

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

DEREK ROCHA,
Appellant

v.

Case No.: G1-12-64


**DEPARTMENT OF
CORRECTION,**
Respondent

DECISION

The Civil Service Commission (Commission) voted at an executive session on October 18, 2012 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated August 14, 2012. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on October 18, 2012.

A true record. Attest.



Christopher C. Bowman
Chairman

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 to:
Derek Rocha (Appellant)
Kerry A. Rice (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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August 14, 2012

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Derek Rocha v. Department of Correction
DALA Docket No. CS-12-368
CSC Docket No. G-12-64

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Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Derek Rocha
Kerry A. Rice

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Derek B. Rocha,

Petitioner

v.

Docket Nos. CS-12-368;

(G1-12-64, Civil Service Commission)

Department of Correction,

Respondent

Dated: **AUG 14 2012**

Appearance for Appellant:

Derek B. Rocha, *pro se*

82 Landing Drive

Taunton, MA 02780

Appearance for Appointing Authority:

Kerry A. Rice

Human Resources Division

Department of Correction

P.O. Box 946, Industries Drive

Norfolk, MA 02056

Administrative Magistrate:

Sarah H. Luick, Esq.

Summary of Recommended Decision

The Department of Correction (DOC) had a reasonable justification to bypass the Petitioner for hire as a Correction Officer I based on the applicability of its long-term and consistently applied unwritten policy to his criminal background check. If on the day DOC runs the candidate's criminal records check it reveals an open criminal case, including a term of probation that has not ended, the candidate is automatically disqualified from being appointed a Correction Officer. There is no discretion applied by DOC such as the probation term ending before the hiring date. The Petitioner had an open criminal case due to his probation period not yet over at the time the check was run. I recommend that DOC's bypass decision be affirmed by the Civil Service Commission.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Petitioner, Derek B. Rocha, is appealing the January 18, 2012 decision of the Respondent (Appointing Authority), DOC, bypassing

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him for appointment to the position of Correction Officer I. (Ex. 2.) The appeal was timely filed. (Ex. 1.) A hearing was held for the Civil Service Commission on July 20, 2012 at the offices of the Division of Administrative Law Appeals, One Congress Street, 11th Floor, Boston, MA 02114.

Various documents are in evidence. (Exs. 1 – 7.) The hearing was digitally recorded. The Respondent filed a pre-hearing memorandum, the Petitioner filed a statement in support of his claim, and the parties entered into some stipulations of fact that were reached at the pre-hearing conference held by the Civil Service Commission on April 3, 2012. (Ex. A.) The Respondent presented the testimony of DOC Human Resources Division Personnel Officer James O’Gara. The Petitioner testified on his own behalf and presented no other witnesses. Both parties made arguments on the record.

FINDINGS OF FACT

Based on the documents entered into evidence, the testimony presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Derek Rocha, d.o.b. 02/22/89, took and passed a civil service examination for the position of Correction Officer I on Sept. 26, 2009. Mr. Rocha scored a 95 on the examination. (Exs. A, 3, 4 & 7. Testimony.)
2. On February 8, 2010, DOC established a list (#4011045) of eligible candidates for appointment to Correction Officer I. Mr. Rocha was ranked 135 out of 305 eligible candidates. Mr. Rocha signed that he would accept the appointment if offered. The eligible list established February 8, 2010 was revoked on February 8, 2012. (Exs. A & 3. Testimony.)
3. On September 30, 2011, in connection with seeking the job of Correction

Officer I, Mr. Rocha completed the required DOC application form titled, "Background Information Request and Waiver," authorizing DOC to perform a criminal record check. (Ex. 4. Testimony.)

4. On October 3, 2011, DOC ran a criminal records check on Mr. Rocha. James O'Gara, Personnel Officer of DOC's Human Resources Division, reviewed Mr. Rocha's Criminal Offender Record Information (CORI) that same day. Mr. O'Gara assesses the applications of candidates for the position of Corrections Officer, including reviewing all the CORI results. He has reviewed the CORI checks of candidates for over five years. He is familiar with the policies that are applicable when DOC assesses candidates' CORIs. (Exs. 5, 6 & 7. Testimony.)

5. Mr. Rocha's CORI revealed that on May 5, 2010, he was charged with one count of operating a motor vehicle while under the influence of alcohol (OUI) and one count of negligent operation of a motor vehicle. He was arraigned on both counts on August 24, 2010. (Exs. 6 & 7. Testimony.)

6. Mr. Rocha's CORI revealed that on March 4, 2011, the Taunton District Court dismissed his OUI charge but found that he had admitted to sufficient facts on the negligent operation of a motor vehicle. The Court continued his case without a finding and made him subject to terms of probation imposed by the Court until December 2, 2011. Only if the full probation term was successfully served, would the case would be dismissed. (Exs. 6 & 7. Testimony.)

7. Mr. Rocha's CORI also contained a number of citations for speeding that DOC could consider in its hiring assessment of Mr. Rocha. (Ex. 6. Testimony.)

8. DOC has an unwritten but long-term and consistently applied policy that

candidates for Correction Officer with open criminal cases at the time their CORIs are run are automatically bypassed for appointment. This encompasses candidates who are still serving probation terms at the time the CORIs are run, even if they are close to successfully ending their probation terms after which their cases will be dismissed. The hiring assessment/process stops immediately for them. They do not reach the level of having their long form application reviewed. They also do not reach an interview process. DOC does not engage in any discretionary decisions whenever there is an open criminal case on a candidate's CORI on the day it is run. DOC does not permit the candidate to explain their particular circumstances to overcome application of this policy. (Testimony.)

9. On December 2, 2011, the Taunton District Court dismissed the negligent operation of a motor vehicle criminal case against Mr. Rocha because he successfully completed his probation term. (Exs. A & 7. Testimony.)

10. In a letter dated January 18, 2012, DOC informed Mr. Rocha that he would be bypassed for appointment to Correction Officer I due to his "unsatisfactory Criminal History report." In that same letter, DOC notified Mr. Rocha of his appeal rights to the Civil Service Commission. No further explanation was given to Mr. Rocha. (Ex. 2.)

11. Following Mr. Rocha's bypass, DOC selected 208 candidates for appointment. 170 of the candidates ranked below Mr. Rocha on the eligibility list. (Exs. A & 1. Testimony.)

12. By letter filed February 23, 2012, Mr. Rocha timely appealed the DOC's bypass decision to the Civil Service Commission. (Ex. 1.)

13. Under DOC's policy about open criminal cases, whether or not Mr. Rocha could have produced for DOC, a letter of recommendation from his probation officer, or the fact that he ended his probation period before the appointment process for Correction Officers was done, would not have overcome the application of the DOC policy to halt his candidacy when it did. (Ex. 2. Testimony.)

Conclusion and Recommendation

I recommend that DOC's bypass decision be affirmed. The findings make clear that DOC had a reasonable justification for bypassing Mr. Rocha based on its long-term and consistently applied policy not to hire any candidate with an open criminal case at the time the candidate's CORI check is run. *Brckett v. Civil Service Commission*, 447 Mass. 233, 241 (2001); *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). This is what Mr. O'Gara's credible testimony explained. Mr. Rocha's circumstances fell within the reach of this policy to immediately stop his application process for the job of Correction Officer I.

G.L. c. 31, § 1 defines basic merit principles in pertinent part as follows:

(a) recruiting, selecting ... employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

When an Appointing Authority bypasses an otherwise eligible candidate it must provide both a reasonable justification for doing so as well as proof that such a justification could be applied fairly to all potential candidates.

In hearing bypass appeals, the Civil Service Commission must determine whether the Appointing Authority has “sustained its burden of proof that there was reasonable justification for the action taken.” *Cambridge v. Civil Serv. Commission*, 43 Mass. App. Ct. at 304. Reasonable justification requires that the Appointing Authority based its actions on adequate reasons, supported by creditable evidence, guided by common sense, and weighed by an unprejudiced mind. See, *Wakefield v. First District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Serv. Commission v. Municipal Court of Boston*, 359 Mass. 214 (1971). In sustaining its burden of proof, the Appointing Authority must prove its justification by a preponderance of the evidence. G.L. c. 31, § 2(b).

The Civil Service Commission cannot substitute its views and preferences for those of the Appointing Authority. The Civil Service Commission’s role is to “protect against overtones of political control ... and assure neutrally applied public policy.” *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 303. So long as the Appointing Authority provides a sound and sufficient reason for the bypass and applies its policies equally, the Civil Service Commission should not intervene.

When DOC runs a CORI, it examines the data to determine whether or not the candidate has an open criminal case at the time the CORI is run. If so, there is no discretion involved and the candidate’s application process is abruptly stopped. This policy is consistently applied. Only Mr. O’Gara and his supervisor, DOC’s Human Resources Director, review the candidate’s CORI data and determine if there is an open criminal case to trigger application of this policy. Only when a candidate’s criminal record contains closed criminal charges, do Mr. O’Gara and his supervisor engage in a

review with discretion over whether or not that prior criminal charge should cause the applicant to be bypassed. When a criminal record contains an open criminal charge, including a case that is continued without a finding but with terms of probation still open when the CORI is run, DOC's policy automatically applies to disqualify the candidate from appointment. Although this policy is unwritten, Mr. O'Gara gave credible testimony that it has been consistently applied without exceptions for at least the five plus years he had been reviewing CORIs of candidates for hire. He also provided a very consistent account of just how this policy operates. I conclude the existence of the policy and how it applies automatically was shown by a preponderance of the evidence.

The record shows that DOC bypassed Mr. Rocha because he had an open criminal case at the time his CORI check was run. In signing the waiver form on Sept. 30, 2011, DOC put Mr. Rocha on notice that it planned to investigate his criminal history in determining his eligibility for appointment. In challenging DOC's decision, Mr. Rocha raises only one issue. Mr. Rocha claims that the DOC's policy of automatically bypassing candidates with open criminal charges is unfair because it fails to take into account mitigating circumstances such as letters of recommendation he feels he could have provided from his probation officer, and the fact that before the hiring of the Correction Officers occurred, he had successfully finished his probation term with his case thereafter dismissed.

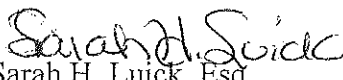
According to Mr. O'Gara, no such mitigating circumstances are ever involved when an open criminal case is found at the time the CORI is run. Such a letter or the fact that the probation term would be over before the hiring of the Correction Officers, would never prevent application of this DOC policy. Because of its feature of operating as an

automatic disqualifier when applicable to the candidate's CORI profile at the time the CORI is run, there is no unfairness in the sense of a candidate being able to avoid the terms of the policy.

DOC's decision to bypass Mr. Rocha has been shown to be reasonable by a preponderance of the evidence. Even though it would have aided Mr. Rocha in appreciating why he was bypassed to have his DOC bypass letter provide a specific reason that included reference to the DOC policy and how it operates, I do not find this lack of information impacts the reasonable justification DOC had for its bypass determination.

For these reasons I recommend that the Civil Service Commission affirm the DOC's bypass determination.

DIVISION OF ADMINISTRATIVE
LAW APPEALS


Sarah H. Luick, Esq.
Administrative Magistrate

DATED: **AUG 14 2012**