

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

THOMAS ROUSSEAU,
Appellant
v.

G1-14-24

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Thomas Rousseau

Appearance for Respondent:

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

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Thomas Rousseau, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b), from the decision of the Department of Correction, the Appointing Authority (DOC) to bypass him for appointment to the position of Correction Officer I (CO I). The Commission held an evidentiary hearing on May 19, 2014, which was digitally recorded. DOC called one witness and Mr. Rousseau testified on his own behalf. The Commission received eleven (11) exhibits in evidence.

FINDINGS OF FACT

Giving appropriate weight to the documents in evidence (Exhibits 1 through 11), the testimony of the witnesses (Mr. Rousseau and James O’Gara), and inferences reasonably drawn from the evidence I find credible, I make the findings of fact stated below.

¹ The Commission acknowledges the assistance of Law Clerk Julie Muller in the drafting of this decision.

1. Mr. Rousseau took and passed the civil service exam for Correction Officer on March 24, 2012, achieving a score of 84. (*Exh. 6*).
2. Mr. Rousseau appeared tied for 62 on Certification 00974 issued to DOC by the state's Human Resources Division (HRD) on July 2, 2013. The DOC selected 182 applicants for appointment, 122 of whom were ranked below Mr. Rousseau. (*Exh. 6*).
3. On his application for employment, Mr. Rousseau disclosed on the employment history addendum that he had been formally disciplined by his former employer, Apollo Security in March 2009 because he did not follow protocol and had received two (2) written warnings. (*Exh. 5*).
4. The first step in the process after completing the application is the Criminal Justice Information Services (CJIS) check. Mr. Rousseau passed both the criminal background and driving record check. (*Exh. 4*).
5. On August 1, 2013, Mr. Rousseau reported for the next step in the process, the physical ability test (PAT). Mr. Rousseau successfully passed the PAT. (*Testimony of Mr. O'Gara; Exh. 8*).
6. The interview followed immediately after the PAT. The interview was conducted by a three (3) member panel consisting of a Deputy PM VII, a Correction Officer II, and a Correction Officer I who asked each applicant a series of standard questions. The panel had access to the applicant's application form during the interview. The panel unanimously recommended Mr. Rousseau for hire stating, "Mr. Rousseau presented himself professionally. He was calm doing [sic] his interview. He answered the panel questions clearly and adequately. The panel does recommend this candidate for hire." The panel completed a written assessment of Mr. Rousseau, which rated Mr. Rousseau's

responses “satisfactory” in all questions and four overall traits of “experience and ability.” (*Testimony of Mr. O’Gara; Exh. 8*).

7. Mr. Rousseau testified to remembering a hypothetical question he was asked during the interview. He recalls the question to be what he would do if he was the only correction officer in the yard with forty-five (45) inmates and a fight broke out. His answer was to use his radio to contact backup and to call the necessary code. Then he would wait until back up arrived. (*Testimony of Appellant*).
8. The DOC later produced a document that corroborated Mr. Rousseau’s testimony. One of the questions appearing on the list of Correction Officer I Interview Questions states: “You are working in a housing unit with 45 inmates. One of the inmates is very hostile. He is being verbally abusive to you and the other inmates. What steps would you take to insure that control is maintained and the other inmates are not drawn into also participating in the same type of behavior?” (*Exh. 9*).
9. After passing the PAT and interview, a pre-employment background investigation was conducted by Mark Brennan and was completed on August 25, 2013. (*Exh. 4*).
10. At the time of the background check, Mr. Rousseau was working at Applefield Farm. His employer described him “as a hardworking, dependable individual who can be trusted to get the job done.” There were no disciplinary issues to report and his employer believed Mr. Rousseau would do very well at the DOC. (*Exh. 4*).
11. Mr. Rousseau worked at the United Parcel Service (UPS) during the holiday season of 2012. His former employer did not report any disciplinary actions. (*Exh. 4*).

12. Mr. Rousseau worked at the Country Hen from June 2010 until December 2011. His former employer reported Mr. Rousseau had an “easy-going” and “charismatic” personality and he would do well working at the DOC. (*Exh. 4*).
13. As one of his professional references, Mr. Rousseau listed a current correction officer who said Mr. Rousseau would be the type of person he would want by his side. He described Mr. Rousseau as a “hard working kid.” (*Exh. 4*).
14. Mr. Rousseau’s neighbor provided positive feedback and thought he would do well at the DOC. Mr. Rousseau’s home visit was also positive and Mr. Brennan thought that Mr. Rousseau’s “answers were direct and without hesitation,” leading him to conclude Mr. Rousseau was being “honest and sincere.” (*Exh. 4*).
15. Under positive employment aspects in the background investigation, Mr. Brennan listed: “[g]ood work ethics”, “[h]ard working”, and “[a]ppears eager to serve in [l]aw [e]nforcement.” There are no notes under negative employment aspects. (*Exh. 4*).
16. Mr. Brennan attempted to contact Apollo Security during the background investigation, but was unable to make contact with the employer to obtain the necessary information. (*Testimony of Mr. O’Gara*).
17. Once Mr. Brennan completed Mr. Rousseau’s background investigation, Mr. O’Gara reviewed the information. Mr. O’Gara noted that Mr. Brennan was unable to gather information regarding Mr. Rousseau’s disciplinary reports at Apollo Security. Mr. O’Gara asked Gene Jalette, Supervising Identification Agent, to find out more information regarding the disciplinary actions. Mr. Jalette asked Jason Romans, another investigator, to retrieve the information. (*Testimony of Mr. O’Gara*).

18. A fax from Apollo Security containing copies of Mr. Rousseau's disciplinary reports was received on September 10, 2013. No DOC personnel followed up with anyone at Apollo Security about this matter. The fax described the two disciplinary incidents as follows:
- a. On March 8, 2009, Mr. Rousseau was a security officer for Apollo Security on patient watch in the emergency room at Heywood Hospital when a patient ripped an IV from his arm and tried to leave the hospital. Mr. Rousseau did not restrain the patient but, instead, he radioed another officer. Mr. Rousseau and the other officer tried to verbally persuade the patient to return to the emergency room. The patient continued to verbally threaten Mr. Rousseau and the other officer until he fled through a rear door and retreated into the woods. Mr. Rousseau was unsure whether or not he could use force to restrain the patient and was concerned about getting the patient's blood on him. Mr. Rousseau failed to call a Code 100 to assist, did not have protected gloves on him, and failed to restrain a patient who has harmed himself and threatened others. The disciplinary report is dated March 8, 2009 and the offense description is "[n]eglect of duty." The disciplinary report served as a written warning.
 - b. On May 30, 2009, Mr. Rousseau failed to respond adequately to two codes during his shift. There was a Code Pink called in the Maternity Ward and when Mr. Rousseau arrived, the nurses reported that Mr. Rousseau looked around for a minute and then left. Later in the shift, there was a Code Blue called in the emergency room. Mr. Rousseau again, arrived on the scene, looked around for a minute, and left. Additionally, Mr. Rousseau asked another officer who finished his detail early, to perform his round for him when he was not busy with something else. The

disciplinary report is dated June 1, 2009 and the offense description is “neglect of duty.” The disciplinary report served as a final written warning.

(Mr. O’Gara’s Testimony; Exh. 4)

19. The training to become a security officer at Apollo Security involves a four (4) hour job orientation before starting and four (4) days of on-the-job training. In addition, security officers will watch approximately fifteen (15) online videos and read through the manual.

(Testimony of Appellant).

20. The training to become a Correction Officer I consists of a ten (10) week Recruit Training Program and a forty (40) hour Institution Orientation. (<http://www.mass.gov/eopss/docs/doc/policies/216.pdf>).

21. Mr. O’Gara provided the Commission with the following statistics referring to applicants for Correction Officer I: 728 applicants signed; 264 recommended by interview panel; 13 not recommended by interview panel; 219 passed background investigation; 38 failed background investigation. *(Exh. 11).*

22. Personnel Analyst III O’Gara is responsible for coordinating the review of background investigations completed for Correction Officer applicants. He has been employed by DOC for approximately eight (8) years. *(Testimony of Mr. O’Gara).*

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

24. The official Appointing Authority for DOC is Commissioner Luis Spencer. Under the law, the Deputy Commissioner, Paul DiPaolo has authority to make appointments. Mr. DiPaolo did not review Mr. Rousseau’s file. *(Testimony of Mr. O’Gara)*

25. Mr. O’Gara notes areas of concern in the applicant’s file and sends the whole package of the applicant’s information to Erin Gotovich, DOC’s Acting Director of Human Resource Operations. There is no written summary memorializing what information Mr. O’Gara conveyed to Ms. Gotovich regarding Mr. Rousseau’s candidacy. (*Testimony of Mr. O’Gara*).
26. Karen Hetherson, at the time of the bypass at issue, was 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). Ms. Hetherson makes the decision about bypasses based on Ms. Gotovich’s recommendation. Ms. Hetherson is the highest authority who would review Mr. Rousseau’s file to make a decision concerning a bypass. (*Testimony of Mr. O’Gara*).
27. Mr. O’Gara claimed that, at some point during the selection process, Ms. Gotovich had a verbal discussion with Ms. Hetherson concerning Mr. Rousseau’s ultimate bypass. There was no evidence presented memorializing Ms. Hetherson’s and Ms. Gotovich’s conversation or even that Ms. Hetherson reviewed Mr. Rousseau’s file. (*Testimony of Mr. O’Gara*).
28. On September 13, 2013, Ms. Gotovich hand-wrote the following note on the cover sheet of Mr. Rousseau’s background investigation: “no based on prior work history Apollo Security 9/13/13.” (*Exh. 4*).

29. In a letter dated November 13, 2013, DOC informed Mr. Rousseau he was being bypassed because of his “negative work history” with Apollo Security regarding disciplinary actions. (*Exh. 2*).

30. Mr. Rousseau filed an appeal of DOC’s decision to bypass him for the position of Correction Officer I on January 27, 2014. (*Exh. 6*).

CONCLUSION

Applicable Standard of Review

Appeals from a bypass for original appointment to a permanent civil service position are governed by G.L.c.31, Section 27, which provides:

“If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification] . . . the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest.”

The task of the Commission when hearing a bypass appeal is “to determine . . . whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the decision to bypass the candidate Reasonable justification in this context means ‘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.’ ” E.g., Brackett v. Civil Service Comm’n, 447 Mass. 233, 543 (2006) and cases cited. See also Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321 (1991) (discussing preponderance of the evidence test); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (same)

The Commission’s primary concern is to ensure that the appointing authority’s action comports with “basic merit principles,” as defined in G.L.c.31,§1. Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) citing Massachusetts Ass’n of Minority Law Enforcement

Officers v. Abban , 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. E.g., Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) See also Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (“An Appointing Authority must proffer objectively legitimate reasons for the bypass”); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons.”)

The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001) It is the purview of the hearing officer to determine the credibility of the witnesses who appear before the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (decision relying on an assessment of the relative credibility of witnesses cannot be made by someone who was not present at the hearing)

Analysis

The issue presented is whether or not DOC conducted a reasonably thorough review and offered reasons explaining why it had “legitimate doubts” about Mr. Rousseau’s abilities to serve as a Correction Officer. They have not.

The decision here lacked any involvement by the Appointing Authority or by an individual duly delegated with the responsibility for making appointments. Additionally the appointment process lacked any written internal documents (i.e. –written summaries) memorializing how the decision to bypass Mr. Rousseau was made and what consideration, if any, was made of the many positive traits of Mr. Rousseau’s qualifications.

In Machnik v. Department of Correction, 26 MCSR 21 (2013), Mr. O’Gara stated 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 allowing such a delegation. Even if such delegation were permissible, there was no evidence presented here showing that the Assistant Deputy Commissioner actually reviewed the reasons for bypass, even superficially. In Machnik, the Commission stated: “DOC, on a going forward basis, should ensure that the Commissioner fulfills this important responsibility [of making final hiring decisions]”. See also Moreira v. Department of Correction, 27 MCSR 251 (2014); Rolle v. Department of Correction, 27 MCSR 255 (2014).

Here, no written summary exists that memorialized the alleged verbal discussion between Ms. Gotovich and Ms. Hetherson even occurred. I cannot credit Mr. O’Gara’s testimony regarding the conversation between Ms. Heatherson and Ms. Gotovich and the role Ms. Heatherson played in the decision making process. Indeed, it was Ms. Gotovich who signed the bypass letter issued to Mr. Rousseau. Instead, it appears Ms. Gotovich, who reports to Ms. Hetherson, made the decision to bypass Mr. Rousseau based solely on the “concerns” flagged by her subordinate, Mr. O’Gara, the Personnel Analyst.

Had a reasonably thorough review been conducted, the DOC would have revealed that, save for his brief employment at Apollo Security in 2009, Mr. Rousseau had an exemplary

employment record since then and impressed the interview panel with his answers, including one response specifically germane to his prior lapse of judgment, showing great reflection and progress from his disciplinary actions taking place four (4) years prior. On its face, Mr. Rousseau's response to the interview panel's hypothetical illustrates his growth, his capabilities of learning from his mistakes, and his aptitude to learn. This piece of information would certainly be relevant in determining an applicant's suitability to be a corrections officer. By not conveying the interview information to whomever made the bypass decision, critical information was neglected in making the bypass decision.²

Nor was there any showing that Ms. Gotovich or any other decision-maker had considered Mr. Rousseau's positive employment history since 2009, his strong personal references, and his positive responses to the interview and weighed them against the one negative disciplinary record. DOC presented no witnesses or evidence why the 2009 incident was dispositive, despite recommendation of a well-experienced DOC interview panel and his otherwise positive traits.

It is also noteworthy that the training Mr. Rousseau received as a security officer was relatively sparse and considerably less extensive than the training he would be receiving as a correction officer. This does not serve as an excuse for what Mr. Rousseau did at Apollo Security, but it does indicate, along with his subsequent employment record and interview

² It might behoove the DOC to consider conducting the interview after the background investigation is complete, or in the alternative, provide an opportunity for a follow up interview to explain anything that came up in the pre-employment background investigation. According to the statistics Mr. O'Gara provided to the Commission, of the 264 candidates who passed the interview process, few (38) are eliminated by the background check. Thus, by conducting the background check before the interviews would not seem to add a significant additional workload and would enable the interview panel to have a complete picture of each candidate and allow the interview panel to inquire about potential negative aspects of an applicant's background investigation, give the applicant a chance to respond and provide a sound and reasoned judgment that takes into account the applicant's complete record. In this case, the interview panel would have been able to ask Mr. Rousseau about the two disciplinary reports and give appropriate weight to Mr. Rousseau's answers to the hypothetical questions asked.

response, that the behavior exhibited by Mr. Rousseau in 2009 is not so clearly disqualifying for the position of Correction Officer I.

As the Commission has indicated, in addition to the requirement that an appointing authority conduct a thorough investigation of an applicant's qualifications, where there are substantive judgment calls required to weigh the information received, in fairness to the applicant, and consistent with basic merit principles, those decision must rest with the Appointing Authority or a qualified official in the chain of command duly delegated with authority to make the appointment, with the benefit of all of the information garnered during an investigation and independent review of the results of that investigation. In a case of this nature, this decision is not one to be made, in effect, by the DOC Human Resource support staff. It is true that "the Commission owes substantial deference to the Appointing Authority's exercise of judgment in determining whether there was reasonable justification shown." See Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182, 188 (2010). This standard, however, implicitly assumes that the decision must be made by an official with the substantive training and experience needed to make an informed judgment based on all relevant factors. This is especially true in a case, such as here, where there are pros and cons to an applicant's qualification that must be weighed by such an official in order to make a reasonably justified judgment call. In addition, the DOC must present evidence to detail how that decision-maker arrived at the decision, what was and was not presented and considered by the appointing authority, and to allow the candidate (and the Commission) to test the thoroughness of the investigation and the reasonableness of the justification asserted as the basis for the decision-maker's bypass decision. This did not happen in this case. Here, the Commission heard only Mr. O'Gara's testimony, a personnel analyst who

did not make the decision or even a recommendation. Evidence of whose decision it was, or what information was presented to the decision-maker was not presented.

RELIEF TO BE GRANTED

Accordingly, for the reasons stated above, DOC has not provided reasonable justification for its decision to bypass Mr. Rousseau for appointment as a Correction Officer I. The decision to bypass Mr. Rousseau is overturned and his appeal under Docket No. G1-14-24 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 Thomas Rousseau at the top of any current or future Certification for the position of Correction Officer I until he is appointed or bypassed.
- If Mr. Rousseau is appointed as a Correction Officer I, he 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 Mr. Rousseau with any additional pay or benefits including creditable service toward retirement.

Paul M. Stein

/s/ Paul M. Stein

Commissioner

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman [AYE]; Ittleman [No], McDowell [AYE] and Stein [AYE], Commissioners, on July 24, 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:

Thomas Rousseau (Appellant)

Jeffrey Bolger. (For Respondent)

John Marra, Esq. (HRD)