

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ANGELO TEIXEIRA,
Appellant,

v.

G1-14-8

DEPARTMENT OF CORRECTION,
Respondent.

Appearance for Appellant:

John Pavlos, Esq.
120 Torrey Street
Brockton, MA 02301

Appearance for Respondent:

Jeffrey S. Bolger
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION

On January 8, 2014, the Appellant, Angelo Teixeira (Mr. Teixeira), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). A pre-hearing conference was held on February 25, 2014 at the offices of the Commission. A full hearing was held at the same location on May 23, 2014.¹ The hearing was digitally recorded.² Both parties submitted post-hearing briefs.

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.

FINDINGS OF FACT:

Ten (10) exhibits were entered into evidence at the hearing. Based on those exhibits, the stipulated facts, the testimony of:

Called by DOC:

- James O’Gara, Jr., Personnel Officer III, DOC;

Called by the Appellant:

- Angelo Teixeira, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, including G.L. c. 6, § 171A, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Mr. Teixeira is thirty-eight (38) years old and has a nine (9) nine year old son. He coaches his son’s youth baseball and basketball teams and serves as a chaperone on his class trips.
(Testimony of Mr. Teixeira)
2. For the past eight (8) years, Mr. Teixeira has served as the beverage coordinator for a restaurant in Southeastern Massachusetts, where he supervises many employees. (Testimony of Mr. Teixeira)
3. Mr. Teixeira graduated from Bristol-Plymouth Vocational Technical High School (Bristol-Plymouth) in 1994. (Testimony of Mr. Teixeira)
4. In 1993, while he was a high school junior at Bristol-Plymouth and enrolled in a “co-op” learning program, he was working at a local garage. (Testimony of Mr. Teixeira)

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.

5. While at the garage on May 13, 1993, some of the adult mechanics told Mr. Teixeira that the garage owner was out of town and that they planned on having a party at the garage. These men told Mr. Teixeira that he could attend the party if he could provide a female prostitute for the party. Mr. Teixeira, then 17, drove to Route 138 in Taunton and attempted to find and pay a prostitute to come to the party. While still in his car talking to a woman on Route 138, he saw the blue flashing lights of a Taunton police cruiser in his rear view mirror.

(Testimony of Mr. Teixeira)

6. Mr. Teixeira was handcuffed, arrested and charged with “Prostitution – Pay for Sex” and “Soliciting – Prostitution”. (Testimony of Mr. Teixeira) Both charges were continued without a finding on July 2, 1993 and dismissed on November 19, 1993. (Exhibit 7)
7. Mr. Teixeira was horrified by this experience which caused him, his family and his girlfriend at the time great embarrassment. He deeply regrets what occurred over twenty-one (21) years ago, claiming it didn’t represent who he was then or he is now. (Testimony of Mr. Teixeira)
8. Approximately two decades after this incident occurred, Mr. Teixeira took the civil service examination for Correction Officer I and received a score of 89. (Stipulated Facts)
9. His name appeared tied for 57th on Certification No. 00974 on July 2, 2013, putting him within the statutory “2N + 1” formula for DOC to consider as part of a hiring cycle in which they ultimately appointed one hundred eighty-two (182) candidates, one hundred forty-three of whom were ranked below Mr. Teixeira. (Stipulated Facts)
10. Mr. Teixeira signed Certification No. 00974, indicating his willingness to accept employment, at which time he was required to sign a waiver form allowing DOC to conduct a background investigation “which will include a check with any past employers, a criminal records check with the local police department, the State Police, the FBI in Washington,

D.C., the Massachusetts Board of Probation, Registry of Motor Vehicles and interviews with any character references.” (Exhibit 4)

11. James O’Gara is a Personnel Analyst III with DOC and coordinates all of the administrative functions related to the hiring process at DOC, including background investigations.

(Testimony of Mr. O’Gara)

12. On July 27, 2009, when testifying before the Joint Committee on the Judiciary in favor of the Administration’s CORI-Reform legislation, Governor Patrick stated: “The only condition we impose [as part of the proposed legislation] is that the employer give the applicant a chance to discuss the criminal record, both its accuracy and its relevance to the job in question, before the employer makes a hiring decision.” (Administrative Notice)

13. DOC never provided Mr. Teixeira with a chance to discuss his criminal record. (Testimony of Mr. O’Gara)

14. DOC never asked Mr. Teixeira to fill out an application for employment. (Testimony of Mr. O’Gara)

15. DOC never asked Mr. Teixeira for a list of current or past employers and, thus, never inquired with any such employers regarding his performance, reliability or character.
(Testimony of Mr. O’Gara)

16. DOC never asked Mr. Teixeira for a list of character references. (Testimony of Mr. O’Gara)

17. DOC evaluated Mr. Teixeira’s candidacy solely on the information obtained from a Criminal Justice Information Services (CJIS) report which listed the criminal matter when he was a junior in high school as well as his driving history. (Testimony of Mr. O’Gara)

18. In regard to a candidate's driving history, DOC focuses primarily on the most recent five (5) years. In the past five (5) years, Mr. Teixeira was cited twice (in 2009) for not having an inspection sticker. (Exhibit 7)
19. During this hiring cycle, DOC appointed other candidates who had more citations on their driving history in the past five (5) years than Mr. Teixeira. (Testimony of Mr. O'Gara)
20. On November 26, 2013, DOC sent Mr. Teixeira written notification that he was bypassed for appointment due to: "Background investigation: Failed CJIS-Negative Criminal History-Prostitution / Pay for Sex; Soliciting 5/13/93; Poor Driving History." (Exhibit 2)
21. G.L. c. 6, § 171A states in relevant part:
- "In connection with any decision regarding employment ... a person in possession of an applicant's criminal offender record information shall provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source prior to questioning the applicant about his criminal history. If the person makes a decision adverse to the applicant on the basis of his criminal history, the person shall also provide the applicant with the criminal history record in the person's possession, whether obtained from the department or any other source ..." (emphasis added) (Administrative Notice)
22. Upon notifying Mr. Teixeira of their adverse employment decision against him, DOC did not provide Mr. Teixeira with a copy of his criminal history record." (Testimony of Mr. O'Gara)
23. Mr. Teixeira filed a timely appeal of DOC's adverse decision to the Commission. (Stipulated Fact)

Legal Standard

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 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).

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.” 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

DOC relied on two (2) reasons to bypass Mr. Teixeira for appointment as a Correction Officer: two (2) entries on his CORI related to a matter that occurred while he was a junior in high school; and his driving record.

In regard to Mr. Teixeira’s driving record, DOC focuses primarily on a candidate’s driving history during the past five (5) years. In the past five (5) years, Mr. Teixeira has a limited

number of violations, including two citations for not having an inspection sticker in 2009. Further, DOC acknowledges that candidates with more citations than Mr. Teixeira in the past five years were appointed during this hiring cycle. For these reasons, DOC has not shown that Mr. Teixeira's driving history is a valid reason for bypassing him for appointment as a Correction Officer.

That turns to DOC's other reason for bypass: two (2) entries on Mr. Teixeira's CORI, both related to a matter that occurred while he was a seventeen (17) year-old high school junior.

In July 2009, while speaking in favor of CORI-reform legislation, Governor Patrick challenged Massachusetts employers to give job applicants a chance to discuss their criminal record before making a hiring decision. That challenge was directed toward *all* Massachusetts employers, public and private. Yet, as starkly illustrated here, one of the larger *state agencies* in Massachusetts is ignoring the Governor's directive. Without ever giving Mr. Teixeira the opportunity to even complete an application for employment, let alone the opportunity to discuss his criminal record, DOC decided to exclude him from consideration. This isn't the first time that DOC has flouted the Governor's directive regarding the criminal records of job applicants. As noted in Rolle v. Department of Correction, CSC Case No. G1-13-260 (2014), DOC, based solely on a CORI that was limited to criminal charges that were dismissed, excluded Ms. Rolle for consideration without ever giving her the opportunity to discuss her criminal record – or fill out an application for employment.

DOC has also ignored a portion of the CORI-reform legislation that was enacted, G.L. c. 6, § 171A, which requires employers to provide job applicants with a copy of their CORI report if such report was used to make an adverse employment decision against them. Upon notifying

Mr. Teixeira of its decision, DOC failed to provide him with a copy of the CORI report which they relied on to exclude him from consideration.

The wisdom of looking behind a CORI report was on full display here. Without doing the type of thorough review referenced in Beverly, DOC, when making its hiring decision, did not know that Mr. Teixeira was a junior in high school when the crime was committed. They did not know that, during the two decades that has transpired since then, Mr. Teixeira has become a father who is actively involved in his son's school and extracurricular activities, serving as a youth sports coach and chaperone for class trips. They did not know that, for the past eight (8) years, Mr. Teixeira has worked as the beverage coordinator for a popular restaurant in Southeastern Massachusetts, supervising many employees. In short, they knew almost *nothing* about Mr. Teixeira, his accomplishments, his character or his ability to perform the duties of a Correction Officer.

DOC failed to conduct the type of thorough review that is required here; they inappropriately relied on a stale CORI report without discussing the CORI with the candidate; and violated the statute that requires them to provide a candidate with his CORI if such report was used to make an adverse employment decision against him.

For these reasons, DOC's decision to bypass Mr. Teixeira is ***overturned***; Mr. Teixeira's appeal under Docket No. G1-14-8 is ***allowed*** and, pursuant to the Commission's authority under Chapter 310 of the Acts of 1993, the state's Human Resources Division (HRD) or DOC in its delegated capacity shall:

1. Place the name of Angelo Teixeira at the top of the next Certification for Correction Officer until such time as he is appointed or bypassed;
2. DOC shall not bypass Mr. Teixeira for appointment based on his CORI report without first giving Mr. Teixeira a chance to discuss his criminal record, both its accuracy and its relevance to the job in question, before making a hiring decision;

3. DOC shall comply with all other law and rules, including, but not limited to, those laws that took effect in 2012 related to CORI reform.
4. In the event that Mr. Teixeira is appointed, he shall be given a retroactive civil service seniority date the same as those candidates appointed from Certification No. 00974. This retroactive date shall not entitle Mr. Teixeira to any additional pay or benefits, including creditable service toward retirement.

Civil Service Commission

/s/Christopher C. Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on July 24, 2014.

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:
John Pavlos, Esq. (for Appellant)
Jeffrey Bolger (for Respondent)
John Marra, Esq. (HRD)