

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 9/23/11
Civil Service Commission *CB*

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

Vernon M. Locario,
Appellant

v.

Docket No. G1-11-168

Department of Correction,
Respondent

Appellant's Representative:

Vernon M. Locario
Pro se

Respondent's Representative:

Kerry A. Rice
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant, Vernon Locario (hereinafter "Locario" or "Appellant"), filed an appeal regarding the Department of Correction's (hereinafter "DOC" or "Appointing Authority") decision to bypass him for original appointment to the position of Correction Officer I. The reason given for bypass was an "unsatisfactory CJIS report", more specifically an unsatisfactory criminal history and driver's history. The Appellant filed a timely appeal at the Civil Service Commission, (hereinafter "Commission"). A full hearing was held on July 25, 2011 at the offices of the Commission. The full hearing was digitally recorded and 1 CD was made of the proceeding. A copy of the CD was provided to the parties. The parties submitted post-hearing briefs.

FINDINGS OF FACT

Eighteen (18) exhibits and a stipulation of facts were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Cheryl Brannan, Personnel Officer II, Human Resources Division, Department of Correction;

For the Appellant:

- Vernon M. Locario, Appellant;

I make the following findings of facts:

1. The Appellant took and passed a civil service examination for the position of Correction Officer I on March 20, 2010. He scored a 93 on the examination (Stipulated Facts)
2. An eligible list of candidates for Correction Officer I, Certification #4010034 (Minority), was established on July 14, 2010. (Stipulated Fact)
3. HRD sent the Certification of eligible candidates to the “Delegated” Appointing Authority on October 12, 2010. That list was created to fill thirty eight (38) Correction Officer I vacancies at the DOC. (Stipulated Facts)
4. The Appellant was ranked 70th among those candidates willing to accept employment. Of the thirty eight (38) candidates selected for appointment, twenty four (24) were ranked below the Appellant. (Stipulated Facts)
5. On May 6, 2011, DOC notified the Appellant in writing that he was being bypassed for appointment due to an “unsatisfactory CJIS Report”. (Stipulated Facts and Exhibit 2)
6. Cheryl Brannan, Personnel Officer II for the DOC testified before the Commission relative to the selection process of the Appointing Authority. She has been employed in the DOC Personnel Office for twelve years doing this type of pre-employment reviews. Ms. Brannan stated that once the civil service list is certified, the candidates report to fill out an application

and sign release of information forms. (Exhibit 3) A background investigation is then commenced. This is inclusive of both criminal records check and driving history. It is DOC's practice to "screen applicants out" whose background is determined to be unsatisfactory.

(Testimony of Brannan)

7. Ms. Brannan testified that the final decision on an applicant's disapproval is made by DOC Director of Personnel, Alexandra McInnis. (Testimony of Brannan)
8. When asked how she would have made that decision in this case, Ms. Brannan stated that it was based on the totality of the applicant's criminal record and driving history. When asked if there was a specific incident or timeframe for incidents that would disqualify a candidate, she stated no, each candidate is looked at individually and decisions are based on the totality of the background information, including the number and type of offenses or incidents. (Testimony of Brannan)
9. Ms. Brannan testified that the primary reason for bypassing the Appellant related to the combination of criminal history and his extensive poor driving history which included several suspension of his license. Although the Appellant currently has his driver's license, he has been cited and/or arrested several times for operating with a suspended license and he continued thereafter to operate a motor vehicle after each suspension. His behavior indicated a pattern of flagrant disregard for the law. (Testimony of Brannan, Exhibit 14)
10. Additionally, the Appellant has an extensive history of motor vehicle violations, Assault and Battery, and issuances of several c. 209A restraining orders. Based on the totality of both the Appellant's driving history and criminal history, the Appellant was determined unsuitable as a candidate for the position of correction officer. (Testimony of Brannan, Exhibit 14)
11. Ms. Brannan testified regarding the relevance of a suspended license to the performance of a correction officer's duties. Ms. Brannan stated that it is part of the 7 essential functions, specifically function #1, "Maintain custodial care and control of inmates by escorting or transporting them under restraints..." Correction Officers are also expected to carry firearms

under certain circumstances, depending on assignment. The Appellant's ability to qualify for a license to carry a firearm was called into question due to this background information.

(Testimony of Brannan and Exhibits 6, 9, 13, 14, and 18)

12. The Appellant testified and admitted to the accuracy of and nature of the charges on his record; he had both a poor driving history and criminal background. However, he claimed that the matters were old and that he had changed and become more responsible and mature since then. He admitted that substantially all of the facts stated on both his criminal and his driving record are accurate. The 3 restraining orders, 2 counts of assault and battery, and threats were all involving the mother of two of his six children in 1996, 1997, 1998 and 1999. He admitted that he was arraigned for violations of the restraining orders. In one instance he claimed he did not know that he could not send a birthday gift to his son through a third party. In another instance he claims he saw his daughter on the street in Worcester and wanted to give her a hug. He denied that he had ever threatened or hit any of the children or their mother. He claimed that arguments had ensued over the raising of the children. (Testimony of Appellant and Exhibits 6, 9 and 14)
13. The Appellant testified that in 2001 he had lost his job and was unable to pay child support; which had been paid through a wage-assignment/payroll deduction. As a result of non-payment his driver's license was suspended. The Appellant claims he did not know his license could be suspended as a result of non-payment until he was stopped on April 26, 2001. Then he testified that he did not know his license had been suspended until he was stopped in 2003 for the same offense. Additionally, he was stopped by the police in 2005 and 2010 and cited for driving without a license. It was not until 2005 when he contacted the Department of Revenue and worked out a payment plan for the child support arrearage. However, he continued to drive without a license. He was stopped again in February 2010. He got his license reinstated in June 2010. He admitted to continuing to drive after knowing of his license suspensions, since he had no other way to get to work. (Testimony of Appellant, Exhibits 6, 13 and 14)

14. The Appellant states that he had to use his vehicle to drive to work as a certified nurses assistant (CNA) and continued to get pulled over for driving with a suspended license every time he drove. He drove to work in the towns of Dudley, Medway and Holden. (Testimony of Appellant)
15. The Appellant's testimony shows a disregard or lack of concern for motor vehicle laws. It also shows some inconsistency regarding his lack of knowledge concerning the suspension of his license. He was initially pulled over in 2001 for driving with a suspended license and stated that at that time he learned that his license was suspended for non-payment of child support. Thereafter, he knowingly continued to operate a motor vehicle with a suspended license and was pulled over again in 2003, 2005 and yet again in 2010. His testimony that he got pulled over every time he operated a motor vehicle is not plausible. The Appellant stated that he had to drive his vehicle to work because of his employment as a CNA and travel to areas with no public transportation such as Dudley, Medway, and Holden. However, the record shows that he was pulled over and cited and/or arrested for driving with a suspended license in Shrewsbury, Webster, Charlton, Dudley, and Milford. The necessity of daily required work travel indicates that he was likely driving with a suspended license more frequently than the number of times he was stopped. (Testimony of Appellant, reasonable inference, Exhibit 14)
16. The Appellant testified regarding his September 21, 2010 arrest in Maine. He states that he went to Maine to pay the fine/restitution, which he had owed on a probation matter from, 1992-93. However, instead when in Maine he went to a playground with a friend and her child and an alarm went off and he was questioned by police and then arrested. However, rather than promptly paying the fine and taking care of the obligation to the Maine courts as he stated was his intent, he went to a playground with a friend and her daughter. His scenario renders his explanation or certainly his judgment to be suspicious or questionable. (Testimony and demeanor of Appellant, Exhibit 11)

17. The Appellant was questioned about his arrest for the probation violation on September 21, 2010, at Bangor Maine. The Appellant stated he had been found guilty of unauthorized use of property and criminal mischief in 1992 and was sentenced to 30 days in jail which was suspended, placed on six months' probation and issued a fine or restitution. He left the State and did not pay the fine/restitution. His justification for leaving Maine without paying the fine/restitution or notifying Probation, was due to his inability to find a job in Maine and believing he could find a job in Mass. He claims he returned to Maine in September 2010, to pay the fine/restitution. (Testimony of Appellant, Exhibit 11)
18. Repeatedly, over long periods of time the Appellant has chosen to disregard laws and court orders. He continued to drive without a license. He failed to make a reasonable attempt at reinstating his license until the third time he was arrested for operating without a license. Additionally, he knowing left the State of Maine while on probation and owing a fine to the court, only resolving the matter some 17 years later, after being arrested there. (Testimony of Appellant, Exhibits 6-14)
19. Indicatively, the Appellant left the State of Maine in 1993, where he had been in a program without paying a court fine or restitution of \$716 because he did not have the money. He described the 17 year delay in addressing the court obligation as putting it on the "back burner". If he had voluntarily addressed the court obligation before he was arrested in 2010, the Maine court may have treated him more leniently. (Testimony and demeanor of Appellant, reasonable inferences and Exhibit 11)
20. The Appellant is 37 years old, is now married and has a total of 6 children, some from prior relationships. He has done his best to keep current on his child support payments but fell behind during periods of unemployment. He is a Certified Nurse's Assistant, ("CNA") working for an agency, which assigns him to nursing homes in suburban locations, some without public transportation. (Testimony of Appellant)

21. The Appellant is a likeable, easygoing and well-intentioned person, who readily admitted to his lengthy driving and criminal court activity. He admitted that he looked bad on paper but had changed and was now responsible and mature. His testimony indicated a tendency to minimize his past difficulties with the law. He only now seems to realize its significance since he has been bypassed for appointment to a Correction Officer I position. There is a strong indication from all of the background data and his presentation here; that the Appellant's personality and casual attitude would render him susceptible to continued rule bending or breaking in the future. This is worrisome for a person in a position such as Correction Officer I, which requires sound judgment and strict adherence to the law and rules. (Exhibits, testimony, testimony and demeanor of Appellant)

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 Service 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 Service Comm'n, 31 Mass. App. Ct. 315 (1991). G.L. c. 31, § 43.

Appointing Authorities are rightfully granted sound yet significant discretion when choosing individuals for public safety positions, from a certified list of eligible candidates. 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 Civil Service 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 37-year old male with some general success in life. However he also has a long history of criminal and driving offenses. The significance of these offenses is the manner in which he addressed them. He established a pattern of ignoring or disregarding driver’s license laws or court orders; whether c. 209A orders or probation and fine payments. He was regularly stopped or arrested for driving after his license was suspended. Significantly, he went 17 years without paying a fine/restitution to the State of Maine courts. Claiming that he returned to Maine to clear up the matter; he had to be arrested before it was finally resolved by the court. These are incidents in which the Appellant either ignored or mishandled his legal obligations. The Appellant is a likeable, easygoing and well-meaning person, who readily admitted to his lengthy driving and criminal court activity. He admitted that he looked bad on paper but had changed and was now responsible and mature. His testimony indicated a tendency to minimize his past difficulties with the law. He only now seems to realize its significance since he has been bypassed for appointment to a Correction Officer I position. There is a strong indication from all the background data and his presentation here; that the Appellant’s personality and casual attitude would render him susceptible to rule bending or breaking in the future. This is worrisome for a person in a position such as Correction Officer I, which requires sound judgment and strict adherence to the law and rules.

Notwithstanding the explanations given by the Appellant, DOC has shown, by a preponderance of the credible evidence in the record, that it had reasonable justification to bypass the Appellant for

the position of Correction Officer I. The primary reasons for the Appellant's bypass were his poor driving record coupled with his criminal record. The superior court determined, "it is permissible for the Department to review a CORI and make a determination based on the record as to whether the applicant should be denied." See Dep't of Correction v. Anderson and Civ. Serv. Comm'n, No. 09-0290, Suffolk Sup. Ct. (2010).

The Appellant's testimony shows a lack of sufficient concern regarding the suspension of his license. He was initially pulled over in 2001 for driving with a suspended license and stated that at that time he knew his license was suspended for non-payment. He knowingly continued to operate a motor vehicle and was pulled over again in 2003, 2005 and yet again in 2010. He excused his continued practice of law breaking due to the necessity to drive to work where there was no public transportation. However, He should have sought some appropriate relief such as a restricted license through the courts or the Registry of Motor Vehicles.

He did not contact the Department of Revenue until 2005 to inquire about getting his license back. His statement that he got pulled over every time he operated a motor vehicle is not credible. Mr. Locario stated that he had to drive his vehicle to work because of his employment as a CNA and travel to areas with no public transportation such as Dudley, Medway, and Holden. However, the record shows that he was pulled over and cited and/or arrested for driving with a suspended license in Shrewsbury, Webster, Charlton, Dudley, and Milford. This evidence shows that he was driving with a suspended license more frequently than just the times he was stopped.

The Appellant also has c. 209A abuse prevention orders and violations of the orders on his record. He violated those orders on more than one occasion.

The Appellant displayed a long term lack of sound judgment and responsibility regarding his September 21, 2010 arrest in Maine. This long delayed, above described scenario in Maine indicates that his judgment, responsibility and timing to be suspicious or questionable.

Repeatedly over a prolonged period of time, the Appellant has chosen to disregard legal obligations including motor vehicle laws and civil and criminal court orders. Additionally, he knowing

left the State of Maine while on probation and still owing a fine/restitution. The Maine matter was only resolved seventeen years later after his arrest there. The Appellant's poor judgment and lack of adherence to the law indicates an inability to meet the required standards to be a correction officer.

The DOC, as has been shown here and in the public's interest, must hire applicants who demonstrate good judgment, controlled behavior; and respect for others and the law. The DOC could reasonably conclude that the Appellant's behavior, which resulted in criminal charges against him, demonstrated a risk that the Appellant may respond with the same poor judgment as a correction officer. There was no evidence presented to show any political favoritism or bias or other improper consideration.

For all of the above reasons, the Appellant's appeal under Docket No. G1-11-168 is hereby *dismissed*.

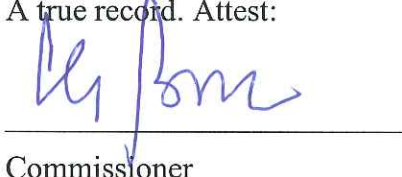
Civil Service Commission,



Daniel M. Henderson
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Marquis, Stein, and Henderson, Commissioners), [McDowell absent], on September 22, 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)(1), 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 MGL c. 31 S. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Vernon M. Locario (Appellant, Pro Se)
Kerry Rice (for Appointing Authority)
John Marra, Atty. (HRD)