

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

LIZETTE EMMA,

Appellant

v.

D1-16-194

DEPARTMENT OF CORRECTION,

Respondent

Appearance for Appellant:

Stephen Schultz, Esq.

Engel & Schultz, LLP

One Federal Street, Suite 2120

Boston, MA 02110

Appearance for Respondent:

Jody Brenner, Esq.

Amy Hughes, Esq.

Department of Correction

P.O. Box 946: Industries Drive

Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION

On November 18, 2016, the Appellant, Lizette Emma (Ms. Emma), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to terminate her employment as a Correction Officer I (CO I) for allegedly violating the Department’s “Rules and Regulations Governing All Employees of the Massachusetts Department of Correction”.

On December 13, 2016, I held a pre-hearing conference at the offices of the Commission. A full hearing was held at the same location on March 3, 2017.¹ As no written notice was received from either party, the hearing was declared private. The hearing was digitally recorded.² Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Thirty-five (35) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For DOC:

- Erin Gaffney, Deputy Superintendent, MCI Framingham
- Sara Parmenter, Director of Payroll, Department of Correction
- Robert LeFort, Captain, MCI Framingham
- Jeffrey DiCenzo, Captain, MCI Framingham
- Allison Hallett, Superintendent, MCI Framingham

For Ms. Emma:

- Lizette Emma, Appellant

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. Ms. Emma was employed as a Correction Officer I from August 15, 2004 through November 16, 2016, at which time she was terminated by DOC. (Stipulated Facts)

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

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 the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

2. During the first 10 years of her career as a Correction Officer, Ms. Emma was never the subject of any disciplinary proceedings. (Testimony of Ms. Emma)
3. Prior to 2011, Ms. Emma never missed time from work for which she was off of the payroll. (Testimony of Ms. Emma)
4. Ms. Emma's most recent performance evaluation, covering the period July 2015 through June 2016 stated that: "Officer Emma is a well respected Officer who works the 7 x 3 shift. She is the primary Officer in the ... unit. She is a fair and dependable officer that runs her unit with very little supervision." (Exhibit 22)
5. In 2011, Ms. Emma was out of work, off of the payroll for a period of time, because of a complicated pregnancy and maternity leave. (Testimony of Ms. Emma)
6. In 2012, Ms. Emma was out of work, off of the payroll, for less than one week, because of medical problems being experienced by her new-born son. (Testimony of Ms. Emma)
7. In 2013, Ms. Emma was out of work, off of the payroll, for a period of two to three weeks, because her teenage daughter experienced a life-threatening condition.
(Testimony of Ms. Emma)
8. In 2014, Ms. Emma was out of work, off of the payroll, on FMLA leave from February 16, 2014 through June 3, 2014, because she suffered a serious medical condition due to family problems. For the same reason, she remained out of work after her FMLA leave expired from June 4, 2014 through August 28, 2014. She returned to work effective August 29, 2014. (Testimony of Ms. Emma)
9. On October 29, 2014, DOC issued Ms. Emma a Notice of Charges and Hearing, alleging that she smoked a cigarette while on leave on March 10, 2014 and for being absent without authorization for most of June, July and August 2014. (Exhibit 2)

10. Instead of moving forward with a (DOC) Commissioner's hearing based on the October 29, 2014 charges, Ms. Emma, her union and DOC entered into a Last Chance Settlement Agreement (LCSA) dated November 18, 2014. As part of the LCSA, Ms. Emma received a ten (10)-day suspension. (Exhibit 3)
11. In the LCSA, Ms. Emma admitted that: a) she smoked a cigarette on March 10, 2014, which correctional officers are statutorily prohibited from doing; and b) that she had violated time and attendance policies through her absences. (Exhibit 3)
12. The LCSA stated in part that: "any future violations involving smoking or attendance by Lizette Emma within two years from the date of execution of this LCSA, as determined by the Commissioner of the Department after a hearing shall result in Lizette Emma's termination and Lizette Emma and MCOFU agree to waive any right to appeal such termination." (Exhibit 3)
13. From September 2015 – January 2016, Ms. Emma took leave to assist in the care of her infant son who broke his tibia, and had to be taught how to walk again. (Testimony of Ms. Emma)
14. DOC employees may take up to 26 weeks (i.e. 130 days) of authorized leave under the Family Medical Leave Act ("FMLA"), on a "rolling" 12-month period measured backward. (Exhibits 17 [p. 8], 18, 31).
15. On February 18, 2016, DOC approved Ms. Emma's request for intermittent medical leave and authorized FMLA leave from February 11, 2016 through August 11, 2016. (Exhibit 34)
16. On April 28, 2016, DOC's Director of DOC's Benefits and Leave Unit sent Ms. Emma a letter regarding her attendance. The letter states, "A review of your attendance from

February 11, 2016 through April 9, 2016 reflects you have utilized FMLA every week during this period in conjunction with your scheduled days off including utilizing FMLA every Sunday during this period. Also, four of the weeks during this approval period show that you have used FMLA more than the approved eight hours or two days per episode. This attendance pattern raises concern of your use of intermittent FMLA medical leave. Be advised that your attendance for the current approval period will be closely monitored.” (Exhibit 35)

17. On July 27, 2016, Ms. Emma’s daughter experienced another life-threatening condition. She was hospitalized from July 27, 2016 through September 5, 2016. (Testimony of Ms. Emma)
18. Ms. Emma was a critical part of her daughter’s treatment program. Ms. Emma was requested by her daughter’s treatment team to either be at the hospital on a daily basis for participation in treatment or to be on call 24/7 for the treatment. Ms. Emma understood that she could not be on call, while working at MCI Framingham, because the prison needed advance notice of an officer’s absence in order to arrange for someone to cover for her absence. (Testimony of Ms. Emma)
19. On August 4, 2016, Ms. Emma submitted a medical certification requesting further FMLA leave, because of her need to assist in the treatment of her daughter. On August 17, 2016, Vincent Massey, the Department’s Director of Benefits and Leave Unit, approved Ms. Emma’s request for further FMLA leave, but informed her that her FMLA leave would be exhausted at the end of the day on August 24, 2016. (Testimony of Ms. Emma & Exhibit 7)

20. DOC has the authority to grant, in its discretion, more than 26 weeks of leave in a 52 week period. Any such “discretionary leave” is non-FMLA leave. (Exhibit 8)
21. On a date in early August, Superintendent Hallett, Mr. Massey and other representatives of DOC met in order to discuss the mechanics and reasonableness of granting Ms. Emma discretionary continuous leave beyond her FMLA leave, given the need for Ms. Emma to assist in the treatment of her daughter, who was still hospitalized at the time. (Testimony of Ms. Hallett)
22. Superintendent Hallett’s understanding was that Ms. Emma would be granted continuous discretionary leave immediately upon the expiration of her FMLA leave in order to allow Ms. Emma to participate in the treatment of her daughter. (Testimony of Ms. Hallett)
23. On August 22, 2016, Ms. Emma formally requested discretionary continuous leave (discretionary leave) in order to allow her to assist in the treatment of her daughter. As of the date of this request, both Ms. Emma and DOC understood that Ms. Emma’s entitlement to FMLA leave would end in two days, i.e. August 24, 2016. (Testimony of Ms. Emma; Exhibits 7 & 9)
24. On August 25th and August 28th, 2016, immediately after her FMLA had expired, and before DOC had sent her notification regarding whether her request for discretionary leave had been allowed, Ms. Emma was scheduled to work the 7:00 A.M. to 3:00 P.M. shift. Although she had no sick time available, she called in sick and did not report to work. (Exhibit 20)
25. Ms. Emma was also scheduled to work on August 29th and August 30th, 2016. On August 28th, Ms. Emma contacted DOC. Ms. Emma recalls calling into MCI Framingham to tell them that she would not be reporting to work on *both* August 29th and

August 30th, 2016. (Testimony of Ms. Emma) DOC records show that Ms. Emma only stated that she would be absent on August 29th. (Exhibit 24)

26. After reviewing all of the relevant evidence and testimony, I find that Ms. Emma mistakenly believed that, on August 28th, she told MCI Framingham officials that she would be out of work on August 29th and August 30th. She did not. Rather, she only called out for August 29th, not August 30th. (Testimony of Ms. Emma & Captain LeFort; Exhibit 24)

27. In a letter dated August 29, 2016, DOC notified Ms. Emma that her request for discretionary leave was approved. The letter stated in part:

“Ms. Emma:

We have reviewed your August 23, 2016 medical certification seeking leave due to your family member’s serious health condition. As discussed on August 25, 2016, and as noted in my August 17, 2016 letter to you, your maximum available leave under the Family and Medical Leave Act (FMLA) and Enhanced Family Friendly Benefits (EFFB) was recently exhausted. As also discussed, the August 23, 2016 medical certification indicates that upon your family member’s discharge, continuous supervision will be required, for which you are seeking continuous leave. You have confirmed that your family member has not yet been discharged. On August 26, 2016, you faxed an amended page three of the medical certification, indicating an approximate discharge of September 1, 2016. As such, based on the information, upon confirmation of the actual discharge date from your family member’s provider, you will be approved for discretionary medical leave for a period of thirty days beginning on the discharge date. This leave is not pursuant to the FMLA/EFFB and, therefore, remains subject to the provisions of your collective bargaining agreement.

Available leave credits may be used during this approved leave. If you have sufficient leave credits to cover your absence, there will be no interruption of payroll deductions. If you do not have available leave, your leave will be without pay and you must make direct payment of all fees normally deducted through payroll, such as health insurance, dental/vision, etc. Failure to make such payments will result in termination of those benefits.” (Exhibit 11)

28. On August 30, 2016, Ms. Emma, who mistakenly believed that she had called in for that day, was listed as a “No Show/No Call” by DOC. (Exhibit 5)

29. On August 31st, September 1st, 4th and 5th, 2016, Ms. Emma did not have sick time available, but called in sick and did not report to work. (Exhibit 20 and Testimony of Ms. Emma)

30. In a letter dated September 7, 2016, DOC notified Ms. Emma that:

“We have received your medical certification updated on September 2, 2016 seeking leave due to your family member’s serious health condition. As you know, your maximum available leave under the ... FMLA ... and ... EFFF ... recently exhausted. The August 23, 2016 medical certification indicated that upon your family member’s discharge, continuous parental supervision will be required, for at least two weeks for which you are seeking continuous leave. The updated medical certification has confirmed that your family member’s discharge date is September 6, 2016. As such, based on information, you are approved for discretionary continuous medical leave for a period of up to thirty days beginning on September 6, 2016 and ending on October 5, 2016. This leave is not pursuant to the FMLA/EFFF and, therefore, remains subject to the provisions of your collective bargaining agreement.

Available leave credits may be used during this approved leave. If you have sufficient leave credits to cover your absence, there will be no interruption of payroll deductions. If you do not have available leave, your leave will be without pay and you must make direct payment of all fees normally deducted through payroll, such as health insurance, dental/vision, etc. Failure to make such payments will result in termination of those benefits.” (Exhibit 12)

31. In a memorandum dated September 16, 2016, Allison Hallett, Superintendent at MCI Framingham, sent a letter to the DOC Commissioner stating in part:

“I would like to request that a Commissioner’s hearing be scheduled in order to determine the appropriate disciplinary action to be taken against Correction Officer Lizette Emma as a result of her continued attendance issues. Attached please find a copy of the Last Chance Agreement and Release on November 18, 2014, which states in part:

The parties further agree that any future violations involving smoking or attendance by Lizette Emma within two years from the date of execution of this LCSA, as determined by the Commissioner of the Department after a hearing, shall result in Lizette Emma’s termination and Lizette Emma and MCOFU agree to waive any right to appeal such termination.

Also attached is a copy of CO Emma’s calendar and letter from Human Resources Department dated February 18th, April 28th, August 29th and September 7, 2016 regarding her Family and Medical Leave Benefits which clearly illustrates her continued attendance

violations. As a result, I believe a Commissioner's hearing is warranted to consider her termination." (Exhibit 15)

32. As referenced in the prior findings, the DOC letters dated February 18th, August 29th and September 7th do not reference "continued attendance violations", but, rather, relate to DOC's approval of FMLA or discretionary leave for Ms. Emma. (Exhibits 11 and 12)

33. Ms. Emma returned to work from her discretionary leave on October 6, 2016. (Exhibits 5 & 20)

34. Ms. Emma called in sick on October 17, 18, 19 and 20, 2016 to take care of two of her children who were ill (tonsillitis and a "respiratory condition"). She had no sick leave available, except for 5.09 hours of sick leave that was available on October 17th.
(Testimony of Ms. Emma)

35. As of October 17, 2016, Ms. Emma had 36.98 hour of vacation time available. (Exhibit 20)

36. By letter dated October 21, 2016, DOC sent a letter to Ms. Emma informing her that a Commissioner's hearing would be held on November 3, 2016 to determine whether she should be disciplined based on the results of an investigation "that revealed the following:

1. You did not report for your scheduled shift on August 30, 2016. You were not authorized to be absent from the institution. Accordingly, you were 'Not on Payroll' for this date.
2. You called in sick and failed to report to work on the following dates: August 25, 28, 29, 31, September 1, 4 and 5, 2016. You had no sick leave available to cover these absences. Accordingly, you were 'Not on Payroll' for these dates.
3. You called in sick and failed to report to work on the following dates: October 17, 18, 19 and 20, 2016. You did not have sufficient sick leave available to cover these absences. Accordingly, you were 'Not on Payroll' for approximately 2.91 hours on October 17, 2016 and for 8 hours per day on October 18, 19 and 20, 2016.

4. The above-mentioned attendance matters took place after you had entered into a Last Chance Settlement Agreement, dated November 2014 regarding attendance and smoking. This LCSA remains in effect until November 18, 2016.” (emphasis in original) (Exhibit 13)”

37. A (DOC) Commissioner’s hearing was held on November 10, 2016. Ms. Emma attended the hearing with two (2) union representatives and testified on her own behalf. (Exhibit 14)

38. The (DOC) hearing officer upheld all of the charges and Ms. Emma was terminated, effective November 16, 2016.

Legal Standard

G.L. c. 31, § 43, states:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the

efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the 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, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331 (1983).

An appointing authority may terminate an employee who is medically incapable of performing his position. Rivera v. Dep't of Correction, 26 MCSR 502 (2013), *citing* Brackett v. Gloucester Housing Authority, 10 MCSR 127 (1997) (termination of maintenance worker who had stopped reporting to work because of back problems) and Hilton v. Dept. of Employment and Training, 10 MCSR 247 (1997) (termination of employee stopped working because of chronic fatigue.)

Analysis

Jurisdiction

As a preliminary matter, DOC, as part of these proceedings, has reserved its right to challenge whether the Commission has jurisdiction to hear this appeal due to the language in the November 18, 2014 LCSA which stated: “any future violations involving smoking or attendance by Lizette Emma within two years from the date of execution of this LCSA, as determined by the Commissioner of the Department after a hearing shall result in Lizette Emma’s termination and Lizette Emma and MCOFU agree to waive any right to appeal such termination.” (*emphasis added*) Based on a review of other LCSAs submitted by DOC regarding other DOC employees, it appears that this language is contained in all LCSAs drafted by DOC that are related to disciplinary issues. For the reasons cited in Kenney v. Cambridge Housing Authority, 20 MCSR 160 (2007), that practice should come to an end forthwith.

In Kenney, the Appellant had signed a last chance agreement, waiving his right to file an appeal with the Civil Service Commission for a period of one year after reinstatement. When he was terminated during this one-year window, he filed an appeal with the Commission, prompting the appointing authority to file a motion to dismiss the appeal based on a lack of jurisdiction. The Commission denied the motion stating, in relevant part:

“Although parties have the ability to reach agreements freely, such ability is not without limitations. An agreement between two parties shall not be enforced if it is in violation of recognized public policy. Bureau of Special Investigations v. Coalition of Public Policy. 430 Mass. 601, 603 (2000). Public policy is laid out in the statutory language, wherein the Legislature intimates the policy concerns underlying the enactment of the statute. Beacon Hill Civic Association v. Ristorante Toscano Inc.. 422 Mass. 318, 321 (1996). The Judiciary may also determine public policy. See A.Z. v. B.Z.. 431 Mass. 150, 160-161 (2000). (“To determine public policy, we look to the expressions of the Legislature and to those of this court.”). T.F. v. B.L.. 442 Mass. 522, 529 (2004).”

A fundamental purpose of the civil service law, as codified in the basic merit principles of Chapter 31, is “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, s. 1. See Callanan v. Personnel Administrator for Comm; 400 Mass. 597, 600 (1987). Debnam v. Belmont, 388 Mass. 632, 635 (1983). Chapter 31 bestows the Civil Service Commission with the authority to “hear and decide appeals by persons aggrieved by decisions, actions or failures to act by local appointing authorities in accordance with the provisions of section eight of chapter thirty-one A”. G.L. c. 31 s. 2(c).

The Legislature clearly recognized a strong policy interest in preventing public employers from making unjustified decisions concerning its employees. If the Appellant were permitted to waive his future civil service rights by agreement, then the legislative purpose behind the law would be frustrated. Any action the Appointing Authority took against the Appellant would be without review. This is exactly the type of situation that Chapter 31 was enacted to prevent; an appointing authority having unchecked discretion to treat an employee as it

wishes without the need to justify its actions. It must be noted that the Appellant agreed to waive any rights to arbitration under the collective bargaining agreement in addition to his waiver of his civil service rights. If the Appellant still had the means to submit a complaint to arbitration, then the agreement might not violate public policy. Arbitration, if elected by the employee, shall be the exclusive means of settling grievances involving disciplinary action taken by the employer, even if the subject of the grievance would normally be within the jurisdiction of the Commission. G.L. c. 150E, s. 8. See Sullivan v. Town of Belmont, 7 Mass. App. Ct. 714, 716 (1979). The Commission has held that an employee maintains their right to appeal under Chapter 31 throughout every step of the grievance procedure until they decide to pursue their grievance to arbitration. Stewart v. Department of Employment and Training, 7 MCSR 240 (1994). Vaughn v. Department of Public Health, 7 MCSR 248 (1994). In this case, the Appellant would have no means of making such an election because he has waived his rights to arbitration through the grievance process. The agreement reached by the parties in this matter does not provide the Appellant with any means of relief whatsoever against future action taken the Appointing Authority.

...

The Commission also takes notice of the fact that the Appellant waived his rights to “civil service” for a period of one year. This language is without modification or limitation. It is uncertain whether the parties intended that the Appellant surrender all of his rights to make any sort of appeal as permitted under the civil service law. The civil service law allows an employee to appeal to the Commission when aggrieved by an action of the Personnel

Administrator, as well as by the appointing authority. G.L. c. 31 s. 2(b). The terms of the agreement would bar the Appellant from appealing even those matters that did not involve the

Appointing Authority, such as an examination appeal.

Had the agreement only required the Appellant to withdraw his appeal at the time, the Commission would have no contention with the agreement. Indeed, the Commission encourages parties to reach an agreement where appropriate rather than proceed with the appeals process. However, the Commission will not enforce an agreement containing a complete waiver of an employee's civil service rights for matters yet to arise ..." (emphasis added)

Just Cause

From 2004 to 2011, Ms. Emma's first seven (7) years of employment with DOC, she had no disciplinary issues and no need to request time off the payroll. Then a series of life events intervened that required her to take both paid and unpaid leave, including FMLA. As noted in the findings, Ms. Emma's challenges included, but were not limited to: a complicated pregnancy; her newborn son's subsequent illness soon after birth; a serious personal illness; her son's broken tibia; and her teenage daughter's recurring life-threatening issues that required her attention.

In 2014, Ms. Emma acknowledged that: a) she was not authorized to be absent for three periods of time in June, July and August of that year; and 2) she had smoked a cigarette while out on leave (as documented by an investigator hired by DOC). Those actions resulted in a 10-day suspension and the LCSA referenced above. Upon her return to work, Ms. Emma took authorized FMLA leave to deal with many of the above issues, including a serious personal illness and her daughter's life-threatening issues that required her constant attention. It is undisputed that Ms. Emma was on some form of *authorized* FMLA leave to deal with these issues through *August 24, 2016*, at which time her eligibility for unpaid FMLA leave was set to expire.

As August 2016 progressed, the fast-approaching FMLA expiration date created a dilemma for Ms. Emma. Her daughter was hospitalized at the time due to a life-threatening issue and required Ms. Emma's constant attention. Even after her discharge, the medical professionals responsible for her daughter's care informed Ms. Emma that she needed to be part of her daughter's rehabilitation plan. It was clear to Ms. Emma that she would not be able to return to work while her daughter was hospitalized and during the rehabilitation period that would follow.

Sometime in early August 2016, DOC officials met to discuss the mechanics and reasonableness of granting Ms. Emma discretionary leave beyond her FMLA leave to care for her daughter. Superintendent Hallett left that meeting of DOC officials understanding that Ms. Emma would be granted discretionary leave immediately upon the expiration of Ms. Emma's FMLA leave. That, however, was not the case. DOC was only willing to grant discretionary leave *upon the discharge of Ms. Emma's daughter from the hospital and entry into the rehabilitation program*, a date that was eventually established as September 6, 2016. That left a gap of time between August 24, 2016 and September 6, 2016 in which Ms. Emma needed to be with her daughter in the hospital but had no sick time or authorized FMLA or discretionary time. This is the time period that corresponds with the following two (2) of four (4) charges that formed the basis of Ms. Emma's termination:

1. You did not report for your scheduled shift on August 30, 2016. You were not authorized to be absent from the institution. Accordingly, you were 'Not on Payroll' for this date.
2. You called in sick and failed to report to work on the following dates: August 25, 28, 29, 31, September 1, 4 and 5, 2016. You had no sick leave available to cover these absences. Accordingly, you were 'Not on Payroll' for these dates.

In regard to Charge #1, DOC alleges that Ms. Emma failed to report for her shift on August 30th without calling and informing DOC of her absence. As referenced in the findings, I have

concluded that Ms. Emma mistakenly believed that she called in for two (2) days (August 29th and August 30th) when she called MCI Framingham on August 28th. She did not. Rather, she only called in for August 29th.

Charge #2 relates to DOC's allegation that, although Ms. Emma called in for these days, the absences were unauthorized as Ms. Emma had exhausted her sick time and had no authorized FMLA or discretionary time. Ms. Emma does not dispute this. Rather, she argues that DOC was wrong to terminate her for this given that DOC knew or should have known that she would need to miss work in order to care for her daughter in the hospital during the time period after her FMLA leave expired, but before the date they selected for her discretionary leave to begin. in order to allow Ms. Emma to participate in the essential treatment of her daughter.

DOC argues that they went *beyond* any legal requirements by granting Ms. Emma additional discretionary time to attend to her family situation. However, DOC argues that, without diminishing the circumstances surrounding the condition of Ms. Emma's daughter, DOC cannot properly run a prison when employees repeatedly do not show up as required and that it was not unreasonable to expect Ms. Emma to make arrangements to be at work during her 7:00 A.M. to 3:00 P.M. shift during the short gap between the end of her FMLA and the beginning of her discretionary leave.

Ms. Emma's authorized discretionary time began on September 6th and was effective through October 5th. While Ms. Emma was on this leave to participate in her daughter's rehabilitation, Superintendent Hallett penned a memo on September 16th to initiate disciplinary proceedings against Ms. Emma. That memo is troubling as it states in part, " attached is a copy of CO Emma's calendar and letter from Human Resources Department dated February 18th, April 28th, August 29th and September 7, 2016 regarding her Family and Medical Leave Benefits which

clearly illustrates her continued attendance violations. As a result, I believe a Commissioner's hearing is warranted to consider her termination." (emphasis added) As referenced in the findings, the DOC letters dated February 18th, August 29th and September 7th do not reference "continued attendance violations", but, rather, relate to DOC's approval of FMLA or discretionary leave for Ms. Emma.

The following remaining charge(s) (#3 & #4) relate(s) to the time period *after* Ms. Emma's discretionary leave expired on October 5th:

3. You called in sick and failed to report to work on the following dates: October 17, 18, 19 and 20, 2016. You did not have sufficient sick leave available to cover these absences. Accordingly, you were 'Not on Payroll' for approximately 2.91 hours on October 17, 2016 and for 8 hours per day on October 18, 19 and 20, 2016.
4. The above-mentioned attendance matters took place after you had entered into a Last Chance Settlement Agreement, dated November 2014 regarding attendance and smoking. This LCSA remains in effect until November 18, 2016." (Exhibit 13)

Ms. Emma does not dispute that, with the exception of 5.09 hours of sick time, she had no sick time available to her when she called in sick to care for her sick children. Rather, she argues that she was entitled to FMLA for the 3 ½ days that DOC claims she was absent without authority during this period. Ms. Emma argues that, as of October 17, 2016 (i.e. the first date of absence in October, 2016), she was entitled to 14 days of FMLA leave, as she had only utilized 116 days of FMLA leave in the prior 365 days. Further, Ms. Emma argues that, even if, *arguendo*, she was not entitled to count any dates for which she was on discretionary leave as part of the 365 backward looking days from which it is determined how many FMLA dates she had taken, she would still have been entitled to 5 days of FMLA leave as of October 17, 2016. She argues that DOC failed to meet its obligation to inform her of her entitlement to take these sick days in issue as FMLA leave and points the Commission to a *Department of Labor Fact*

*Sheet & Employer Notification Requirements under the Family and Medical Leave Act, submitted as Exhibits 28 and 33 which states in part: “eligibility notice . . . must . . . [b]e provided within **five business days** of . . . when the employer acquires knowledge that an employee leave may be for an FMLA-qualifying reason; . . .”*)(Emphasis in original).

DOC argues that Ms. Emma’s argument is without merit because she did not request FMLA leave for these dates and that DOC was not on notice that Ms. Emma’s absences on these dates might be for an “FMLA qualifying reason” because Ms. Emma testified before the Commission that when she called in sick in October, she simply called in “SL2,” without explanation. Therefore, DOC argues that they could not have notified her that FMLA may be available because Ms. Emma did not disclose the nature of the illnesses which caused her to call in sick. Finally, DOC argues that, even if Ms. Emma put DOC on notice of why she was out of work on October 17-20, 2016, these illnesses, (tonsillitis and a respiratory condition/chest infection) do not meet the definition of a serious medical condition that would warrant the approval and/or use of FMLA time.

Ms. Emma also argues that it was DOC practice to allow employees to utilize vacation time as sick days, when an employee had no entitlement to paid sick time, even though the employee had not requested the vacation time in advance. DOC argues that the fact that Ms. Emma may have had vacation time available in October is irrelevant as there is no evidence that she asked permission to use vacation time to cover these absences and that vacation picks are subject to collective bargaining agreements and vacation days must be requested at least ten days in advance. Finally, DOC argues that it is hard to imagine that Ms. Emma could not find someone else to stay with her children those days as opposed to calling in sick with no leave available, especially since she knew her job was at risk, noting that Ms. Emma’s husband (and the father of

the young son) was present with her during the entire hearing and no explanation was offered as to why he was not able to care for his sick son on those dates.

Ms. Emma has lived through and endured an incredibly unfortunate string of unfortunate events over the past few years. For that reason, I urged the parties, as part of the pre-hearing conference, to engage in settlement discussions guided by the principles of equity and good conscience. Those efforts were not successful, leaving it to the Commission to determine solely whether DOC, by a preponderance of the evidence, has shown that they had just cause to discipline Ms. Emma. They have.

While there may have been compelling humanitarian reasons to grant Ms. Emma discretionary time from August 24th to September 6th, while Ms. Emma's daughter was hospitalized, DOC was not required to. As such, when Ms. Emma failed to appear for her scheduled shifts during this time period and she violated DOC time and attendance policies. Further, although I have concluded that she mistakenly believed that she had called in to report her absence on August 30th, a preponderance of the evidence establishes that she did not. This "no call / no show" in addition to the overall absences during this time period provided just cause for discipline.

Similarly, DOC had just cause to discipline Ms. Emma for failing to report to work after her discretionary time had expired in October 2016. By this time, Ms. Emma had exhausted her approved FMLA and the additional discretionary time that had been granted to her. She was also aware that she was still subject to the provisions of a last chance agreement that resulted, in part, from past time and attendance abuses. For all of the reasons cited by DOC, I conclude that DOC was not required to allow Ms. Emma to use accrued vacation time nor were they required, based

on the evidence presented to her, to notify her of her right to request additional FMLA, which she was unlikely to qualify for anyway.

In reaching this conclusion, I did consider Ms. Emma's argument that DOC was, at least in part, motivated by an alleged displeasure with Ms. Emma exercising her lawful right to utilize FMLA. The September 16th internal memo from the Superintendent of MCI Framingham, suggests exactly that, conflating Ms. Emma's use of FMLA with time and attendance violations. Ultimately, however, I believe that DOC's decision here was based on a sincere and legitimate desire to ensure proper staffing. Had DOC been intent on disciplining Ms. Emma for impermissible reasons (i.e. – using FMLA), it is unlikely that they would have granted her additional discretionary time, in what appears to be an unprecedented – and laudatory – step.

In summary, Ms. Emma's failure to report to work for multiple shifts in August and September, including one "no call / no show" and her failure to report to work for multiple shifts in October, provided DOC with just cause to discipline her.

Having determined that it was appropriate to discipline Ms. Emma, I must determine if DOC was justified in the level of discipline imposed, which, in this case, was termination.

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. "The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Falmouth v. Civ. Serv. Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600

(1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” E.g., Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).

First, my findings of fact do not differ significantly, if at all, from those reported by DOC nor have I interpreted the relevant law in a substantially different way. Further, after considering all of the evidence, I have concluded that DOC’s decision here was not the result of any impermissible motivations such as political or personal bias or any other unlawful reasons.

In regard to the principle of uniformity and whether similarly situated individuals were treated differently, Ms. Emma, based on a series of LCSAs submitted as exhibits, argues that DOC has recognized that the existence of a “last chance” settlement agreement does not mandate that an employee be terminated even if the employee is found to be in technical violation of the language of the agreement. On at least five occasions, Ms. Emma argues, DOC has granted second, “last chance” settlement agreements to employees. On one such occasion, the original “last chance” agreement had been issued because of the employee’s “sick leave abuse and excessive absenteeism”. Given that DOC has purportedly provided second “last chance agreements” to other employees similarly situated to Ms. Emma, she argues that any decision to terminate her would violate the principle of uniformity and equitable treatment of similarly situated individuals.

DOC argues that that fact that a handful of employees may have entered into more than one LCSA, in no way obligates DOC to enter into a second LCSA with Ms. Emma. They argue that these LCSAs involving other employees were negotiated between the various parties for many

reasons; that each employee had a different length of service, disciplinary history and misconduct, all of which may have factored into the negotiations. Moreover, DOC argues, each LCSA contains language to the effect that it may not be used as precedent in other cases.

I have reviewed all of the LCSAs submitted as evidence. The LCSA involving “Employee D” is the most similar to the issues involved in the instant appeal.

On December 13, 2013, DOC made the following allegations against Employee D:

“At my request, my investigation was initiated on August 12, 2013 after learning that [Employee D] was only working one day a week due to his working at a bar ... On September 11, 2013 I made a request through [the Worker’s Compensation Director] to conduct surveillance via an outside contractor of [Employee D]’s activities regarding his excessive use and possible abuse of sick time. He was observed to work at a golf tournament held at the [redacted] on October 4, 2013; and it was also confirmed that he was on the work schedule

A review of the Shift Roster for Friday, October 4, 2013 revealed that [Employee D] had only worked nine (9) days since July 1, 2013 and had been out sick/INP (Illness No Pay) for 74 days during that time. A similar pattern of sick time use was also observed during the summer months of 2012; although not as excessive.”

On February 17, 2014, DOC and Employee D entered into a LCSA similar to the LCSA involving Ms. Emma, in which he was suspended for five (5) days and agreed that he would be terminated for any similar violations within a two-year period.

Approximately nine (9) months later, on November 26, 2014, DOC alleged that Employee D “inappropriately used sick leave to attend a golf tournament” on or about October 15, 2014. Unlike Ms. Emma, Employee D was not terminated. Rather, Employee D and DOC entered into a second LCSA on January 15, 2015 in which Employee D received a fifteen (15)-day suspension, five (5) days of which were held in abeyance. The terms of the prior LCSA were extended for one (1) additional year.

Employee D violated the LCSA by abusing sick time to attend a golf tournament. Rather than terminate Employee D, DOC chose to effectively impose an additional ten (10)-day suspension

and extend the LCSA. Ms. Emma violated the LCSA for bona fide medical reasons related to her children, including caring for her daughter who was experiencing a life-threatening condition. She was terminated. I cannot conjure up a more egregious example of disparate treatment, warranting the Commission's intervention in the form of a modified penalty.

Conclusion

Ms. Emma's appeal, under Docket No. D1-16-194 is hereby ***allowed in part***. Pursuant to the Commission's authority under G.L. c. 31, s. 43, the termination is hereby modified to include the same penalty imposed on Employee D for violating his LCSA, including a fifteen (15)-day suspension, five (5) of which will be held in abeyance if no future violations occur within one (1) year.

Further, DOC shall reimburse Ms. Emma for expenses incurred in defending herself, not to exceed the limits contained in G.L. c. 31, s. 45.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 6, 2017.

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)(1), 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Stephen Schultz, Esq. (for Appellant)

Jody Brenner, Esq. (for Appointing Authority)

Amy Hughes, Esq. (for Appointing Authority)