

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

LESLIE ANDERSON,
Appellant

v.

CASE NO: G1-08-106

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Gigi D. Tierney, Esq.
Lang, Xifaras & Bullard
115 Orchard Street
New Bedford, MA 02740

Department of Correction Representative:

Alexandra McGinnis
Department of Correction
Division of Human Resources
Industries Drive, P.O. Box 946
Norfolk, MA 02056

Commissioner:

Paul M. Stein

DECISION

The Appellant, Leslie Anderson, acting pursuant to G.L. c.31, §§42-43, duly appealed a decision of the Department of Correction ("DOC"), the Appointing Authority, to bypass the Appellant for original appointment to the position of Correction Officer I based on the Appellant's CORI record. A full hearing was held by the Civil Service Commission (the Commission) on August 6, 2008. The proceedings were recorded on one (1) audiocassette. DOC called no witnesses. The Appellant testified on her own behalf. Eight (8) exhibits were received into evidence. The record was left open for additional documentation from the Appellant (marked Exhibit 9 – Appellant's Criminal Dockets) and from DOC (Exhibit 10 – DOC Criminal History Checks).

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the the Appellant, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Leslie Anderson, is a thirty-eight year old single mother with five children who resides in New Bedford, Massachusetts. (*Anderson Testimony*)

2. On September 29, 2007, Ms. Anderson took the open civil service examination for the position of Correction Officer I and received a passing score of 95. (*Exhibits 4, 5, 6*)

3. Ms. Anderson's name was placed on Certification No. (150) CO I – 408003 dated January 22, 2008 and she signed the certification indicating her willingness to accept a position. (*Exhibits 3,7; Anderson Testimony*)

4. As part of the application process, on January 23, 2008, Ms. Anderson completed a Background Information Request and Waiver, authorizing the DOC to conduct a background investigation including a check with past employers, a criminal records check and interviews with character witnesses. (*Exhibit 2*)

5. Incident to the DOC's background check, the DOC obtained a computer-generated Criminal Justice Information System (CJIS) report, which includes so-called "CORI" or Criminal Offender Records Information and motor vehicle driver history from several databases (the "CORI" report). (*Exhibit 2*)

6. On February 26, 2008, DOC notified Ms. Anderson that she had been bypassed and was no longer being considered for appointment because she had "failed to meet the

eligibility criteria for the position of Correction Officer I – Unsatisfactory Criminal History Check.” (*Exhibit 1*)

7. The only evidence proffered by DOC to support its bypass of Ms. Anderson was the computer-generated .CORI report. The CORI report contains summary information concerning Ms. Anderson’s prior arrests and driving history back to 1994. (*Exhibit 2*)

8. DOC proffered no testimony to interpret the report or explain how it was used in the bypass determination. In the absence of any such evidence, I infer that the DOC bypass decision was based on the totality of the CJIS record, which appears to include the following entries of possible concern to DOC:

11/08/05 OFF ASSAULT DANGEROUS WEAPON - KNIFE
DISP: 4/28/06 SP 10/29/06 DISM

02/17/04 OFF: OPER UND INFL OF LIQ
DISP: 6/15/04 (JT) 7/15/05 CWO SP PROG VWF 7/14/06
11/7/05 VN 5/24/06 VOP 7/14/06 PD DISM
OFF: OPER NEGLIGENTLY
DISP: 6/15/04 (JT) 7/15/05 FILE

03/01/00 OFF: VANDALIZE PROPERTY
DISP: 5/16/00 DISM

OFF: MAL DISTRUCTION OF PROPERTY
DISP: 5/16/00 (JT) 8/18/00 C 8/17/01 REST PD DISM

OFF: ASSAULT AND BATTERY
DISP: 5/16/00 (JT) 7/5/00 G PROB 1/3/01 FN VWF DF 1/12/01
DR PD TERM

11/28/94 OFF: DISTURBING THE PEACE (BREACH)
DISP: CC VWF 12/28/94 DF 4/3/95 DR CC VEW PD DISM

(*Exhibit 2*)

Another entry concerning Ms. Anderson’s Registry of Motor Vehicles (RMV) “Driver History” appears related to the 2/17/04 incident mentioned above:

ENTRY DATE	INCIDENT DATE	DESCRIPTION
09/08/05	2/17/04	SEAT BELT VIOLATION R

Finally, two other entries of apparent concern in the RMV Driver History:

ENTRY DATE	INCIDENT DATE	DESCRIPTION
06/29/07	06/29/07	NON RENEW NEW BEDFORD
12/05/07	12/05/07	NON RENEW NONRENEW INDEFINATE

9. The DOC proffered no evidence to indicate that it had made any inquiry about any of the incidents or information contained in the "CORI" report and did not submit any documents to the Commission to show that it had procured the criminal dockets or taken any other action to investigate the circumstances of the incidents attributed to Ms. Anderson and made the bypass decision based solely on the entries in the CORI report.

The Appellant's Testimony

10. Ms. Anderson was the sole witness. She is a soft-spoken woman who appeared nervous but sincere in her demeanor. She confronted the facts surrounding her past criminal record in a way that convinced me that she was being truthful about her past. She acknowledged her deficiencies and took responsibility for her actions. I find her testimony about facts surrounding each of the charges that she faced in the past to be credible and consistent with the available documentary records and with common sense. (*Anderson Testimony; Exhibits 2, 9*)

11. As to the most recent RMV entry, Ms. Anderson explained that the suspension notice had to do with a late payment made on her auto excise tax bills. She testified that she had not been aware of the suspension until June of this year and she produced evidence that she promptly paid these bills in full on June 12, 2008. (*Exhibit 8; Anderson Testimony*)

12. The 2005 criminal charges against Mrs. Anderson were lodged by a neighbor living in her housing project after Ms. Anderson had reported to the housing project

manager that she suspected the neighbor of running a drug operation. In retaliation, the neighbor claimed Ms. Anderson had attacked her. According to Ms. Anderson, a review of the housing project security video tapes supported her claim that the neighbor was lying. The charges were dismissed. (*Anderson Testimony ; Exhibits 2, 9*)

13. The 2004 charges against Ms. Anderson arose from her operation of a motor vehicle while impaired. Ms. Anderson does not deny her responsibility. She testified that she had been taking sinus medication (inhaler) and had gone out that evening (her birthday), consumed one alcoholic beverage and proceeded to drive home without realizing she may be impaired. There was no alcohol blood-level test given to her. A CWOFF was entered on the OUI charge, she completed an alcohol education program and the charges were dismissed. (*Anderson Testimony ; Exhibits 2, 9*)

14. The 2000 charges against Ms. Anderson stem from an altercation she had with another woman Ms. Anderson believed to have intentionally and severely injured her disabled, wheelchair-bound son and put him in the hospital. Ms. Anderson testified that she accepted responsibility for over-reacting and regretting the way she handled the situation, attributing her actions to her protective feelings for her disabled son. She was found guilty of the assault and battery charge (a misdemeanor), satisfactorily completed a six-months probation and paid \$125.00 restitution; the property destruction charges were dismissed. (*Anderson Testimony ; Exhs. 2, 9*)

15. The 1994 charges for disturbing the peace arose after police were called to a fight outside a bar. Ms. Anderson was a bystander in a nearby park but was arrested. Ms. Anderson paid a \$30 fine and/or court costs and the charges were dismissed. (*Anderson Testimony ; Exhs. 2, 9*)

CONCLUSION

Applicable Standard of Review

In a bypass appeal, the Commission must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was “reasonable justification” for the bypass. E.g., City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997) (Commission may not substitute its judgment for a “valid” exercise of appointing authority discretion, but the Civil Service Law “gives the Commission some scope to evaluate the legal basis of the appointing authority’s action, even if based on a rational ground.”). See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001) (“The [Civil Service] commission properly placed the burden on the police department to establish a reasonable justification for the bypasses [citation] and properly weighed those justifications against the fundamental purpose of the civil service system [citation] to insure decision-making in accordance with basic merit principles the commission acted well within its discretion.”); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and

sufficient' reasons to justify his action"). See also, Bielawski v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission "sufficient to satisfy due process")

It is well settled that reasonable justification requires that the Appointing Authority's actions be based on "sound and sufficient" reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. See Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346, 348 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 451 N.E.2d 443, 430 (1928). All candidates must be adequately and fairly considered. The Commission has been clear that it will not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

A "preponderance of the evidence test requires the Commission to determine whether, on the 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, 321, 577 N.E.2d 325, 329 (1991).

The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,' in order that he may make the necessary finding. If the court is unable to make such affirmative finding, that is, if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is

required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

Conclusion

Applying these applicable standards in the circumstances of the present case, the Commission concludes that DOC's bypass of Ms. Anderson, for appointment to the position of Correction Officer I, does not comport with basic merit principles and has resulted in harm to her employment status through no fault of her own. The DOC has not sustained its burden to prove the reasons proffered for the by-pass are justified on this record. The Commission reaches this conclusion because it finds the DOC's by-pass decision was based solely on the entries made in the CORI report. Since no effort was made to inquire further, the DOC decision to bypass Ms. Anderson on those grounds is arbitrary as a matter of law and not supported by a preponderance of substantial evidence. In the absence of clearly stated reasons for the bypass other than "Unsatisfactory Criminal History Record Check", no evidence or documentation as to the practice and process employed in evaluating the CORI report and no evidence of the rationale for concluding that the Appellant's CORI report renders her unsuitable as a Correction Officer I, it is impossible for the Commission to know precisely which incidents were the disqualifying events and whether the DOC is justified in relying on those incidents to bypass Ms. Anderson.


The Commission recently considered the DOC's undocumented practice of automatically disqualifying a candidate for appointment as a Correction Officer on the basis of "CORI information" and found such a practice inconsistent with basic merit principles. Collett v. Department of Correction, CSC Docket No. G1-08-53 (2008). The principles stated in the Collett case apply equally here. In the future, the DOC will be expected to provide more specific support in order to justify the bypass of a candidate for correction officer than the bare, unexplained facts that appear in a CORI report.

Relief to Granted to the Appellant

Pursuant to Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission directs the DOC to place the name of the Appellant, Leslie Anderson, at the top of the current (and any future) eligibility list for the position of Correction Officer I until such time as she has received at least one consideration for the position of Correction Officer I. The DOC may not automatically disqualify the Appellant for consideration solely on the entries of "CORI activity" that appears in a CJIS record without further documented explanation and a reasonable justification.

Accordingly, for the reasons stated above, Ms. Anderson's appeal is hereby *allowed*.

Civil Service Commission



Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor, Commissioners; Bowman, Chairman [absent]) on November 20, 2008.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Gigi D. Tierney, Esq. (for Appellant)

Alexandra McGinnis. (for Appointing Authority)

John Marra, Esq. (for HRD)