

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 10/2/09
Civil Service Commission *CB*

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

KRISTEN ENGLISH,
Appellant,

v.

G2-08-44

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Kristen English,
Pro Se

Respondent's Attorney:

Alexandra McInnis
Director of Personnel
Division of Human Resources
Department of Corrections
P.O. Box 946
Norfolk, MA 02056

Commissioner:

Daniel M. Henderson¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Kristen English, (hereinafter, "English" or "Appellant") filed an appeal alleging that she was denied promotional opportunities to the title of Correctional Program Officer C (CPO C) when the Department of Correction (hereinafter "DOC") wrongfully terminated her from her position as a Correctional Program Officer I A/B on May 20, 2003. The appeal was

¹The Commission acknowledges the assistance of Legal Intern Kelly Deegan in the drafting of this decision.

timely filed. A full hearing was held on April 25, 2008 at the offices of the Civil Service Commission (hereinafter "Commission"). One (1) tape was made of the hearing.

FINDINGS OF FACT:

Ten (10) exhibits were entered into evidence at the hearing. [The Appellant's past medical problems are redacted from the exhibits and the record of this hearing]. (Exhibit 3 & 6, Testimony of Appellant). The record was left open until May 9, 2009, for the parties to file any additional exhibits.

Based on these exhibits and the testimony of the following witnesses:

For the Appointing Authority

- Alexandra McInnis, Director of Personnel, DOC Human Resources Department

For the Appellant

- Kristen English, Appellant

I make the following findings of fact:

1. On January 6, 1996, the Appellant was hired by the DOC as a Correctional Program Officer I A/B. (Testimony of Appellant)
2. She performed her job well; as evidenced by her annual employee performance reviews. (Exhibit 4)
3. On November 18, 2000, the Appellant took and passed the Correctional Program Officer C promotional exam with a score of 80. (Testimony of Appellant)
4. After giving birth in April 2000, the Appellant returned to work in August 2000. (Exhibit 3)

5. Upon her return to work, she began to experience specified medical problems. Which medical problems are redacted from the exhibits and the record of this hearing.
(Exhibit 3 & 6, Testimony of Appellant)
6. Due to these medical issues, the Appellant sought medical leave from the DOC under the state Family Medical Leave Act (“FMLA”), Family Friendly Benefits, and “*reasonable accommodation*” through the DOC Affirmative Action Division from August 2000 through May 2003. (Exhibit 3, Testimony of Appellant)
7. At no time did the DOC inform the Appellant that she was entitled to a further three-month leave under the federal FMLA when the state FMLA expired on or about April 22, 2003. The DOC claimed that the arbitrator lacked jurisdiction since the Appellant had been terminated exclusively due to her unauthorized and voluntary separation from employment for a period greater than fourteen days, in violation of G.L. c. 31 § 38. The Superior court decision affirmed the arbitrator’s award on this issue; there being no conflict between the CBA and G.L. c. 31 § 38 and section 38 did not apply to this case. (Exhibit 3, Testimony of Appellant)
8. On May 20, 2003, the Appellant was terminated from employment by the DOC after being informed that her medical leave had expired on April 22, 2003. (Exhibit 6, Testimony of Appellant)
9. The Appellant filed a grievance pursuant to the terms of the Collective Bargaining Agreement on June 3, 2003. (Exhibit 3)
10. On April 18, 2004, the Appellant received 2 cards in the mail, requesting that she sign as willing to accept appointment on the promotional eligibility list in regard to the promotional exam she had taken on November 18, 2000. The Appellant’s union

advised her not to sign the cards. The Appellant did not sign because she believed that she was not eligible due to her termination. (Testimony of Appellant)

11. Six (6) other candidates who scored lower than the Appellant were promoted from that (2000 exam) eligibility list after the Appellant was terminated. The promotional effective date for those 6 candidates is March 14, 2004. The Appellant testified that she was not asked by the DOC whether she wanted to return to work at any time in 2004. (testimony of Appellant, Exhibit 5)
12. The Appellant did not present any evidence that she was able and willing to return to work, at any time in 2004, with or without a reasonable accommodation provided by the DOC. (Exhibits and testimony)
13. The Appellant did not take the promotional exams offered in May 2005 and November 2007, which were offered during the Appellant's termination period or the arbitration/appeal of said termination. The list from the 2005 exam was exhausted in May, 2007 and 3 to 4 appointments were made subsequently from the 2007 exam list. (Testimony of Appellant, Testimony of McInnis)
14. The parties stipulated that the Appellant would not have been bypassed for past performance, past discipline or related issues, if she had been a candidate considered for promotion by the DOC during the relevant period. (stipulation)
15. On March 6, 2007, by arbitration award, the Appellant was reinstated to her CPO I position. The arbitrator found that the Appellant had been wrongfully terminated or terminated without just cause. The award also called for the Appellant to report for work, within a 60-day period, with medical documentation of her ability to perform the duties of the CPO I position or to have applied for and received a "*reasonable*

accommodation” allowing her to return to the position of CPO I, within that 60-day period. (Exhibit 3 and 6, Testimony of Appellant)

16. The Appellant, agents for her or medical professionals sent the DOC written medical documentation and requests for “reasonable accommodation” on five (5) different occasions in April and May, 2007. The DOC did not accept and/or respond to any of these written notifications. (Exhibits 6, 7, 8, 9 and testimony of Appellant)
17. In May 2007, the DOC appealed the Arbitrator’s Award to the Massachusetts Superior Court. (Exhibit 6)
18. On November 29, 2007, entered on the docket on December 4, 2007, the **Superior Court affirmed the arbitrator’s award**. That decision stated in conclusion: “There was no “just cause” for English’s termination because the DOC termination of English was not “entertained in good faith.” The Doc terminated English without fully informing her of her options, and further, the DOC undertook English’s termination at a time when it knew she was in the process of applying for an extension of her FMLA leave. Id.” Suffolk Superior Court, Docket # SUCV2007-01517-E, page 10, Spurlock, J. (Exhibit 3)
19. The arbitrator’s award was upheld by the Superior Court. Based on the testimony and evidence submitted at this Commission hearing, which included the arbitrator award and the Superior Court decision, I find that there was no just cause to terminate the Appellant and the DOC did not act in good faith, in the Appellant’s termination and her subsequent attempts to become re-employed. (Exhibits, testimony and reasonable inferences)

20. Neither the arbitrator nor the Superior Court Judge considered the issue of the Appellant's lack of consideration by the DOC, for the promotional opportunities that occurred during her period of termination. (administrative notice: Exhibits 3 & 6)
21. The Appellant was reinstated by the DOC, effective on December 21, 2007. (stipulation of the parties)
22. The critical dates or time period here is from March 6, 2007, the date of the arbitrator's award and December 21, 2007, the date of the Appellant's reinstatement at the CPO I position. (administrative notice)
23. During that period, the DOC made three (3) promotional appointments to the position of Correction Officer C. The appointment date for all three appointments was May 19, 2007. One of those appointments was at MCI-Norfolk, the second was at MCI-Framingham and the third at MCI-Shirley. The Appellant testified that if she were offered any of those promotions then, she would have accepted the promotion at MCI-Shirley, since she had worked there before. (Exhibit 10, testimony of Appellant and McInnis)
24. On February 20, 2008, the Appellant filed an appeal with the Commission, stating that she was denied opportunities for promotion during the time she was separated from the DOC during her wrongful termination. (CSC appeal docket, Testimony of Appellant)

CONCLUSION

The role of the 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.

Commissioners of Civil Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). 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). See G.L. c. 31, § 43.

Appointing Authorities are expected to exercise sound discretion, under the particular circumstances of the matter, when choosing individuals from a certified list of eligible candidates on a civil service list. The Appointing Authority may not be required to appoint any person to a vacant post. “He may select, in the exercise of a sound discretion, among persons eligible for promotion or may decline to make any appointment. See Commissioner of the Metropolitan Dist. Comm’n. v. Director of Civ. Serv. 348 Mass. 184, 187-93 (1964). See also Starr v. Bd. of Health of Clinton, 356 Mass. 426, 430-431 (1969); Seskevich v. City Clerk of Worcester, 353 Mass. 354, 356 (1967); Corliss v. Civil Serv. Comm’r. 242 Mass. 61, 65 (1922). Cf. Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 571-72 (1940). A judicial judgment should “not be substituted for that of . . . [a] public officer” who acts in good faith in the

performance of a duty. See Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 666, (1971); M. Doyle & Co. Inc. v. Commissioner of Pub. Works of Boston, 328 Mass. 269, 271-72 (1952). 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 Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003); Commissioners of Civil Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975).

I find that the Appellant is an “aggrieved person” under c.31, § 2(b). On November 18, 2000, the Appellant took a promotional exam for the position of Correctional Programs Officer C and scored an 80. Six (6) candidates with lower scores were promoted from that list. The Appellant was terminated in May 2003, and received her cards to accept that promotion almost one year later.

The Appointing Authority argues that the Appellant could not be advanced at the time they chose candidates for promotion because she had not signed the cards. Ms. English did this upon her union’s advice and in consideration of her non-employment status with the DOC. Had the DOC not previously terminated Ms. English, she would have had the option of signing the cards and accepting the promotion. In effect, when the DOC terminated her, she was de facto bypassed for any promotional appointments during her period of unemployment with the DOC. The Appellant grieved the matter through arbitration and was successful. The arbitrator award was upheld by the Superior Court. Based on the testimony and evidence submitted at the Full Hearing, which included the

arbitrator award and the Superior Court decision, I find that there was no just cause to have terminated the Appellant.

The Appellant seeks relief under c. 310 to redress the damages done to her. The DOC argues that c. 310 relief is not applicable here for the following two reasons. First, had the Appellant not been terminated and accepted the promotion, she would have been unable to assume the CPO C position under PAR.09 (4) which states that “no person shall be regarded as appointed to a full time position within the requirements of these rules unless he accepts the position and is actually employed within thirty days from the date of receipt of notice of appointment...”. The Commission does not find this argument persuasive. The DOC has been found by the arbitrator and affirmed by the Superior Court to have not acted in good faith and acted without just cause in terminating the Appellant from employment. The DOC is now trying to guess what would have happened had they not wrongfully terminated the Appellant. The DOC’s speculation should not be rewarded after its own wrongful actions; as the Appellant is an aggrieved person under these circumstances.

The critical dates or time period here is from March 6, 2007, the date of the arbitrator’s award and December 21, 2007, the date of the Appellant’s reinstatement at the CPO I position. During that period, the DOC made three (3) promotional appointments to the position of Correction Officer C. The appointment date for all three appointments was May 19, 2007. One of those appointments was at MCI-Norfolk, the second was at MCI-Framingham and the third to MCI-Shirley. The Appellant testified that if she were offered any of those promotions then, she would have accepted the promotion at MCI-Shirley, since she had worked at MCI-Shirley before.

The DOC makes the argument that the Appellant had several opportunities, (May '05 and November '07) to take the promotional exam for the CPO C position. Yet the exams were offered during the period of the Appellant's wrongful termination from employment. The DOC was treating her like a non-employee and ineligible for any promotion. Also, according to G.L. c.31 § 9, "such departmental promotional examination[s] shall be open ...only to persons who have been employed in the departmental unit as civil service employees for at least one year immediately preceding the date of the examination..." This statute precludes the Appellant from taking the tests in 2005 and 2007 because she was actually not employed for the requisite preceding year in order to sit for the examinations.

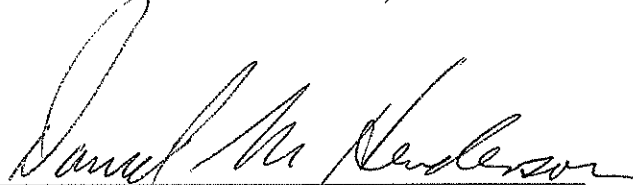
For all of the forgoing reasons, the Appellant's appeal under Docket No. G2 – 08 – 44 is hereby *allowed*.

RELIEF GRANTED TO THE APPELLANT

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that name of the Appellant, Kristin English be placed at the top of the eligibility list for promotional appointment to the position of Correctional Program Officer C so that her name appears at the top of any current certification and eligibility list and/or the next certification and list from which the next promotional appointment to the position of Correctional Program Officer C in the Department of Correction, (DOC) shall be made, so that she shall receive at least one opportunity for consideration from the next certification for appointment as a Correctional Program Officer C in the Department of Correction. The Commission further directs that, if and when Kristin English is selected for promotional appointment and commences

employment as a Correctional Program Officer C, her civil service records shall be retroactively adjusted to show, for civil service/seniority purposes only, in that position as her starting date, the date of May 19, 2007. That is the starting date of a certain promotional appointment that the Appellant would have accepted, if offered and when she was willing and able to perform the duties.

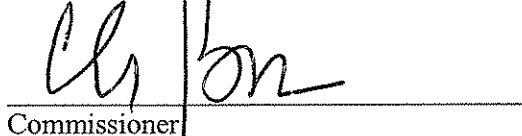
Civil Service Commission,



Daniel M. Henderson,
Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman, Henderson, Stein and Taylor, Commissioners) [Marquis voted No] on October 1, 2009.

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 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:
Kristen English
Alexandra McInnis - DOC