

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

CHERISE CUFF,
Appellant

Docket No.: G1-10-91

v.

DEPARTMENT OF CORRECTION,
Respondent

Attorney for the Appellant:

David L. Jaffe, Esq.
Family Law Associates
300 Rosewood Drive, Suite 106
Danvers, MA 01923

Representative for the Respondent:

Jeffrey S. Bolger
Department of Correction
Division of Human Resources
P.O. Box 946 Industries Drive
Norfolk, MA 02056

Hearing Officer:

Angela C. McConney, Esq.
General Counsel

DECISION

The Appellant, Cherise Cuff, (hereinafter "Appellant"), pursuant to G.L. c.31 § 2(b), filed an appeal with the Civil Service Commission, (hereinafter "Commission") on May 7, 2010, seeking review of the Personnel Administrator's (HRD) decision to accept the reasons of the Department of Correction (hereinafter "DOC") for bypassing her for original appointment to the position of Correction Officer I. A Full Hearing was held on August 19, 2010 at the offices of the Commission.

The hearing was digitally recorded. Copies of the hearing were forwarded to the parties, and a copy is retained by the Commission.

Both parties submitted proposed decisions on September 24, 2010.

FINDINGS OF FACT

Forty (40) exhibits were entered into evidence at the hearing. The record was left open in order for the Respondent to submit further documentation upon the request of the hearing officer, namely information regarding applicants from the 307 Basic Training Class with incarcerated relatives. That document was received on August 26, 2010 and was admitted as Exhibit 40. The record was then closed.

Based on the exhibits submitted at the hearing and the testimony of the following witnesses:

For the Appointing Authority:

- Alexandra McInnis, Director of Personnel, Department of Correction
- James O’Gara, Personnel Officer II, Department of Correction

For the Appellant:

- Cherise Cuff, Appellant.

I make the following findings of fact:

1. The Appellant is a thirty (30) year old mother. She received her GED in 1997 and an Associates Degree in Criminal Justice from Middlesex Community College in 2008. (Testimony of Appellant; Exhibit 33).
2. While she was a student at Middlesex Community College, the Appellant began work as an unpaid intern at the South Middlesex Correctional Center (SMCC) in October 2008. SMCC is a minimum level pre-release center for women. (Testimony of Appellant; Exhibits 9 and

13)

3. The Appellant worked three (3) to four (4) hours weekly, performing clerical duties including filing and taking notes. (Exhibit 10)
4. Nothing the Appellant did in her internship involved the care, custody and control of inmates. (Testimony of Appellant)
5. DOC interns are governed by 103 DOC 226, the Intern Program Policy. (Exhibit 6)
6. Karen Swank, the Appellant's supervisor, found that she carried herself in a professional manner, finished all her assigned tasks, and was well respected by the staff at the facility. (Exhibit 10)
7. The Appellant's former boyfriend father of two of her children is incarcerated at MCI-Shirley. (Testimony of Appellant)
8. He is scheduled to be released November 11, 2011. (Exhibit 39)
9. When she became an intern at SMCC, the Appellant disclosed this relationship to her superiors. (Testimony of Appellant, Exhibits 1, 3, 4, 7, 8 and 9)
10. The Appellant was required to notify the Superintendents of both institutions (SMCC and MCI-Shirley) before contact with her former boyfriend. This contact included visits, telephone calls and correspondence. (Exhibit 9)
11. After graduation from Middlesex Community College, the Appellant enrolled at the University of Massachusetts in order to pursue her Bachelor's degree. (Testimony of Appellant)
12. Alexandra McNinnis (hereinafter "McNinnis") is the Director of Personnel for the Department of Correction. She testified that DOC is a delegated agency in regard to civil service functions. (Testimony of McNinnis; Exhibit 37)
13. The Appellant was encouraged to apply for a Correction Officer I position by her supervisors

at SMCC. She took the civil service examination on March 21, 2009. (Stipulated Facts, Exhibit 13)

14. On July 20, 2009, the Appellant ranked 15th on Female Certification # 4090017 for the position of Correction Officer I with a score of 98. (Stipulated Facts).
15. On August 7, 2009, DOC advised the Appellant that she was scheduled to proceed in the Pre-Employment Screening Process. This consisted of an initial interview with the background investigator and a formal interview. (Exhibit 16)
16. The Appellant was interviewed by James O’Gara (hereinafter “O’Gara”), Human Resources Personnel Officer, on October 13, 2009 as part of her background check. She informed him that the inmate was the father of two of her children, and had helped to raise the others. She indicated that she had not visited him since she began the correction officer process, was willing to cut off contact with him if she were hired, and would not allow him to live with her when he was released. She said that she was “willing to do whatever it takes in order to be considered for the position.” (Testimony of O’Gara; Exhibit 35)
17. On October 23, 2009, DOC extended a conditional offer of employment to the Appellant.
18. However, on November 6, 2009, DOC continued a further check on the Appellant. Karen Hetherson, Assistant Deputy Commissioner of Administration (hereinafter “Hetherson”), requested an update on the last time the Appellant had visited the inmate at MCI-Shirley. (Exhibit 39)
19. She discovered that the Appellant had last visited the inmate on December 14, 2008. (Exhibit 39)
20. On January 27, 2010, Hetherson requested a further update on whether there had been further calls or visits between the Appellant and inmate. (Exhibit 39)
21. She found that the Appellant had had further contact with the inmate since her last inquiry

back in November 2009. The inmate phone records from MCI Shirley document that the Appellant's telephone number was listed on the inmate's "Pin List" as his girlfriend. Inmate telephone activity also shows that he called her on seven (7) occasions in January 2010 for a total time of approximately two (2) hours and that in December 2009 they also spoke on at least seven (7) occasions. The Appellant visited the inmate eighteen times, and her last visit was July 16, 2009. (Testimony of Appellant; Exhibits 35 and 39)

22. The Appellant has also contributed to the inmate's commissary account in the past.

(Testimony of Appellant)

23. DOC filled thirty-six (36) Correction Officer I positions from that certification. Twenty-four (24) of the selected candidates ranked below the Appellant. (Stipulated Facts)

24. On March 5, 2010, DOC notified the Appellant that she had been bypassed due to an

"Unsatisfactory Background Check" (Exhibit 32, Stipulated Facts).

25. All DOC Correction Officers' applications, including the background checks, are reviewed by McInnis. (Testimony of McInnis)

26. There were some applicants hired into the 307th Basic Training Class who reported having relatives who were incarcerated in the Department of Correction. The incarcerated relatives were all blood relatives, not spouses, significant others or coparents. (Exhibit 40)

27. DOC has strict rules regulating contact among employees, inmates and former inmates in order to maintain the safety and the security of the department. Rule 8(c): Conduct between Employee and Inmate, Rules and Regulations Governing All Employees of the Department of Correction governs states:

"(c) You must not associate with, accompany, correspond or consort with any inmate or former inmate except for a chance meeting without specific approval of your Superintendent, DOC Department Head or the Commissioner of Correction. Any other outside inmate contact must be reported to your Superintendent, DOC Department head or Commissioner of Correction. Treat all inmates impartially, do not grant special privileges to

any inmate. Your relations with inmates, their relatives or friends shall be such that you should willingly have them known to employees authorized to make inquiries. Conversation with inmates' visitors shall be limited only to that which is necessary to fulfill your official duties." (Exhibit 34).

28. The Appellant's relationship with this inmate, while fully disclosed by her, still poses a potential conflict of interest and security risk which DOC deemed to be unacceptable.

(Testimony of McInnis)

29. The Appellant is willing to accept employment in any DOC facility, whether it houses male or female inmates. (Testimony of Appellant)

30. The Appellant testified before the Commission that she had fully disclosed her relationship with the inmate with her supervisors when she was an intern at SBCC, and throughout the Correction Officer screening process. She testified that she believed that she had been promised a position when she was encouraged by her supervisor at SBCC to apply and later when she was offered a conditional offer of employment. Because the background check had already been conducted when the conditional offer was made, the Appellant believes that she should be offered the position. (Testimony of Appellant)

31. Although different rules govern DOC interns from DOC employees, the Appellant believed her acceptance into the internship meant that she was fully qualified to be a DOC employee. (Testimony of Appellant; Exhibits 6 and 34)

32. The Appellant repeatedly stated that she was a good person, and that she was willing to sever any and all ties to the inmate in order to get the Correction Officer I position.

CONCLUSION

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 Serv. Comm'n, 43 Mass. App. Ct. 300, 304

(1997). 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). G.L. c. 31, § 2(b) requires that bypass cases be determined by 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 Serv. Comm'n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, §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 Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). However, 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, 43 Mass. App. Ct. at 304.

The Appellant is a likeable young mother. She was a good witness. She presented herself as a motivated individual who has a sincere desire to obtain a career that provides financial security for her and her children. After getting a GED, she attended and graduated from Middlesex Community College with an Associates Degree in Criminal Justice, and is now a student at the

University of Massachusetts. While interning at the SBCC, she was encouraged to pursue a career as a Corrections Officer.

The Appellant has wrongly argued that this encouragement from a Supervisor while she was a student intern coupled with the conditional offer of employment amounts to a promise of a permanent civil service position.

DOC has shown, by a preponderance of the evidence, that it had reasonable justification to bypass the Appellant for the position of Correction Officer I. The Appellant involvement with an imprisoned inmate, who is the father of two of her three children, is a sound and sufficient reason.

When she started her internship, the Appellant informed her supervisors at SBCC of the relationship with the father of two of her children, an individual who is an inmate at MCI-Shirley. She also informed them before initiating any contact with him, and informed them immediately if he contacted her.

It is true that some of the DOC employees hired from what would have been the Appellant's entering class have relatives that are also incarcerated. None of the relationships involved that of a common law spouse or a coparent of a child. The relationships were those of father, uncle, brother and brother-in-law. There was no evidence presented as to the level of contact between those chosen candidates and their incarcerated relatives.

But the fact remains that the Appellant continued to engage in a relationship with the inmate after he was incarcerated, and that there was regular contact between them which continued even after she took the civil service exam. There were phone calls, letters and visits. This contact continued after DOC extended a conditional offer of employment.

DOC requested an update on the Appellant when it was time to start the class and found that this contact was still being maintained. Inmate telephone records document that the inmate listed the Appellant on his phone list as his girlfriend, and called her seven (7) times in January 2010 for a total of two (2) hours. In December 2009, they spoke on at least seven (7) occasions. She visited him at least eighteen (18) times, the last date being in July 2009. It is obvious that the Appellant was committed to maintaining the family relationship – even after the conditional offer - until she believed it was no longer in her best interests to do so. I cannot countenance that the children should not be prohibited from maintaining a proper relationship with their father in order for the other parent to be employed.

No matter which DOC facility the Appellant may work in, she would have computerized and other form of access to data and inmate information. The core mission of the DOC remains the safe keeping and custodial care of the inmate population. Employing the Appellant at this time would entail an unacceptable risk for the DOC.

DOC's decision at the time was a valid exercise of discretion based on merit and policy in which there was no evidence of political favoritism or bias. The Commission does not have the authority "to substitute its judgment about a valid exercise of discretion based on merit and policy consideration by an appointing authority ...," Burlington v. McCarthy, 60 Mass. App. Ct. 914 92004), *quoting* Cambridge, 43 Mass. App. Ct. 300, 304-305 (1997). "It is not for the Commission to assume the role of super-appointing agency, and to revise those employment determinations with which the Commission may disagree." Burlington at 914.

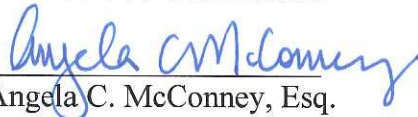
For all the above reasons, DOC has demonstrated by a preponderance of the evidence that there was just cause to bypass the Appellant.

Throughout her testimony, the Appellant maintained "that she was a good person." I concur and do not doubt that she would have been an excellent Correction Officer under other circumstances. The inmate is scheduled to be released in November 2011, less than a year away.

Based on the unique circumstances of this case, the appeal is *allowed in part*, and I order the following.

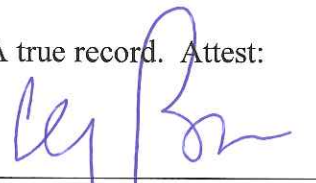
Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, the Civil Service Commission orders the Department of Correction to place the name of Cherise Cuff at the top of the then current and future certifications for the position of Correction Officer immediately upon the release of the inmate, Ricky Castor from MCI-Shirley. The Appellant shall receive at least one opportunity for consideration and appointment.

Civil Service Commission


Angela C. McConney, Esq.
General Counsel

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on December 16, 2010.

A true record. Attest:


Commissioner

Commissioner McDowell was
absent on December 16, 2010.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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 sent to:

David L. Jaffe, Esq. (for the Appellant)

Jeffrey S. Bolger (for the Appointing Authority)