based on the fact that she had been charged with a felony and a warrant had been issued, despite the fact that the warrant was withdrawn and the case was dismissed. Mr. O’Gara did no further investigation of the charges. He and his supervisor considered the larceny charge serious and concluded that it might mean Ms. Rodriguez is not trustworthy. Correction Officers are held to the highest standard of conduct. No candidate with a worse CJIS report was hired. (Testimony, O’Gara.)
 6. Ms. Rodriguez went to court and obtained a copy of the written statement of facts that accompanied the application for criminal complaint and supplied it to Mr. O’Gara. The DOC did not have this document when it made the decision to bypass Ms. Rodriguez. (Ex. 9; Testimony, Rodriguez.)
 7. An asset-protection associate at Walmart filed the application for a criminal complaint against Ms. Rodriguez when she worked at Walmart’s customer service desk. The warrant was issued because Ms. Rodriguez was unaware of the charges. She was in a bad relationship with a man and living in Springfield. The paperwork went to the home of Ms. Rodriguez’s mother in Worcester and her mother did not forward the mail to Ms. Rodriguez. (Testimony, Rodriguez.)
 8. The case was dismissed in court because the asset-protection associate who filed the complaint asked to withdraw the complaint. Ms. Rodriguez was in court with a court-appointed attorney. (Testimony, Rodriguez.)

9. Ms. Rodriguez has spent ten years in the military - two years in the Air Force and eight years in the Army. She was deployed to Iraq from November 2009 to December 2010.
10. Ms. Rodriguez is still in the military. She was never arrested, and she is not a felon.
(Testimony, Rodriguez.)
11. The DOC has asked for a second certification. Ms. Rodriguez appears on the second certification.

CONCLUSION AND RECOMMENDATION

The Civil Service Commission, under M.G.L. c. 31, s. 2(b), is required “to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303 (1997). Justified means “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law.” *Id.*, at 304. The Commission’s role is to ensure that political favoritism or bias does not taint the appointing authority’s employment decisions. *Id.*, at 305. If the Commission finds by a preponderance of the evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004). 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, 334 (1983).

If a city is unwilling to bear the risk of hiring a specific candidate, “[a]bsent proof that the city acted unreasonably ... the commission is bound to defer to the city’s exercise of its judgment.” *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 190-191 (2010).

In order to prevail in a bypass case, the Appellant must demonstrate that the reasons offered by the Appointing Authority 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*, G-1160, 1 MCSR 6.

I conclude that the DOC has demonstrated that it had reasonable justification for bypassing the Appellant based solely on her criminal history despite the fact that the one charge against her was dismissed. This is consistent with Commission precedent.

In *Preece v. DOC*, 20 MCSR 152 (2007), the Commission held that the DOC could rely on the applicant’s criminal record to bypass him for appointment as a Correction Officer, although he had been acquitted of charges of second degree murder. The Commission upheld the bypass of an applicant for the position of police officer based on his criminal history, although all charges against him had been dismissed. *Lavaud v. Boston Police Department*, 17 MCSR 125 (2004).

In an instance in which the Commission declined to uphold the bypass of an applicant for the position of Correction Officer based on her criminal history, the Superior Court reversed. *Massachusetts Department of Correction v. Leslie Anderson and the Massachusetts Civil Service Commission*, Suffolk Superior Court Civil Action No. 09-0290 (2010).

The Appellant has not demonstrated that the reasons proffered by the DOC for her bypass were untrue, apply equally to the bypassed candidate and the selected candidate, are incapable of substantiation or are a pretext for other impermissible reasons.

I therefore recommend that the Commission uphold the bypass of the Appellant.

I note that the Appellant's name appears on a second certification list currently before the DOC. I encourage the DOC to re-examine the Appellant's application, in view of her military history and service, to determine whether the one dismissed criminal charge against her should exclude her from a career at the DOC.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imperato

Maria A. Imperato
Administrative Magistrate

Dated:

OCT 25 2013