

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GISEMI ROLLE,
Appellant,

v.

G1-13-260

DEPARTMENT OF CORRECTION,
Respondent.

Appearance for Appellant:

Amy Codagnone, Esq.
107 Union Wharf
Boston, MA 02109

Appearance for Respondent:

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

Commissioner:

Christopher C. Bowman

DECISION

On December 4, 2013, the Appellant, Gisemi Rolle (Ms. Rolle), 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 her for original appointment as a permanent, full-time Correction Officer I (CO I). A pre-hearing conference was held on January 7, 2014 at the offices of the Commission. A full hearing was held at the same location on March 7, 2014.¹ 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.

FINDINGS OF FACT:

Thirteen (13) 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:

- Gisemi Rolle, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Ms. Rolle is twenty-seven (27) years old. She has twin children who are six (6) years-old. She graduated from Worcester Academy in 2006 and received an Associates degree from Salter College in 2013. (Testimony of Ms. Rolle)
2. Ms. Rolle currently works two (2) jobs. She has been employed at Heywood Hospital for the past two (2) years as a Certified Nursing Assistant (CNA). As a CNA, she helps patients with eating, cleaning, getting dressed and other associated duties. Ms. Rolle is also employed at the Institute of Professional Practice, Inc. (IPPI) on a per diem basis working with mentally handicapped individuals. (Testimony of Ms. Rolle)
3. Ms. Rolle was encouraged to seek appointment as a Correction Officer by her brother, who has been employed by DOC for the past five (5) or six (6) years. (Testimony of Ms. Rolle)

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.

4. On March 24, 2012, Ms. Rolle took and passed the civil service examination for Correction Officer I. She received a score of 85. (Stipulated Facts)
5. On July 2, 2013, Ms. Rolle's name appeared on Certification No. 00974 for the position of Correction Officer I. Her name appeared in the 61st group of tied candidates. (Stipulated Facts)
6. On July 13, 2013, Ms. Rolle signed the Certification as willing to accept appointment if selected. She also signed a waiver allowing DOC to inquire about her criminal history. (Testimony of Ms. Rolle)
7. Ms. Rolle was never asked to fill out an application for employment. She was never questioned by a background investigator and she was never interviewed by an interview panel. (Testimony of Ms. Rolle)
8. Although the Appointing Authority for DOC is Commissioner Luis Spencer, it is undisputed that he plays no role in the appointment process.
9. 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.
10. James O'Gara is a Personnel Analyst III who has been employed by DOC for seven (7) years. Mr. O'Gara oversees the review of applicants for CO I. (Testimony of Mr. O'Gara)

11. In reviewing Ms. Rolle's criminal history record, Mr. O'Gara observed that Ms. Rolle was charged with "Larceny More" on 8/31/09 and that the charge was dismissed on 10/15/09 contingent on the payment of court costs or performance of community service. (Testimony of Mr. O'Gara and Exhibit 9)
12. Mr. O'Gara never spoke with Ms. Rolle about the entry on her criminal history report nor did he ever ask Ms. Rolle to provide the criminal docket or police reports related to this entry. (Testimony of Ms. Rolle)
13. The arrest report, which was never reviewed by DOC, states that: 1) Ms. Rolle denied stealing any merchandise from a department store; and 2) that her sister admitted that she (the sister) was the individual who stole the merchandise in question. (Exhibit 3)
14. The criminal docket, which was never reviewed by DOC, shows that the charge against Ms. Rolle was "dismissed upon Request of Commonwealth." (Exhibit 13)
15. Mr. O'Gara also reviewed Ms. Rolle's driving history which showed multiple speeding violations, that her license was once suspended and that her license was in a "non-renew" status. (Testimony of Mr. O'Gara)
16. A review of Ms. Rolle's driving history shows that she was found responsible for two (2) speeding violations in 2011 (Holden, MA) and 2012 (Clinton, MA). She was found "not responsible" for a third speeding violation in 2012 (Harvard, MA). (Exhibit 12)
17. The license suspensions and non-renew status were primarily related to an accident that occurred in New Hampshire during icy conditions in January 2012. Ms. Rolle was cited for bald tires. Her failure to pay that ticket and appear in a New Hampshire court ended up resulting in her "non-renew" status in Massachusetts. All citations have now been paid and Ms. Rolle's license is no longer in a "non-renew" status. (Testimony of Ms. Rolle)

18. 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 told Ms. Gotovich that Ms. Rolle had “a hit” within five (5) years on her criminal history and a poor driving record. Based on this information, Ms. Rolle was bypassed for appointment. (Testimony of Mr. O’Gara)
19. There is no written documentation memorializing the conversation between Mr. O’Gara and Ms. Gotovich. According to Mr. O’Gara, Ms. Gotovich usually writes her decision regarding a bypass on a “yellow sticky note” but there was no such note in this case. (Testimony of Mr. O’Gara)
20. On December 4, 2013, approximately five (5) months after signing the Certification, Ms. Rolle received a one-page (1) form letter from DOC stating that she was “not considered” for appointment due to: “Background Investigation: Failed CJIS-Negative Criminal History-Larceny More Than \$250; Poor Driving History.” (Exhibit 6)
21. Ms. Rolle timely filed an appeal with 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

“The only condition we impose 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.”

Governor Deval L. Patrick, testifying before the Joint Committee on the Judiciary in favor of the Administration’s CORI-reform legislation on July 27, 2009.

One month after Governor Patrick spoke these words before the Legislature’s Joint Committee on the Judiciary, Ms. Rolle was arrested and charged with Larceny Over \$250. Ms. Rolle denied the charges; her sister admitted that she stole the merchandise in question; and the

charges against Ms. Rolle were dismissed upon the request of the Commonwealth. Yet, in 2013, the state's Department of Correction bypassed Ms. Rolle for appointment as a Correction Officer primarily because of this criminal charge. They did so without ever giving Ms. Rolle a chance to discuss the dismissed charge or its accuracy. Nor did they retrieve, or ask Ms. Rolle to provide a copy of, the arrest report or the criminal docket sheet. Further, DOC made this decision without ever having Ms. Rolle fill out an application for employment, which would have provided them with a summary of her personal, educational and professional background. This falls woefully short of the "reasonably thorough review" cited in Beverly and is contrary to the stated principles of the Governor.

Had DOC conducted a reasonably thorough review, they would have learned that the charge in question was dismissed at the request of the Commonwealth. They would have learned that Ms. Rolle has consistently denied the charge. They would have learned that Ms. Rolle's sister admitted responsibility for stealing the merchandise. They would have had the opportunity to assess the credibility of Ms. Rolle and determine whether, after hearing her version of events, they had any reservations about her ability to perform the duties and responsibilities of a Correction Officer.

Had DOC conducted a reasonably thorough review, they would have learned that Ms. Rolle has balanced her role as the mother of six (6)-year old twins with two (2) jobs as a CNA and a per diem job assisting mentally-handicapped individuals. They would have learned that she recently obtained an Associates degree and find out why she sought to follow her brother's career path as a Correction Officer. DOC learned none of this. Instead, they relied primarily on an 8 ½ x 11 sheet of paper stating that Ms. Rolle was once charged with a felony to "not consider" her for appointment.

This applies equally to the issues related to Ms. Rolle’s driving history, which, at first blush, might raise some legitimate concerns. Based on the limited documentation before me, and the testimony from the DOC witness, however, I have inferred that the primary reason for the bypass related to Ms. Rolle’s criminal “record” as opposed to her driving history.

Other troubling aspects of the review process here are: the lack of any involvement by the Appointing Authority or the individual purportedly delegated with the responsibility for making appointments; and the lack of any written internal documents (i.e. –written summaries) memorializing how the decision to bypass Ms. Rolle was made.

This is not the first occasion that the Commission has advised DOC of its insufficient vetting process. 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. First, as noted in Machnik, there is no provision in the civil service law or rule that allows such a delegation. Second, even if such delegation were permissible, there was no 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 Ms. Rolle 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 directive apparently received as much consideration by DOC as the Governor’s 2009 statement directed to all Massachusetts employers, both private and public, to give applicants a chance to discuss their criminal record before disqualifying her for employment.

Conclusion

For all of the above reasons, DOC has not provided reasonable justification for its decision to bypass Ms. Rolle for appointment as a Correction Officer I. The decision to bypass Ms. Rolle is overturned and her appeal under Docket No. G1-13-260 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 Gisemi Rolle at the top of any current or future Certification for the position of Correction Officer I until she is appointed or bypassed.
- If Ms. Rolle 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. Rolle 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:

Amy Codagnone, Esq. (for Appellant)

Joseph Santoro (for Respondent)

John Marra, Esq. (HRD)