

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KATELYN MARINO,
Appellant
v.

G1-13-280

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Katelyn Marino

Appearance for Respondent:

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

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Katelyn Marino (Ms. Marino), filed an appeal with the Civil Service Commission (Commission) on December 27, 2013, regarding the decision of the Department of Correction, the Appointing Authority (DOC), to bypass her for appointment to the position of Correction Officer I (CO I). A pre-hearing conference was held on February 4, 2014 and a full hearing was held on March 26, 2014 at the offices of the Commission.¹ The hearing was digitally recorded.²

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT:

Nine (9) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For DOC:

- James O’Gara, Personnel Analyst III;

For Ms. Marino:

- Katelyn Marino, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following:

1. Ms. Marino is 22 years-old and resides in Danvers, Massachusetts. She graduated from North Shore Technical High School in Middleton, MA. She is licensed as a Cosmetologist. (Testimony of Ms. Marino and Exhibit 8A)
2. Her personal references, when interviewed by a background investigator described her as “honest”, “trustworthy” and “dependable”. (Exhibit 6) When interviewed, her neighbors described her as “sweet and friendly” and someone they would recommend for employment. (Exhibit 6A)
3. While in high school, Ms. Marino began working at Ambiance Hair Design as a hairstylist / assistant. She worked there from 2008 to 2010. Her former employer described her as “a very mature young woman” who “got along with everyone and was easy to work with” and that she was “upbeat with a great attitude. Her clients loved her and did not want her to leave.” (Exhibit 6)

4. At some point, Ms. Marino decided that she would like to pursue a career in the healthcare industry and completed courses to become a Certified Nurse's Assistant (CNA). (Testimony of Ms. Marino)
5. From September 2010 to February 2011, Ms. Marino worked as a CNA at Whittier Healthcare / Masconomet in Topsfield. The company has a policy of only providing the title and dates of employment for prior employees. However, when DOC reviewed Ms. Marino's personnel file, they found nothing negative to report. (Exhibit 6)
6. In February 2011, at the age of 19, Ms. Marino accepted a job as a CNA at Beverly Hospital. By May or June 2011, she had decided that the healthcare industry was not her desired field and was contemplating returning to work as a hairstylist. (Testimony of Ms. Marino)
7. Ms. Marino met with her supervisor, explained her change of heart, and also shared with her some personal issues that she was facing at the time. Her supervisor recommended that she take a ninety (90) day leave of absence, which she did. (Testimony of Ms. Marino)
8. Shortly thereafter, Ms. Marino began working for Supercuts in Saugus, where she has now been employed for three (3) years. She is currently a shift manager. In addition to supervising four (4) to five (5) employees during each shift, she also performs the duty of a hairstylist. (Testimony of Ms. Marino)
9. Ms. Marino never informed anyone at Beverly Hospital that she did not intend to return to her job as a CNA. In September 2011, approximately ninety (90) days after her leave began, Ms. Marino received a letter from Northeast Hospital Corporation which stated in part, "Since your leave ended, we have not heard from you with your intentions of returning to work or for your desire to apply for another Personal Leave. Therefore, we will consider this your voluntary resignation, effective September 4, 2011. When you are able to return to

work, please feel free to apply for any posted positions for which you are qualified.” Ms. Marino misplaced this letter and never presented it to DOC during the review and selection process. (Testimony of Ms. Marino and Exhibit 9)

10. In March 2012, Ms. Marino took and passed the civil service examination for Correction Officer I. She received a score of 82. (Stipulated Facts)

11. Her name appeared tied for 58th on Certification No. 00974 issued to DOC by the state’s Human Resources Division (HRD) on July 2, 2013 from which DOC ultimately appointed one hundred eighty-two (182) candidates, 118 of whom were ranked below Ms. Marino. (Stipulated Facts)

12. As referenced above, DOC conducted a background investigation of Ms. Marino, which noted the positive references from previous employers, neighbors and her personal references. (Exhibit 6)

13. The background investigation also referenced another investigation completed a few months earlier when Ms. Marino was considered as part of a prior hiring cycle. During that hiring cycle, she was ultimately not reached for consideration as she was not ranked high enough to be within the statutory “2n + 1” formula. (Testimony of Mr. O’Gara)

14. The background investigator’s summary of Ms. Marino listed the following “positive employment aspects”: “Applicant graduated from North Shore Technical High School (diploma); Applicant presents as a mature, professional and hardworking individual as supported through professional references and past employer; Applicant presents as a ***trustworthy, honest and genuine individual*** as supported through professional references and past employer.” (*emphasis added*) (Exhibit 6)

15. The background investigator listed no entries under negative employment aspects. (Exhibit 6)

16. In regard to her employment at Beverly Hospital, the background investigator wrote in relevant part:

“In April 2013, during Ms. Marino’s previous background, she was requested to furnish her personnel file from Beverly Hospital. Ms. Marino complied with the request. Information in her personnel file lists her as being terminated from employment with Beverly Hospital for failing to return from a planned leave of absence. Until obtaining her personnel file, Ms. Marino had no idea that Beverly Hospital considered her as being terminated. Consequently, she contacted Beverly Hospital as well as a previous supervisor in order to rectify the misunderstanding. Ms. Marino was advised that Beverly Hospital would re-hire her. Additionally, Ms. Marino contacted Jim O’Gara at Human Resources in order to clarify the matter. Jim O’Gara placed an attachment in Ms. Marino’s previous background stating that Ms. Marino was under the impression that it was a voluntary resignation not termination from Beverly Hospital.” (Exhibit 6)

17. Documents in Ms. Marino’s personnel file at Beverly Hospital state that: 1) effective 6/4/11, she was on a “LOA”; and 2) effective 9/4/11, “EE terminated, did not return from LOA” with a “reason code 60” listed on the document. (Exhibit 4 and 4A)

18. Personnel Analyst III James O’Gara is responsible for coordinating the review of background investigations completed for Correction Officer candidates. He has been employed by DOC for approximately (8) years and has another ten (10) years of prior experience working in a correctional facility. (Testimony of Mr. O’Gara)

19. According to Mr. O’Gara, he does not make the decision regarding which candidates to bypass for appointment, nor does he make a recommendation in this regard. (Testimony of Mr. O’Gara)

20. Although the Appointing Authority for DOC is Commissioner Luis Spencer, it is undisputed that he plays no role in the appointment process.

21. Karen Hetherson is DOC’s Assistant Deputy Commissioner for Administration. The Assistant Deputy Commissioner for Administration oversees DOC’s Personnel Unit which:

“develops, monitors and implements all Department personnel transactions by coordinating all Department’s personnel actions, policies and procedures to ensure hiring, promotions, transfers and all human resources programs are effectively and efficiently administered.”

(www.mass.gov/doc) There was no evidence presented showing that the Assistant Deputy Commissioner for Administration played any role in the appointment process, including the review of bypass decisions.

22. At some point during the selection process, Mr. O’Gara met with Erin Gotovich, DOC’s Acting Director of Human Resource Operations. Mr. O’Gara informed Ms. Gotovich that Ms. Marino was untruthful on her application for employment. He based this on two (2) factors: 1) Under “reason for leaving” Beverly Hospital on her application for employment, Ms. Marino wrote “Hairdressing” on her April 2013 application and “career change” on her September 2013 application; and 2) On her April 2013 application, she stated that she stopped working for Beverly Hospital in May 2011. (Testimony of Mr. O’Gara and Exhibits 8 and 8A)
23. According to Mr. O’Gara, these statements were untruthful because: 1) Ms. Marino, under “reason for leaving” should have stated that she was terminated from Beverly Hospital; and 2) Ms. Marino should have indicated that she worked at Beverly Hospital until September 2011, because that is the effective date of her termination listed on the personnel records at Beverly Hospital. (Testimony of Mr. O’Gara)
24. There is no written summary memorializing what information Mr. O’Gara conveyed to Ms. Gotovich about Ms. Marino’s candidacy. (Testimony of Mr. O’Gara)
25. According to Mr. O’Gara, Ms. Gotovich usually places a “yellow sticky” on the cover sheet of the background investigations to indicate whether or not the candidate is being appointed

or bypassed. In this case, there was no yellow sticky and Mr. O’Gara could not recall how he was informed that Ms. Marino was to be bypassed. (Testimony of Mr. O’Gara)

26. In a letter dated November 13, 2013, DOC informed Ms. Marino that she was being bypassed because of: “Failed background Due to Untruthfulness on Application and Negative Work History at Beverly (Northeast) Hospital.” (Exhibit 2)

27. Ms. Marino filed an appeal of DOC’s decision to bypass her for the position of Correction Officer I on December 16, 2013. (Stipulated Fact)

28. As part of a pre-hearing memorandum submitted to the Commission, DOC wrote, “the Department of Correction lawfully bypassed the Appellant ... due to an Unsatisfactory Background Check. Upon the conclusion of a complete and comprehensive background investigation conducted by the Department it was determined that the Appellant was untruthful on her job application regarding failing to report her negative work history with Beverly (Northeast) Hospital.

Applicable Law

The Commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm’n., 43 Mass.App.Ct. at 304. “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, section 1. 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 at 304.

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. The Commission must determine whether the Appointing Authority conducted a "reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations" which form "legitimate doubts" about the candidate's suitability. City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 189, 190-191 (2010) citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 824-826 (2006). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. Beverly citing Cambridge at 305, and cases cited.

Analysis

The issue here is whether DOC, by a preponderance of the evidence, has shown that Ms. Marino was untruthful on her application and whether she had a negative work history at Beverly Hospital, the reasons stated for bypass. They have not.

First, the review process here lacked any involvement by the Appointing Authority or the individual purportedly delegated with the responsibility for making appointments; and lacked any written internal documents (i.e. –written summaries) memorializing how the decision to bypass Ms. Marino was made.

This is not the first occasion that the Commission has advised DOC of its insufficient vetting process.³ In Machnik v. Department of Correction, 26 MCSR 21 (2013), Mr. O'Gara stated that the DOC Commissioner had delegated hiring responsibilities to the Assistant Deputy Commissioner of Administration. As noted in Machnik, there is no provision in the civil service law or rule that allows such a delegation. Even if such delegation were permissible, there was no

³ The Commission is issuing another decision today, Rolle v. Department of Correction, which address similar issues (and concerns).

evidence presented here showing that the Assistant Deputy Commissioner reviewed the reasons for bypass. Instead, it appears that DOC's Acting Director of Human Resource Operations, who reports to the Assistant Deputy Commissioner, made the decision to bypass Mr. Moreira based on a brief conversation with Mr. O'Gara, a Personnel Analyst. In Machnik, we stated that: "DOC, on a going forward basis, should ensure that the Commissioner fulfills this important responsibility [of making final hiring decisions]". That apparently did not happen here.

Further, even if Ms. Gotovich were authorized to make final decisions regarding civil service appointments, I am not convinced that Ms. Gotovich asked for or received a full picture of what happened here.

After a thorough investigation, which included a review of Ms. Marino's application and the circumstances regarding her separation from employment at Beverly Hospital, a qualified and experienced DOC investigator concluded that Ms. Marino was a "trustworthy, honest and genuine individual." The investigator listed no negative aspects regarding Ms. Marino's candidacy. After that report was submitted, something went seriously wrong, ultimately leading to Ms. Marino's non-selection *and* a determination by DOC that Ms. Marino was untruthful, a conclusion with far-reaching consequences should Ms. Marino seek other employment in the public safety field.

Simply put, there is no legitimate basis to label Ms. Marino as untruthful and there was no reasonable justification to bypass her for appointment. When filling out her application, Ms. Marino was asked the open-ended question "reason for leaving" next to each of her former employers. She provided what she considered a completely honest answer each time. In regard to Beverly Hospital, Ms. Marino stated that she left because of a career change. According to DOC, Ms. Marino should have stated that she was "terminated". First, the application doesn't

ask that question. Second, DOC's insistence (to this day) that Ms. Marino was "terminated" from Beverly Hospital is bizarre *and* their conclusion that she had a negative work history there is a gross distortion of what actually occurred. As Ms. Marino told Mr. O'Gara in April 2013 and as Ms. Marino told the DOC investigator several months later, she simply decided, at age 19, that she wanted to return to her career as a hairstylist. She informed her supervisor at Beverly Hospital of this and was granted a 90-day leave of absence. While she acknowledges that she did not follow-up with Beverly Hospital at the end of the 90-day leave, this does *not* equate to a negative work history and her statement on the application regarding her reason for leaving does *not* constitute untruthfulness.

Conclusion

For all of the above reasons, DOC has not provided reasonable justification for its decision to bypass Ms. Marino for appointment as a Correction Officer I. The decision to bypass Ms. Marino is overturned and her appeal under Docket No. G1-13-280 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 Katelyn Marino at the top of any current or future Certification for the position of Correction Officer I until she is appointed or bypassed.
- If Ms. Marino is appointed as a Correction Officer I, she 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 Ms. Marino with any additional pay or benefits including creditable service toward retirement.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on April 3, 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:

Katelyn Marino (Appellant)
Earl Wilson, Esq. (For Respondent)
John Marra, Esq. (HRD)