

COMMONWEALTH OF MASSACHUSETTS

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

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

Seta Phay,
Appellant

v.

Docket No. G1-11-176

Department of Correction,
Respondent

Appellant:

Seta Phay,
pro se

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 Seta Phay (hereinafter "Appellant" or "Seta") 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 background check". 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 May 25, 2011. A full

hearing was held at the Commission on November 16, 2009. Witnesses were not sequestered. The hearing was digitally recorded. The DOC filed a post hearing proposed findings of fact on August 8, 2011, in which it assessed the testimony of the percipient Pham family members to credibly corroborate the Appellant's denial of any assault and battery.

FINDINGS OF FACT

Based on the one Exhibit "#1", DOC's pre-hearing memorandum with twenty-seven numbered (27) attachments, the signed Stipulation of Facts entered into evidence and the testimony of the following witnesses:

For the Appointing Authority:

- Alexandra McInnis, Director of Personnel, Division of Human Resources, Department of Correction

For the Appellant:

- Seta Phay, Appellant
- Phan Phay, father of Appellant
- Sophal Phay, brother of Appellant
- Channa Phay, sister of Appellant

I make the following findings of fact:

1. Seta Phay is a resident of Lowell, MA. He is a military veteran who served in the Army active duty from 2004 to 2006 and Army National Guard reserves as a Military Police Officer from 2003 to 2009. He received an Honorable discharge in 2009. (Exhibit # 1).
2. Seta Phay is currently employed by Analog Devices in Wilmington as a Machine Operator (Exhibit # 1).

3. Seta Phay previously worked for Schott Solar as a framer from October 2008 – August 2009 (Exhibit # 1).
4. On March 21, 2009, an examination was held for the position of Correction Officer I (Stipulated Facts).
5. Seta Phay passed the examination with a score of Veteran 88% (Stipulated Facts).
6. On July 9, 2009, the Division of Human Resources established an eligible list Cert. #4010033 for the title of Correction Officer I (Stipulated Facts).
7. On October 20, 2010, a certification # 4010034-minority, was issued for Correction Officer I. The Appellant was bypassed on both certifications. (Stipulated Facts).
8. Seta Phay's name appeared on the Certification where he was ranked 21st among those willing to accept employment (Stipulated Facts).
9. The Department of Correction gave him a conditional offer of employment but did not appoint Seta Phay, but bypassed him for candidates who were ranked lower on the civil service eligibility list than Seta Phay (Exhibit #1, Stipulated Facts).
10. The reason given for the bypass in a letter dated August 6, 2011 was "unsatisfactory background check" (Stipulated Facts).
11. The Appointing Authority runs a CJIS report on all applicants. Seta Phay's CJIS report revealed that he had been arrested and/or charged with 2 counts of Assault and Battery occurring on June 20, 2007, occurring at the Pham family home (Exhibit # 1 and Testimony of McInnis).
12. It is the Department of Correction's practice to bypass any applicant whose CJIS report reflects an arrest for Assault and Battery within the past five years; the background

investigation also uncovered a police report of an investigative incident allegedly involving Mr. Phay and his vehicle (Testimony of McInnis).

13. Seta Phay appealed the Department of Correction's decision to bypass him. The appeal was filed at the Civil Service Commission on May 25, 2011 (Stipulated Facts).

14. Mr. Phan Phay an alleged victim of one of the A&B charges testified that his son Seta Phay never hit or assaulted him during the incident on June 20, 2007. He further stated that the police report was not accurate and that the police never spoke with him that day or any time thereafter. It is noted that the father Phan Phay has a strong foreign accent that requires an effort to understand. It is also noted that his children, the witnesses here are easily understood, having no apparent difficulty communicating in English. (Testimony and demeanor of Phan, Seta, Sophal and Channa Phay).

15. Sophal Phan, also listed in the report as involved in the A&B incident, testified that he and his brother Seta Phay were engaged in a loud verbal disagreement on June 20, 2007 and that his father Phan Phay was merely trying to break it up. The two brothers were standing chest to chest at the time. He stated that there was no assault or battery of his father Phan Phay or anyone else. It is noted that Seta and Sophal are large men, in the 200 lbs. range while the father Phan is much smaller, in the 150 lbs. range. (Testimony of Sophal Phan, demeanor and testimony of Seta, Sophal and Phan).

16. Phan Phay stated that his 13 year old grandson observed the verbal argument and his intervention and called 911 on his cell phone, because he was worried about his grandfather. (Testimony of Pham Phay).

17. It is noted that the police incident report narrative for the June 20, 2007 incident only alleges pushing or shoving not striking or hitting. (Exhibit #1)

18. As for the Police Report dated November 20, 2009, Channa Phay stated that the vehicle is her car and Seta Phay is merely a cosigner of the loan and co-registered owner. On the day in question, the car was being used by Sophal Phan and not Seta Phay as reported by the police report. Seta's name must have been taken from the registration. This is a non-criminal police report, only for investigative purposes. No one in the Phay family including Seta was ever contacted by the police over this matter. (Testimony of Seta, Channa Phay).
19. The Department of Correction bypassed Seta Phay solely on his CJIS report which indicated that he had an Assault and Battery arrest and a Disorderly Conduct arrest within the past five years.
20. The CJIS report reveals that the Assault and battery charges against Seta were NP, (nolle prossed), on November 19, 2007, the first court hearing after arraignment and that the Disorderly Conduct charge was also dismissed on the arraignment date of June 20, 2005. Exhibit #1- CJIS)
21. The definition of Nolle Prosequi (or Nol Prossed) n. [Latin]: A legal notice or docket entry that the plaintiff or the prosecution has abandoned the action. In Mass. In a criminal matter it is usually accomplished by motion by the Commonwealth. (Ex #1, administrative notice)
22. The creditable testimony of the alleged victim Phan Phay is that his son Seta Phay never hit him. This statement was corroborated by the brother of the Appellant, Sophal Phan who credibly testified that no assault or battery occurred. The Appellant also denied any assault or battery occurred in that argument. (Testimony and demeanor of Phan, Seta and Sophal Phay)

23. I find the testimony of all of the Pham family witnesses to be credible and accurate. They answered in direct straight forward fashion, making good eye contact. They used everyday language and expressions that rang true. Phan Phay especially seemed upset that his son Seta was charged with assault and battery, which did not occur. Phan Phay never complained to nor was interviewed by the police regarding this matter (Testimony and demeanor of Phan, Seta, Channa and Sophal Phay)

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) 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 applied its established practice of bypassing candidates who have assault and battery charges or arrests on their record, within 5 years of their application for the position of Correction Officer I.

The Commission hearing on this bypass appeal provided the DOC with the opportunity to examine the documentary evidence, CJIS and related reports, more closely. The hearing also provided the DOC with the opportunity to cross-examine the Appellant and his family members who were percipient witnesses and/or alleged victims of this assault and battery family incident, the main reason for his bypass for appointment.

This hearing officer and apparently the DOC were satisfied that the Appellant credibly and reliably denied that anything more than a loud verbal argument occurred between the Appellant and his brother. The Appellant’s father and brother credibly and reliably corroborated the Appellant’s denial of any assault or battery occurring during the argument. The fact that these 2 assault and battery charges were *not proessed* in court by the Commonwealth, on the first court date after arraignment is further confirmation of its lack of substantiation. The other less significant police matters were also sufficiently explained; one as erroneously linked to the Appellant and the other, a disorderly person charge was shown to have been dismissed by the court at arraignment.

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 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 Seta Phay'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 #4010033. 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)(I), 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:
Seta Phay
Jeffrey S. Bolger-DOC
John Marra, Atty, HRD