

Decision mailed: 8/26/11  
Civil Service Commission UB

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

Jessica Cote,  
Appellant

v.

Docket No. G1-11-218

Department of Correction,  
Respondent

Appellant:

Jessica Cote,  
*pro se*

Respondent:

Jeffrey S. Bolger  
Director of Employee Relations  
Department of Correction  
P.O. Box 946  
Norfolk, MA 02056

Commissioner:

Daniel M. Henderson

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), Appellant Jessica Cote (hereinafter "Appellant" or "Cote") appealed the decision of the Respondent, Massachusetts Department of Correction (hereinafter "DOC" or "Department") to bypass her for appointment as a Correction Officer I ("CO I") for the stated reason of an "unsatisfactory background check". The Appellant was notified of the Appointing Authority's decision by letter dated May 6, 2011 and filed her appeal at the Civil Service Commission (hereinafter "Commission") on July 5, 2011. A Pre-

Hearing Conference was held at the Commission on July 19, 2011. Both parties appeared at that hearing and submitted a signed Stipulation of facts. The DOC also filed a Pre-Hearing Memorandum with 14 attached Exhibits. The DOC stated that Cote was bypassed specifically due to her arrest in Manchester NH, on January 16, 2011 for simple assault and criminal mischief. The DOC was unable to determine the final court disposition of that matter; as it was still pending at the time it closed its pre-employment background investigation of Cote on January 21, 2011. Therefore the DOC bypassed the Appellant due to the pending status of the criminal matter. Cote explained that subsequently, those criminal matters were nolle prosequi, (nolle pros/nol proress) by the court. The parties agreed that if the Appellant filed a Motion for Summary Decision to allow her appeal together with certified copies of the court nolle prosequi, the DOC would not oppose her motion.

On August 3, 2011 the Appellant filed at the Commission, a Motion for Summary Decision with certified copies of the court nolle prosequi of the above referenced criminal matters.

The DOC, on August 9, 2011, after reviewing said filing by the Appellant responded by stating that it would not oppose her motion and further proposed a joint motion for Chapter 310 Relief, with a retroactive seniority date for civil service purposes, if she is appointed.

#### **FINDINGS OF FACT**

Based on the parties pleadings and other filings, including the signed Stipulation of Facts, the DOC's pre-hearing memorandum with fourteen numbered (14) attachments, The Appellant's Motion with attachments;

**I make the following findings:**

1. On March 20, 2010, an examination was held for the position of Correction Officer I (Stipulated Facts).
2. The Appellant, Jessica Cote passed the examination with a score of 91% (Stipulated Facts).
3. On July 14, 2010, the Division of Human Resources established an eligible list Cert. #4010035 was established for the title of Correction Officer I (Stipulated Facts).
4. On October 12, 2010, the certification # 4010035 for Correction Officer I was sent to the DOC. (Stipulated Facts).
5. Jessica Cote's name appeared on the Certification where he was ranked 104<sup>th</sup>. among those willing to accept employment (Stipulated Facts).
6. The Department of Correction gave her a conditional offer of employment but did not appoint her, but bypassed her for candidates who were ranked lower on the civil service eligibility list than Jessica Cote (Stipulated Facts).
7. The reason given for the bypass in a letter dated August 6, 2011 was "unsatisfactory background check" (Stipulated Facts).
8. The specific reason for the "unsatisfactory" determination is the following. The DOC runs a CJIS report on all applicants. Cote's CJIS report revealed that she had been arrested and/or charged with simple assault and criminal mischief in Manchester NH on January 16, 2011. At the time the DOC completed its pre-employment background investigation of Cote, on January 21, 2011, these matters were still pending in court. Cote was bypassed due the pending status of these criminal matters. This was the sole reason for Cote's bypass. (DOC Memorandum attachments).

9. Subsequently, on February 8, 2011, Cote appeared in Manchester NH District Court during which these criminal matters: simple assault and criminal mischief, were Nol Prossed by the Court. (Appellant's testimony and Motion with certified records attached)
10. The definition of Nolle Prosequi (or Nol Prossed) n. [Latin]: A legal notice or docket entry that the plaintiff or the prosecution has abandoned the action. In Mass. In a criminal matter it is usually accomplished by motion by the Commonwealth. (administrative notice)

## **Conclusion**

The Appellant here is moving for summary disposition of her appeal before the Commission pursuant to 801 CMR 1.01(7)(g) or (h). The Respondent has conceded that the sole issue, the reason for the bypass here is the fact of the Appellant's arrest for simple assault and criminal mischief on January 16, 2011 and the fact that these matters were still pending when it completed its pre-employment background investigation on January 21, 2011. The Appellant has now shown to the satisfaction of the Respondent that those matters were subsequently favorably resolved for the Appellant on February 8, 2011, with all matters being Nol Prossed in the Court. The Respondent now joins the Appellant and requests Chapter 310 Relief, with a retroactive seniority date for the Appellant, for civil service purposes, if she is appointed to the Correction Officer I position.

The Appellant has claimed and the Respondent has conceded that there is not now remaining any genuine issue of fact and she is now entitled to prevail as a matter of law. The Commission now determines that there are not any remaining factual issues or application of law to be made and therefore no need for further proceedings. The Commission is satisfied with the reliability, credibility and accuracy of the evidence submitted in this matter. The Appellant is entitled to have her appeal allowed pursuant to the parties proposed Chapter 310 Relief.

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 action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997) rev.den., 426 Mass. 1102 (1997); *see also* Watertown v. Arria, 16 Mass.App.Ct. 331 (1983); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473 (1995); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411 (2000); Leominster v. Stratton, 58 Mass.App.Ct. 726, 728 (2003). An action is "justified" when it is 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." Commissoners of Civ. Serv. v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); *see also* City of Cambridge, 43 Mass.App.Ct. at 304; Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the credible evidence in the record. A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority had 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). Appointing Authorities are granted the use of significant yet sound discretion when choosing individuals from a certified list of eligible candidates on a civil service list. 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, 16 Mass.App.Ct. at 334.

The DOC here applied a reasonable policy or standard of review for this by pass, due to the pending status of the criminal matters at the time of the bypass. The Appellant proved that

subsequently, on February 8, 2011, she appeared in Manchester NH District Court during which these criminal matters: simple assault and criminal mischief, were Not Prossed by the Court. The Commission hearing on this bypass appeal provided the DOC with the opportunity to further interview the Appellant and examine the new documentary evidence related to the then pending criminal matters.

G.L. c. 31, § 2(b) requires that bypass cases be determined by a preponderance of the credible evidence in the record. It is found here that a preponderance of the credible evidence in the record shows that the DOC did not established that the reasons assigned for the bypass of the Appellant were more probably than not sound and sufficient.

For all the above reasons, the appeal under Docket No. G1-11-176 is hereby *Allowed*.

The Commission hereby finds that the Appellant did not receive full consideration for appointment, through no fault of his own. The Commission further orders relief pursuant to Chapter 534 of the acts of 1976, as amended by Chapter 310 of the Acts of 1993, and orders the Human Resources Division to take the following action:

The Human Resources Division of the DOC in its delegated capacity shall place Jessica Cote's name at the top of the current eligibility list for original appointment to the position of Correction Officer I, so that her name appears at the top of the existing certification and the next certification which is requested by the DOC from the Human Resources Division and from which the next original appointment to the position of Correction Officer I in the DOC shall be made, so that she shall receive at least one opportunity for consideration.

If selected for appointment, she shall receive for civil service purposes only a retroactive seniority date, which is the same as the other persons selected earlier from Certification #4010035. This retroactive civil service seniority date is not intended to provide any additional

and/or retroactive compensation and should not be used to determine time served in regard to eligibility for any future civil service promotional examinations.

Civil Service Commission,



Daniel M. Henderson  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson and McDowell, Commissioners)[Marquis & Stein absent] on August 25, 2011.

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)(l), 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:  
Jessica Cote  
Jeffrey S. Bolger-DOC  
John Marra, Atty, HRD