

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

Philip B. Gonzalez,
Appellant

v.

Docket No. G1-11-213

Department of Correction,
Respondent

Appellant:

Mary Pat Wickstrom, Atty.
Wickstrom Morse, LLP
Six North Main Street, Suite 301
Uxbridge, MA 01569

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 Philip B. Gonzalez (hereinafter "Appellant" or "Gonzalez") appealed the decision of the Respondent, Massachusetts Department of Correction (hereinafter "DOC" or "Department") to bypass him for appointment as a Correction Officer I ("CO I") for the stated reason of an "Unsatisfactory CJIS report". The Appellant was notified of the Appointing Authority's decision by letter dated May 6, 2011 and filed his appeal at the Civil Service Commission (hereinafter "Commission") on July 1, 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 15 attached Exhibits. The DOC stated that Gonzalez was bypassed specifically due to his arrest for assault and battery on his sister at the family home on March 17, 2010. The matter was subsequently dismissed in Uxbridge District Court. The DOC followed its practice of bypassing candidates for initial appointment to CO I, if there has been an arrest for assault and battery within five years. The Appellant explained that he did not assault his sister but was merely trying to restrain her to protect her and the rest of the family from his sister. She was in a rage at the time and trying to assault him. This was only one of many incidents instigated by his sister. His sister has had long standing mental health and behavior problems to the point that the family was nearly destroyed in the process of continually confronting these problems. The Appellant's mother also appeared at the Pre-Hearing Conference and confirmed the Appellant's version.

The parties agreed that if the Appellant filed a Motion for Summary Decision/Chapter 310 Relief to allow his appeal together with supporting affidavits; the DOC would review the filings and respond accordingly.

On August 4, 2011 the Appellant filed at the Commission, a Motion for Summary Decision/Chapter 310 Relief with numerous supporting affidavits and other documents.

The DOC, on August 5, 2011, after reviewing said Appellant's filing, responded by stating that it would "not be filing anything in opposition" to the Motion.

FINDINGS OF FACT

Based on the parties and witnesses statements, pleadings and other filings, including the signed Stipulation of Facts, the DOC's pre-hearing memorandum with fourteen numbered (15) attachments, The Appellant's Motion with supporting affidavits and other 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, Philip B. Gonzalez passed the examination with a score of Vet 78% (Stipulated Facts).
3. On July 14, 2010, the Division of Human Resources established an eligible list Cert. #4010034 was established for the title of Correction Officer I (Stipulated Facts).
4. On October 12, 2010, the certification # 4010034 for Correction Officer I was sent to the DOC. (Stipulated Facts).
5. Philip B. Gonzalez's name appeared on the Certification where he was ranked 25th. among those willing to accept employment (Stipulated Facts).
6. The Department of Correction gave him a conditional offer of employment but did not appoint him, but bypassed him for candidates who were ranked lower on the civil service eligibility list than him. (Stipulated Facts).
7. The reason given for the bypass in a letter dated August 6, 2011 was "Unsatisfactory CJIS report" (Stipulated Facts).
8. The specific reason for the "unsatisfactory" determination is the following. The DOC runs a CJIS report on all applicants. Gonzalez's CJIS report revealed that he had been arrested and/or charged with assault and battery on his sister, at his family home, on March 17, 2011. The matter was subsequently dismissed without prejudice in Uxbridge District Court. (DOC Memorandum attachments, parties' and witnesses' statements, Motion and affidavits).

9. The DOC followed its practice in this matter of bypassing candidates for initial appointment to CO I, if there has been an arrest for assault and battery within five years. This was the sole reason for Gonzalez's bypass. (DOC Memorandum/ attachments, parties' and witnesses' statements, Motion and affidavits).
10. The Appellant is a veteran of the US Army, Operation Iraqi Freedom 2008-2009, having served in the National Guard and as a Military Police. (DOC Memorandum/ attachments Appellant's testimony and Motion with affidavits attached)
11. He has an Associate's Degree in Criminal Justice and is pursuing a BA in Criminal Justice now. (Appellant's testimony and Motion with affidavits attached)
12. He described the long term mental illness suffered by his sister, including self-inflicted injury, injuries to others, medication and hospitalization. (Appellant's testimony and Motion with affidavits attached)
13. His sister is the alleged victim of this charged assault and battery which occurred at his family home. His sister was in a rage at that time and actually attacked him with a large candle stick and threatened his girlfriend at that time. He denied assaulting or battering her. He grabbed his sister only to restrain her from injuring him, herself, his girlfriend and other family members. (Appellant's testimony and Motion with affidavits attached)
14. He has been forced to similarly protect himself and his family from similar attacks by his sister in the past. (Appellant's testimony and Motion with affidavits attached)
15. His sister the alleged victim here and his mother a percipient witness to this event both confirm his version of this event in their respective affidavits. (Appellant's and Mother's testimony and Motion with affidavits attached)

16. His mother confirmed the past family problems in addressing his sister's mental illness.

She has suffered mental illness since she was 12 years old, approximately five years. She has acted suicidal and violent. She was expelled from school at age 13. She has been on medication since then and hospitalized on occasion. His mother sought a CHINS petition for his sister for which she was committed to the Anna Jacques Hospital Psychiatric Program on April 21, 2010, about a month after this alleged A&B incident. (Appellant's and Mother's testimony and Motion with affidavits attached)

17. The Appellant's mother was particularly persuasive at the pre-hearing conference when she tearfully described how steady, supportive, responsible and protective her son had been in his life and especially toward the family. She stated that she did not believe that her marriage and the family unit would have survived without his involvement and intercession; especially dealing with the serious, repeated problems caused by his sister. (Appellant's Mother's testimony)

18. The affidavit of Worcester Police Department, ("WPD") Detective Daniel Rosario gave an independent professional appraisal of the Appellant, his family and the circumstances of the A&B charge, which caused the bypass. Detective Rosario has been with the WPD for 23 years, 18 of those years as a Homicide Detective. He has personally known the Appellant since 2005. He knows the "facts and circumstances of the dismissed Assault and Battery charge against Philip in March, 2010," (Affidavit of Detective Daniel Rosario)

19. That A&B charge, according to Detective Rosario, was dismissed by the Court due to his sister's "lack of credibility", causing the Court to determine that the underlying facts of the charge were "unsubstantiated". (Affidavit of Detective Daniel Rosario)

20. Detective Rosario stated his knowledge of Philip's sister's "long history of mental illness" and her previous "false allegations" against a teenage boy for "being sexually molested". (Affidavit of Detective Daniel Rosario)

21. Finally, Detective Rosario attested to the fact, based on his personal knowledge that the Appellant possessed: "good judgment and a law abiding character"," exemplary performance as a Military Police Sergeant" and is "levelheaded, hardworking and has the personality needed to be in law enforcement." (Affidavit of Detective Daniel Rosario)

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 specific reason for the bypass here is the fact of the Appellant's Gonzalez's CJIS report revealed that he had been arrested and/or charged with assault and battery on his sister, at his family home, on March 17, 2011. The matter was subsequently dismissed without prejudice in Uxbridge District Court. The Appellant's Motion/ attachments has now shown to the apparent satisfaction of the Respondent that those matters were subsequently resolved for the Appellant on May 7, 2010 in Uxbridge District Court by a Dismissal without prejudice at the request of the Commonwealth. The Respondent after review of the Appellant's filings has responded that it "**will not be filing anything in opposition**" to the Appellant's requests Chapter 310 Relief, with a standard clause of a retroactive seniority date for the Appellant, for civil service purposes, if he 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 he 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 his appeal allowed pursuant to the requested and 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 originally applied its routine practice to the Appellant, of bypassing candidates for initial selection to the position of CO I, if they have an assault and battery arrest/charge within five years. The Appellant did fall into that general category.

However, the Appellant has now come forward with new and compelling credible evidence that establishes that the application of the DOC practice to him in this matter would be a travesty and contrary to the purpose and intent of this cautionary DOC practice.

Neither the DOC nor the public is benefited by the disqualification of an accomplished, qualified and responsible applicant due to his categorical circumstances; which is strongly rebutted and/or refuted by percipient and knowledgeable witnesses of the specific underlying events of this A&B charge. It seems that the DOC practice might be reasonably founded, if later subject to the applicant's reasonable opportunity to refute and/or rebut. The Commission hearing on this bypass appeal provided the DOC with the opportunity to further interview the Appellant and his mother and examine the new documentary evidence related to this family event which was also a criminal court matter. It has been established that the Appellant was actually the law abiding family-protecting party in this encounter with his aggressive and assaultive sister, the putative victim of the event which had occurred at the family home. The Appellant received a favorable disposition of dismissal of this matter in Court. The Appellant, his mother, his sister and especially WPD Detective Rosario corroborated the fact that the Appellant was the protector-victim and his uncredible and problematic sister was the actual assailant in this incident.

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 Appellant's Motion is allowed and his 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 Philip B. Gonzalez's name at the top of the current eligibility list for original appointment to the position of Correction Officer I, so that his 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 he shall receive at least one opportunity for consideration.

If selected for appointment, he shall receive for civil service purposes only a retroactive seniority date, which is the same as the other persons selected earlier from Certification #4010034. 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.

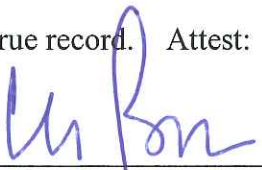
Civil Service Commission,



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:
Mary Pat Wickstrom, Atty.
Jeffrey S. Bolger-DOC
John Marra, Atty, HRD