

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

REGINALD GORE,
Appellant
v.

G1-13-272

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Reginald Gore

Appearance for Respondent:

Joseph S. Santoro
Department of Correction
One Industries Drive: P.O. Box 946
Norfolk, MA 02056

Commissioner:

Paul M. Stein

DECISION

The Appellant, Reginald Gore, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), from the decision of the Department of Correction, the Appointing Authority (DOC) to bypass him for appointment to the position of Correction Officer I (CO I). The Commission held an evidentiary hearing on March 4, 2014, which was digitally recorded. DOC called one witness and Mr. Gore testified on his own behalf. The Commission received thirteen (13) exhibits in evidence. The DOC made an oral closing in lieu of submission of a proposed decision. The Appellant submitted a post-hearing letter.

FINDINGS OF FACT

Giving appropriate weight to the documents in evidence (Exhibits 1 through 13), the testimony of the witnesses (Mr. Gore and James O’Gara), and inferences reasonably drawn from the evidence I find credible, I make the findings of fact stated below.

1. The Appellant, Reginald Gore, resides in Randolph, Massachusetts. He currently works as a Training Officer for Allied Barton, responsible for the training of 50 employees who provide security services to the MWRA. He has a background in finance and accounting and holds the rank of Sergeant in the National Guard where he has served as a combat medic. (*Stipulated Facts; Testimony of Appellant*)

2. Mr. Gore took and passed the civil service exam for Correction Officer on March 24, 2012. (*Stipulated Fact*)

3. Mr. Gore appeared tied for 57th on Certification 00974 issued to DOC by the state’s Human Resources Division (HRD) on July 2, 2013. The DOC selected 182 applicants for appointment, 144 of whom were ranked below Mr. Rousseau. (*Stipulated Facts*).

4. James O’Gara is a Personnel Analyst III in the DOC’s Human Resources Department. Mr. O’Gara is responsible for coordinating the background investigations for correction officer applicants. His immediate supervisor is Erin Gotovitch, the DOC’s Acting Director of Human Resources. (*Exh. 2; Testimony of O’ Gara*)

5. The first step in the hiring review process is the “CJIS” (Criminal Justice Information System) check. This check involves accessing the CJIS data base to check an applicant’s “BOP” (MA Criminal History) and other criminal and driving records. (*Exhs. 3 through 7*)

6. The CJIS check on Mr. Gore turned up a “hit”, meaning it showed that he had been the subject of a Massachusetts criminal proceeding. Specifically, Mr. Gore’s BOP showed that he had been arraigned on February 20, 2007 for the following offenses:

POSS FIREARM W/O PERMIT
OPER UND INFL OF LIQ
FIR FIOL [SIC] W/2 PR VIOL DRG CRIME¹

The BOP also indicated that the first charge was dismissed on 7/16/2007 and Mr. Gore was found Not Guilty of the other two charges on 9/4/2007. (*Exh. 5*)

7. Based on the review of the CJIS results, Mr. Gore was eliminated from further consideration and did not proceed to the written application, interview, or background investigation stage. On November 26, 2013, Ms. Gotovitch issued a letter to Mr. Gore informing him that he was not considered for appointment for the following reason:

“Background Investigation: Failed CJIS-Negative Criminal History-Possession of a Firearm Without a Permit 2/20/07.”

(*Exh. 2: Testimony of O’Gara*)

8. Although it is the general practice of the DOC to look at a candidate’s CJIS activity within a five-year look-back period, the DOC will look at the entire record and may, but not necessarily in every case will, disqualify a candidate for serious misconduct older than ten years. Examples of such misconduct include felonious activity and domestic abuse. (*Testimony of O’Gara*)

9. Since the charge of unlicensed possession of a firearm was a felony, that was considered a per se disqualifying event in Mr. Gore’s case, although it had occurred more than five years

¹ The DOC interpreted this entry to mean that Mr. Gore had been charged with unlawful possession of a firearm after having convictions for two prior violent drug crimes, which all parties agreed was an error and not true. This mistake is not germane to the appeal, however, as neither the OUI charge or the alleged possession after prior drug crime offense, were not used as the basis for bypassing Mr. Gore. (*Testimony of O’Gara; Statement of DOC Representative*)

prior to his application and the charge had been dismissed. This was the sole reason for deciding to disqualify Mr. Gore. (*Testimony of O’Gara*)

10. Had the DOC conducted a further investigation of the February 2007 firearms violation incident, it would have discovered that the unlawful possession charge was dismissed at the request of the Commonwealth. Mr. Gore acknowledged that his license to carry had expired on January 1, 2007, but understood that the law provided a 90-day grace period for renewal after expiration. Although that interpretation of the law appears to have been technically mistaken, as to criminal liability, G.L.c.140, §131(i), did explicitly provide a defense:

“For purposes of section 10 of chapter 269, an expired license to carry firearms shall be deemed valid for a period of not to exceed 90 days beyond the stated date of expiration, unless such license to carry firearms has been revoked.”

(*Exhs. 9 through 11; Testimony of Appellant; Appellant’s Post-Hearing Submission*)²

11. The official Appointing Authority for DOC is the DOC Commissioner. Under the law, the Commission may appoint a Deputy Commissioner for personnel and training. Here, there is no evidence that either the DOC Commissioner or the Deputy Commissioner for Personnel and Training had any role in the decision to disqualify Mr. Gore on the basis of his CJIS record. (*Testimony of O’Gara; Administrative Notice [G.L.c.27, §§1 & 2; G.L.c.124, §§1 & 2]*)

12. Mr. Gore duly appealed DOC’s decision to bypass him for the position of Correction Officer I on December 2, 2103. (*Exh. 1*)

² The DOC interpreted this entry to mean that Mr. Gore had been charged with unlawful possession of a firearm after having convictions for two prior violent drug crimes, which all parties agreed was an error and not true. This mistake is not germane to the appeal, however, as the only reasons for bypass was the felony charge of unlicensed possession

CONCLUSION

Applicable Standard of Review

Appeals from a bypass for original appointment to a permanent civil service position are governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

The task of the Commission when hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the decision to bypass the candidate Reasonable justification in this context means ‘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.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

The Commission’s primary concern is to ensure that the appointing authority’s action comports with “basic merit principles,” as defined in G.L.c.31,§1. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban , 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate

reasons for the bypass”); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “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.”)

The Commission must take account of all credible evidence in the 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 (2001) It is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing)

Analysis

The issue presented is whether or not DOC conducted a reasonably thorough review and offered reasons explaining why it had “legitimate doubts” about Mr. Gore’s abilities to serve as a Correction Officer. In this case it is clear that DOC has not met the required standard.

The Commission has addresses this issue in numerous recent bypass decisions involving the DOC. E.g., Rousseau v. Department of Correction, 27 MCSR 457 (2014); Rolle v. Department of Correction, 27 MCSR 254 (2014); Moreira v. Department of Correction, 27 MCSR 251 (2014); Marino v. Department of Correction, 27 MCSR 247 (2014); Machnick v. Department of Correction, 26 MCSR 21 (2013). See Conner v. Department of Correction, CSC No. G1-14-23,

27 MCSR -- (DALA Magistrate's decision, adopted by the Commission, analyzing the requirements of a "reasonable review" in detail, with specific reference to the recent "sweeping changes in the CORI law" and the Governor's Executive Order No. 495 regarding agencies use of CORI information See G.L.c.6,§171A, St.2010, c. 256; Exec. Order No. 495 (Jan. 11, 2008) (a CORI record "should not be an automatic and permanent disqualification for employment"); 803 CMR 2.17 (notice to applicant is now required prior to taking adverse employment action based on a CORI review)

The Commission acknowledges that the DOC has begun to take appropriate action to rectify the shortcomings that the Commission has found in the DOC's hiring process, generally, and in its use of criminal history, in particular, that has caused it to bypass candidates without the required thorough review required by law. This case is one in which the DOC must rectify its prior process. Had a thorough review been done in this case, or had Mr. Gore been given notice of the DOC's intent to disqualify him prior to taking adverse action, the objection would have been quickly overcome. That is not to say that there may not be other issues of concern in Mr. Gore's record that have surfaced, or may surface in the future, but none of those are before the Commission at this time. Accordingly, Mr. Gore is entitled under basic merit principles of the civil service law to another opportunity to be considered fairly and fully for appointment as a DOC Correction Officer.

RELIEF TO BE GRANTED

Accordingly, for the reasons stated above, DOC has not provided reasonable justification for its decision to bypass Mr. Gore for appointment as a Correction Officer I. The decision to bypass Mr. Gore is overturned and his appeal under Docket No. G1-13-272 is hereby *allowed*.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division (HRD) or DOC in its delegated capacity shall:

- Place the name of Reginald Gore at the top of any current or future Certification for the position of Correction Officer I until he is appointed or bypassed.
- If Mr. Gore is appointed as a Correction Officer I, he shall receive a retroactive civil service seniority date the same as those appointed from Certification No. 00974.

This retroactive civil service seniority date is not intended to provide Mr. Rousseau with any additional pay or benefits including creditable service toward retirement.

Paul M. Stein

/s/ Paul M. Stein

Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman Ittleman, McDowell [Absent] and Stein, Commissioners, on October 30, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or 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 this Commission order or decision.

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

Notice:

Reginald Gore (Appellant)
Joseph S. Santoro (For Respondent)
John Marra, Esq. (HRD)