

The Commonwealth of Massachusetts

Decision mailed: 10/23/09
Civil Service Commission *CB*

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

WILLIAM DESROCHES,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: D1-08-325

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 22, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated July 27, 2009. The Commission received comments from the Appellant on August 27, 2009. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein.

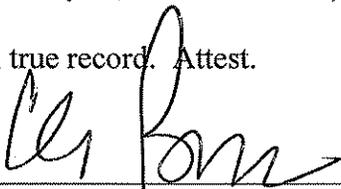
A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

SCRIVENOR'S ERROR

Finding of Fact #1: The date of 1999 is amended to reflect the correct date of March 29, 1998.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 22, 2009.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Robert A. Stewart, Esq. (for Appellant)
Heidi D. Handler, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 NORTH WASHINGTON STREET, 4TH FLOOR
BOSTON, MA 02114

SHELLY L. TAYLOR
Chief Administrative Magistrate

Tel: 617-727-7060
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July 27, 2009

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

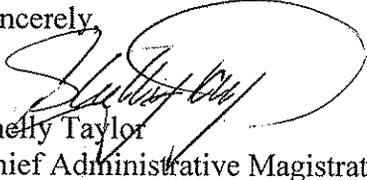
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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Re: William Desroches v. Department of Correction
DALA Docket No. CS-09-77

Dear Chairman Bowman:

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

Sincerely,


Shelly Taylor
Chief Administrative Magistrate

SLT/das

Enclosure

cc: Robert A. Stewart, Esq.
Heidi Handler, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

William Desroches,
Appellant

Docket No. D1-08-325
DALA No. CS-09-77

v.

Department of Correction,
Appointing Authority

Appearance for Appellant:

Robert Stewart, Esq.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

Appearance for Appointing Authority:

Heidi Handler, Esq.
Massachusetts Department of Correction
One Industries Drive
P.O. Box 946
Norfolk, MA 02056

Administrative Magistrate:

Joan Freiman Fink, Esq.

SUMMARY OF DECISION

The Appointing Authority has demonstrated just cause to discharge the Appellant from his position as a Correction Officer II with the Department of Correction (DOC). His use of profane and foul language during an incident at the Health Services Unit Medication Room violated the Rules and Regulations Governing All Employees of the Department of Correction. In addition, the Appointing Authority demonstrated that the Appellant was less than truthful during questioning by a Department investigator regarding the above-referenced conduct.

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RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, William Desroches, is appealing the November 26, 2008 decision of the Appointing Authority, the Department of Correction, discharging him from his position as a Correction Officer II with the Department of Correction. (Exhibit 6.) The Appellant filed a timely appeal of this decision with the Civil Service Commission. (Exhibit 7.)

A hearing in this matter was held on April 29, 2009 at the offices of the Division of Administrative Law Appeals. As no written request was received from either party, the hearing was declared to be private. Various documents were entered into evidence at the hearing. (Exhibits 1– 9.) At the hearing, the parties agreed to the post-hearing submission of disciplinary records for other Correction Officers. These records were submitted by Counsel for the Appellant and were marked into evidence as Exhibit 10. Three cassette tape recordings were made of the hearing. The record in this case was left open until June 11, 2009 for the filing of written closing memoranda.

Adalgisa Ortiz, who is currently employed as a Visiting Nurse and who was formerly employed by DOC as a Charge Nurse in the Medication Unit at Cedar Junction Walpole, testified for the Appointing Authority. The Appointing Authority also called as witnesses the following employees of the DOC: Steven Stonely, an LPN employed at Cedar Junction Walpole and Sergeant Harold Wilkes, a Correction Officer II and head of Investigative Services. The Appellant testified in his own behalf.

The Appointing Authority maintains that just cause exists to discharge the Appellant from his employment as a Correction Officer II for violation of General Policy

I, Rule 1,¹ Rules 6(a) and (b),² and Rules 19(c) and (d)³ of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. Specifically, the Appointing Authority alleges that on November 10, 2007, while he was in the Health Services Unit medication room, the Appellant repeatedly used foul language including calling mentally ill inmates “fucking crazies” and further that these statements were made in the presence of Nurse Ortiz. According to the Appointing Authority, when Nurse Ortiz asked the Appellant to stop using such language, he did not refrain from using profanity. The Appointing Authority further alleges that the Appellant, while speaking to another DOC employee, referred to Nurse Ortiz as a “bitch” and “fucking bitch.” The Appellant stated to Nurse Stonely that “If I have to go out on an I.A., you can bet her name will be on it.” According to the Appointing Authority, a short time later when Nurse Ortiz walked down the hallway on her way to the ladies’ room, the Appellant made inappropriate noises with his mouth including “farting noises.” Finally, the Appointing Authority maintains that the Appellant was less than truthful when he was questioned by a Department investigator regarding this incident.

¹ General Policy I provides in part that: “Nothing in any part of these rules and regulations shall be construed to relieve an employee ... from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will not be excused whether or not it is specifically mentioned and described in these rules and regulations”

² Rule 6 (a) provides in part that: “In your working relationships with coworkers, you should treat each other with mutual respect, kindness, and civility” Rule 6 (b) provides in part that: Do not foster discontent or otherwise tend to lower the morale of any employee”

³ Rule 19(c) provides in part that: “Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself” Rule 19 (d) provides in part that: “It is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders”

FINDINGS OF FACT

Based on the documents entered into evidence (Exhibits 1 – 10) and the testimony of Adalgisa Ortiz, Steven Stonely, Harold Wilkes, and William Desroches, I make the following findings of fact:

1. The Appellant, William Desroches, commenced employment as a Correction Officer with the DOC in or about 1999. He was promoted to the position of Correction Officer II (Sergeant) at Cedar Junction Walpole on September 5, 2001.

(Testimony of the Appellant.)

2. The Appellant's prior disciplinary record with the DOC includes a thirty (30) day suspension and final warning issued on August 14, 2007, for failure to report involvement with law enforcement and failure to report an arrest; a twenty (20) day suspension issued on June 26, 2007, for making inappropriate comments to an inmate and to staff concerning the inmate as well as being less than truthful during the course of an investigation; a fifteen (15) day suspension issued on May 16, 2007, for failure to report arrests for assault and battery, driving under the influence of alcohol and having a 209A restraining order issued against him; a five (5) day suspension and transfer to another institution issued on December 24, 2002, for a verbal and physical confrontation with another employee; a three (3) day suspension with one (1) day held in abeyance issued on June 21, 2006, for failure to properly supervise officers; and a letter of reprimand issued on June 30, 2002, for scheduling issues. (Exhibit 4.)

3. Adalgisa Ortiz is a registered nurse who began her employment with the DOC in 1999 at MCI Framingham. In 2001, she transferred to MCI Cedar Junction. At MCI Cedar Junction, she was the medical supervisor of the Health Services Unit (HSU).

She left the employ of DOC in December 2008 and is currently working as a Visiting Nurse. (Testimony of the Adalgisa Ortiz.)

4. Steven Stonely is a licensed practicing nurse employed by UMass Medical Services. During 2007, Mr. Stonely regularly worked with Nurse Ortiz. (Testimony of Steven Stonely.)

5. Prior to November 10, 2007, the Appellant and Nurse Ortiz had worked together when, on occasion, Sergeant Desroches had been assigned to work in the HSU at MCI Cedar Junction. As the Sergeant in the HSU, the Appellant was responsible for the security of the unit. During the shifts that they worked together, the Appellant was technically Nurse Ortiz's supervisor, although he had no authority with respect to the medical treatment of inmates. (Testimony of Adalgisa Ortiz; testimony of the Appellant.)

6. On several occasions prior to November 10, 2007, Nurse Ortiz had cautioned the Appellant to "watch his language" around her and that she felt that his general conduct was demeaning to her. (Testimony of Adalgisa Ortiz.)

7. On November 10, 2007, both Nurse Ortiz and the Appellant were working in the HSU. At one point, the Appellant approached Nurse Ortiz in the medication room and started talking to her about the inmates, calling them stupid inmates and then "fucking crazy inmates." (Testimony of Adalgisa Ortiz.)

8. As the Appellant's comments made her feel uncomfortable, Nurse Ortiz told the Appellant not to use that language in front of her as it offended her. The Appellant disregarded her request to refrain from such language and kept calling the inmates "fucking crazies." (Testimony of Adalgisa Ortiz.)

9. Nurse Ortiz became frightened by the Appellant's language. She looked over at her co-worker, Nurse Stonely, and gave him a non-verbal cue to the effect that the Appellant was intimidating her. (Testimony of Adalgisa Ortiz.)

10. The Appellant then left the medication room and, as soon as he departed, Nurse Ortiz shut and locked the door as she was afraid that he would return and harm her. She told Nurse Stonely that she did not want to have the Appellant near her as she was scared of him. (Testimony of the Appellant; testimony of Steven Stonely.)

11. A short time later, the Appellant approached Nurse Stonely outside the medication room. The Appellant then said: "What is that bitch's problem? What is wrong with her?" (Testimony of Steven Stonely.)

12. The Appellant also said to Nurse Stonely that he would "love to have had her (Nurse Ortiz) slam the door on my head as I could go out on an IA (Industrial Accident) Leave. If I went out on an IA Leave, her name would be all over it." (Testimony of Steven Stonely.)

13. Later that day, as Nurse Ortiz was passing in the hallway on her way to the ladies room, the Appellant made "farting" noises with his mouth directed at her. He then laughed at her as she walked past him. (Testimony of Steven Stonely; testimony of Adalgisa Ortiz.)

14. Nurse Ortiz felt degraded by the Appellant's actions that day. She reported the incident to her supervisor and filed a report. (Testimony of Adalgisa Ortiz.)

15. Sergeant Harold Wilkes was assigned to investigate the incident of November 10, 2007. As part of his investigation, Sergeant Wilkes conducted interviews of Nurse Ortiz, Nurse Stonely, and the Appellant. (Testimony of Harold Wilkes.)

16. During the interview with the Appellant, Sergeant Wilkes asked him if he ever used profanity or other verbal utterances in the presence of Nurse Ortiz and whether she had ever complained at any time about his language in her presence. (Testimony of Harold Wilkes.)

17. The Appellant informed Sergeant Wilkes that he never used profanity towards Nurse Ortiz. He also denied having made "farting" noises. In addition, the Appellant denied having made a statement to Nurse Stonely relative to going out on Industrial Accident Leave as a result of his interaction with Nurse Ortiz. (Testimony of Harold Wilkes.)

18. By letter dated September 5, 2008, the Appointing Authority notified the Appellant that he was being charged with various violations of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction as a result of his conduct on November 10, 2007. (Exhibit 1.)

19. On October 1, 2008, the Appointing Authority held a hearing pursuant to G.L. c. 31, § 41 concerning these charges. On November 26, 2008, the Appointing Authority sent written notice to the Appellant that he was being terminated from his position as Correction Officer II with the DOC. (Exhibits 5 and 6.)

20. On December 22, 2008, the Appellant filed a timely appeal of this decision with the Civil Service Commission. (Exhibit 7.)

CONCLUSION AND RECOMMENDATION

After reviewing all the testimony and evidence in this case, I conclude that the Appointing Authority has demonstrated by a preponderance of the evidence that just cause exists to discharge the Appellant from his position as a Correction Officer II with

the Department of Correction. The Appointing Authority established that the Appellant violated the various sections of the Rules and Regulations Governing All Employees of the Department of Correction outlined in Exhibit 1 by using foul and profane language towards Adalgisa Ortiz, a Nurse, during a shift at the Health Services Unit of MCI Cedar Junction on November 10, 2007. In addition, the Appellant failed to refrain from using this language when requested to do so by Nurse Ortiz and referred to her in a derogatory and disrespectful manner when speaking to her co-worker, Nurse Stonely. The Appellant made inappropriate "farting" noises with his mouth directed at Nurse Ortiz and laughed at her as she walked to the ladies' room. Finally, the Appellant was less than truthful when questioned by a Department investigator regarding the above-referenced incident.

The Civil Service 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." *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983); *School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct. 486, 488 (1997). In reviewing an appeal brought pursuant to G.L. c. 31, §43, if the Civil Service Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004).

The basis of my conclusion rests with my finding that the testimony of Adalgisa Ortiz was extremely credible. In *Connor v. Connor*, 77 A.2d 697 (Pa. 1951), the Pennsylvania Appeals Court held that the "opportunity to observe demeanor and appearance of witnesses in many instances becomes the very touchstone of credibility."

School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978); *New England Canteen Service, Inc. v. Ashley*, 372 Mass. 671 (1977).

Adalgisa Ortiz gave persuasive testimony to the effect that on November 10, 2007, the Appellant referred to mentally ill inmates as “fucking crazies.” Although she asked him to stop using such language as it offended and upset her, the Appellant continued to refer to the inmates using profanity. The Appellant also made “farting noises” and laughed at Nurse Ortiz while she was walking towards the ladies’ room.

I found Nurse Ortiz’s testimony to the effect that she found the Appellant’s conduct on the day in question to be demeaning and degrading to be particularly compelling. I also credited her testimony to the effect that she was afraid of the Appellant as she found his conduct to be highly intimidating.

Moreover, Nurse Ortiz’s testimony was corroborated by the testimony of her co-worker, Nurse Steven Stonely. At the outset of his testimony, Nurse Stonely stated that he had worked with the Appellant many times prior to November 10, 2007 and that he (Stonely) had a cordial, professional relation with Mr. Desroches. Thus, Nurse Stonely had no reason to dissemble or to fabricate his version of the events that transpired. According to Nurse Stonely, on November 10, 2007, the Appellant referred to Nurse Ortiz as a “fucking bitch.” The Appellant also told Nurse Stonely that he would like to go out on Industrial Accident Leave as a result of his interaction with Nurse Ortiz. Nurse Stonely witnessed the Appellant laughing at Nurse Ortiz and making “farting noises” directed at her as she went to the ladies’ room.

Arguing in his own behalf, the Appellant denied that he had referred to the mentally ill inmates as “fucking crazies.” He further denied having called Nurse Ortiz a

“bitch” and stressed that he never intimidated, embarrassed, or threatened her. He acknowledged that he made “farting” noises with his mouth on the day in question but indicated that these noises were not directed at Ms. Ortiz. He noted that one of the main characters in the television sitcom “King of Queens” routinely makes “farting” noises and that he (Desroches) was merely imitating that character in an attempt to be amusing.

I do not find the Appellant’s explanation to be convincing. During the entire interaction with Nurse Ortiz on the day in question, I conclude that the Appellant acted in a rude, hostile, and disrespectful manner towards her. I further conclude that Appellant was aware of the fact that Nurse Ortiz found his conduct to be threatening and offensive as she informed him of that fact. Despite her request that he refrain from such conduct, the Appellant not only continued his use of profanity but escalated his intimidating conduct by making obscene noises directed at her. I do not credit the Appellant’s explanation that he was merely emulating a television character when he made various noises and that these noises were not meant to reflect in any manner on Nurse Ortiz. Rather, I am persuaded that the Appellant acted in a deliberately aggressive and offensive manner toward Nurse Ortiz on the day in question.

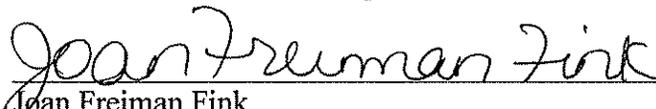
Regarding the charge of being less than truthful when questioned by Sergeant Wilkes during the official investigation of this incident, I conclude that the Appellant was not forthcoming in his response to the investigator. As such, I conclude that the Appointing Authority demonstrated just cause to discipline the Appellant based on that charge as well.

In determining the appropriateness of the discipline to be imposed, I reviewed the Appellant’s prior extensive disciplinary record which included a thirty day suspension, a

twenty day suspension, a five day suspension, and a three day suspension. I noted that at least one of the lengthy suspensions involved the same kind of conduct that is the subject matter of the present case, *i.e.*, use of profane language to inmates and staff and failing to give truthful responses when questioned by department investigators. After due deliberation, I conclude that, based on the facts and circumstances of this case, the Appointing Authority was fully justified in discharging the Appellant from his position as a Correction Officer II with the Department of Correction .

Accordingly, I recommend that the Civil Service Commission affirm the action of the Appointing Authority in this matter.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Joan Freiman Fink
Administrative Magistrate

Dated:

JUL 27 2009