COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293

STEVEN ADAMS,
Appellant

v.

D1-16-205

DEPARTMENT OF CORRECTION
Respondent

Appearance for Appellant: Howard Mark Fine, Esq.
218 Lewis Wharf
Boston, MA 02110

Appearance for Respondent: Amy Hughes, Esq.
Department of Correction
Division of Human Resources
Industries Drive, P.O. Box 946
Norfolk, MA 02056

Commissioner: Cynthia A. Ittleman

DECISION

Steven Adams (Mr. Adams or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on December 8, 2016, under G.L. c. 31, s. 43[1], challenging the decision of the Department of Correction (Respondent) to terminate Mr. Adams' employment.

[1] The Appellant asserts, for the first time, in his post-hearing brief (p. 34, n. 4) that he filed an appeal alleging both procedural (G.L. c. 31, s. 42) and substantive (G.L. c. 31, s. 43) flaws in his discipline. First, this effectively precluded the Respondent from responding to the argument. Second, the Appellant did not appeal the DOC's 2015 discipline decision regarding domestic violence and that matter is not before the Commission. Third, the appeal form filed by the Appellant in the instant case references only a substantive appeal and left the procedural appeal portion of the form blank. Fourth, the Appellant avers that the DOC 2016 discipline decision regarding domestic violence, which is the subject of the instant appeal, was issued late (a month after the hearing). Fifth, pursuant to Commission practice, I read an introduction at the hearing indicating that the appeal was premised on s. 43 and received no objection in that regard. Even if the Commission were to allow amendment of an appeal at this stage, the Appellant has not established that he was aggrieved thereby and the appeal would be denied. That said, all Respondents should issue timely decisions.

A prehearing conference was scheduled in this regard on December 20, 2016 at the offices of the Commission. The Respondent appeared at the prehearing conference but the Appellant failed to appear. By notice to the Appellant dated December 21, 2016, the Appellant was issued an Order to Show Cause by December 30, 2016 why his appeal should not be dismissed for lack of prosecution based on his failure to appear at the scheduled prehearing conference. The Appellant failed to respond and the appeal was dismissed on January 19, 2017. On February 16, 2017, the Commission received a letter from the Appellant stating that he had been unable to attend the prehearing conference because he had been detained in the Norfolk House of Correction. The Appellant's letter was treated as a Motion for Reconsideration of the Dismissal (Motion). The Respondent submitted an Opposition to the Motion. On March 30, 2017, the Motion was allowed. The prehearing conference was rescheduled and held on May 23, 2017 at the offices of the Commission. A hearing[2] was held on August 4 and 18, 2017 at the Commission. The hearing was deemed to be private since I did not receive a request from either party for a public hearing. The witnesses were sequestered. The hearing was digitally recorded and the parties received a CD of the recording.[3] The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

[2] 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.

[3] 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.

FINDINGS OF FACT

Respondent's Exhibits 1 through 16 (including rebuttal cases), and the Appellant's Exhibits 1 through 22 were entered into evidence at the hearing.[4] Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Nicholas Green, Correction Officer, Internal Affairs Unit, DOC
- Jason Wheeler, Police Officer, Easton Police Department (EDP), via subpoena
- Conor Flynn, State Trooper, Massachusetts State Police, via subpoena

Called by the Appellant:

- Edward Slattery, Correction Officer, MCOFU Vice President, via subpoena duces tecum
- Steven Adams, Appellant

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

Background

1. In 1998, DOC hired the Appellant as a Correction Officer I (CO I). (Appellant Exhibits (A.Exs.) 1, 2) The Appellant was assigned to Mass. Correctional Institution (MCI) Concord, a medium secured facility. (Testimony of Appellant)
2. The Appellant was promoted to COII in 2011, and reassigned to MCI Cedar Junction in Walpole. (A.Exs. 1, 3). He successfully bid to work in the Department Discipline Unit (DDU), a most challenging assignment, and he has been assaulted there many times.

[4] The numbers the parties had assigned to their proposed exhibits were changed at the outset of the hearing to reflect deletions pursuant to objections and rulings thereon.

The CO II position is equivalent to the rank of Sergeant. (Testimony of Appellant; Appellant's Exhibits (A.Exs.) 3 – 9)

3. From 2011 until his termination on November 30, 2016, the Appellant was permanently assigned to MCI Cedar Junction, then a maximum secured correctional facility. (Testimony of Appellant; A.Ex. 3-7, 15, 20)
4. During the Appellant's approximately eighteen years of service as a corrections officer, the Appellant received favorable employee performance reviews, specialized training and recognition for his performance. (Testimony of Appellant; A.Exs. 4-7, 9 and10) Specifically, the Appellant had received a number of "exceeds" ratings in his EPRSs in recent years and on at least two (2) occasions, his EPRS referred to the Appellant as an "exemplary correctional professional". (Id.)
5. On November 10, 2010, the Appellant was appointed to the Special Operations Response Unit, Special Reaction Team. (Testimony of Appellant)

September 15, 2016 Incident

6. On September 15, 2016, at approximately 1:41 a.m., the Appellant's wife (Ms. A) entered the Alltown Mobile gas station on Foundary Street in Easton, MA and asked the store clerk, Ms. H, to use the phone. (Respondent's Exhibits (R.Exs.) 4 (pp. 20 and 23) and 6) Ms. A appeared upset so Ms. H asked if she was ok and Ms. A stated that she had been in an argument with her husband. Ms. A dialed 911 on Ms. H's phone. At approximately 1:42 a.m., the Appellant entered the store and stood next to Ms. A, who was on the phone. Ms. A hung up the phone. (R.Ex. 6)
7. The 911 dispatcher at the Easton Police Department (EPD) called the store back shortly thereafter and asked to speak with Ms. A. (R.Ex. 4, p, 20; R.Ex. 5) Ms. A told the

dispatcher that she and her husband had gotten into an argument but there was “no problem”. However, the Appellant was still standing next to Ms. A at that time. (R.Exs. 5 and 6)

8. The dispatcher told Ms. A that police would be responding to the gas station and asked to speak with Ms. H. The Dispatcher asked Ms. H if Ms. A appeared to be upset and Ms. H said that Ms. A did appear to be upset. (R.Ex. 5) Ms. H observed bruises on Ms. A’s arm. (R.Ex. 4) While she was on the phone with the dispatcher, Ms. H said to Ms. A words to the effect that she has been in Ms. A’s situation before herself and that no man should ever put their hands on you. (R.Exs. 4, 5 and 6)
9. At approximately 1:50 a.m., EPD Police Officer Jason Wheeler arrived at the gas station. EPD Officer Dennis Kitsos arrived at the gas station within the next five (5) minutes or so. (R.Ex. 6)
10. Officer Wheeler spoke with Ms. A, who said that her husband “beat her up on the side of Route 24”. (R.Ex. 4; Testimony of Wheeler). Officer Wheeler observed that Ms. A’s nose was bleeding, she had “bruises all over her arms, red marks around her neck, her ears and nose were bleeding, and she looked visibly shaken.” (A.Ex. 4; Testimony of Wheeler)
11. Ms. A informed Officer Wheeler that she and her husband, the Appellant, went to a concert early in the evening in Boston and got separated afterwards for some time. When they were back together, the Appellant became angry with her and they started fighting on the way home. Ms. A was driving and the Appellant was the passenger. The Appellant tried to grab Ms. A’s cell phone and throw it out of the car window but the window was closed and the Appellant injured his elbow. The Appellant had tried to

choke her twice and beat her in the car. In addition, the Appellant tried to grab the steering wheel from Ms. A and force the car into the breakdown lane. Eventually, the car went into the breakdown lane. The Appellant had also pulled Ms. A by the hair and pulled her out of the car, where he attempted to choke her again. This occurred somewhere around the Avon exit on Route 24. Ms. A and the Appellant then got back into the car and proceeded to the Alltown Mobil gas station in Easton. (R.Ex. 4; Testimony of Wheeler)

12. Officer Kitsos took five (5) photographs of Ms. A at the gas station while they waited for someone from the State Police to arrive since the incident occurred on a state road (Rte. 24). The photographs of Ms. A's injuries that night were consistent with the injuries observed by Officer Wheeler. One (1) photograph shows a clump of Ms. A's hair that was "twice the size of a golf ball" that Officer Wheeler saw fall from Ms. A's hair after she put her fingers through her hair, which was consistent with Ms. A's statement that the Appellant had pulled her by her hair. (Testimony of Wheeler; R.Ex.4)

13. At the gas station, Ms. A drafted an affidavit describing what happened that evening. The affidavit states, in part, "he grabbed me in a chock [sic] hold and shook me pulled my hair and drag [sic] me out of car. He then … my car keys into the woods. Then we continued on driving with his set of keys …." (R.Ex. 9)[5]

14. Officer Wheeler also spoke to the Appellant outside at the gas station. Officer Wheeler told the Appellant what Ms. A had told him about the events that night. Officer Wheeler observed that the Appellant's elbow was bleeding. The Appellant told Officer Wheeler that he smashed the car window with his elbow but it was because, he asserted, Ms. A would not let him out of the car. The Appellant admitted to Officer Wheeler that he had

[5] The quality of the copy of the affidavit is poor, making only some sections readable.

pulled Ms. A's hair but he said that he did it because she was trying to bite him. The Appellant alleged that Ms. A was intoxicated or had been drinking that night but Officer Wheeler did not observe that Ms. A was intoxicated. The Appellant mentioned to Officer Wheeler that he (the Appellant) had been in a prior domestic violence incident. (R.Ex. 4; Testimony of Wheeler)

15. State Troopers Flynn and Lucas arrived at the gas station at or around 2:35 a.m. Trooper Flynn spoke with Easton Police Officer Kitsos, then the Appellant and then Ms. A. Trooper Flynn's report indicates, in pertinent part,

> … [The Appellant] said they began arguing and she pulled over into the breakdown lane. He grabbed the keys out of the ignition. As he was doing so, [Ms. A] bit his right bicep. I observed red marks on his right bicep (see photos). Steven then broke the passenger side window with his elbow to 'let himself out'. He said he got out of the vehicle and didn't remember what happened after that and he did not know how he got to the gas station … As I was speaking with Steven I detected a strong odor of an alcoholic beverage coming from his mouth.
>
> I then spoke with [Ms. A] who was visibly upset. She was crying and her hands were shaking. I observed a large bruise on her right bicep and red marks on her arm, shoulder, chest, and neck. I asked her what happened. She stated she and Steven were driving home … from Boston on Rt. 24 South. They began arguing and she pulled into the breakdown lane. Steven grabbed the keys out of the ignition and got out of the car. He walked around to the driver's side, opened the door and grabbed her by her hair and began shaking her. He put his hands around her neck and began 'choking' her. He put his hands around her neck and began 'choking' her. He pulled her out of the drivers (sic) door by her arm and dragged her to the side of the road. He grabbed her around her neck with his hands and began 'choking her'. He had a tight grip around her neck, began to squeeze and she was unable to breath (sic). She stated she was trying to fight back to free herself. Steven then let her go, and threw her car keys and cell phone into the woods. … They continued to argue and eventually got back in the car and drove away … They exited the highway and stopped at the Mobile gas station in Easton. Steven got out of the car, and walked away with the car keys and her purse. [Ms. A] then went inside the gas station and called 911 … [Ms. A] said Steven has hit her multiple times in the past, including an incident last summer where Steve was arrested on Domestic A&B in [town where they live]. [Ms. A] was read her 209A rights … She declined her rights at this time and said she would consider getting a 209A order in the morning at court. [Ms. A] stated Steve gets like this when he drinks, and that he was 'drinking a lot tonight'. [Ms.

> A] showed me a large clump of her hair she said was ripped out of her head by Steven during the altercation …
>
> … The bruises on [Ms. A's] arm, and red marks on her neck were consistent with the account of the incident told by [Ms. A]. Based on the marks and bruises, it was determined Steven Adams was the primary aggressor in this incident. Steven was informed he was under arrest for Domestic Assault and Battery on a Family Member Ch. 265 13M-B and Strangulation or suffocation Ch. 265 15D-A. … He was transported back to the SP Milton Barracks where he was read his rights, booked, photographed and fingerprinted. … Bail Commissioner … was contacted and stated Steven should be held until court. (R.Ex. 4, pp. 47-49; *see also* A.Exs. 2 and 18 and Testimony of Flynn)[6]

In addition to photographing the red marks on the Appellant's right bicep, the State Police photographed the cuts on the Appellant's elbow. In addition, police took control of the Appellant's license to carry a firearm and arranged to remove the Appellant's pistol from his house and to have the house checked to ensure that there were no other firearms there. (Id.) "The remainder of [the Appellant's] firearms are stored at his supervisor's house … [The Appellant] said he has stored them there since he was last arrested for Domestic A&B last summer." (Id.) The State Police informed the Appellant's supervisor, Capt. Jeff Sousa, and his commanding officer, of the Appellant's arrest. (Id.) The Appellant testified at the Commission hearing that he had his gun license at that time. (Testimony of Appellant)

16. By around 3:40 a.m., the State Police and Easton Police appear to have left the Mobil gas station, with the State Police having arrested the Appellant and transported him to the State Police Barracks in Milton, where he was booked, photographed and detained. However, Ms. A remained inside the gas station store. Initially, she was standing next to the cashier or the cashier's counter. At some point, Ms. H apparently brought out a chair for Ms. A, putting the chair next to the cashier or the cashier's counter. From this time

[6] It is unknown if Ms. A was informed that the Appellant would be held without bail at least until he was arraigned in court later that morning.

forward, Ms. A remained close to the cashier or the cashier's counter, except to go to the restroom briefly, until she (Ms. A) left the store. While in the store, Ms. A appeared to talk to the cashier occasionally and borrowed the cashier's phone to make a call a couple of times. During at least one (1) of those calls, Ms. A called a towing company to request a tow for her car because the Appellant had thrown hers away and, apparently, the Appellant did not have or give his keys to Ms. A. A tow truck arrived at the store at or around 5:15 a.m. to tow the car that Ms. A and the Appellant had ridden in that night and Ms. A left the store. (R.Exs. 4 and 6)

17. Later that morning, the Appellant was arraigned in Stoughton District Court, bail was set and he was ordered not to abuse Ms. A and to stay away from her. However, at the Prosecution's motion, the Court then ordered the Appellant to be held without bail until December 14, 2016 apparently because of conditions related to the Appellant's arrest for an OUI in July 2016 in Attleborough District Court. The assault and battery and strangulation or suffocation charges in Stoughton were transferred to the Attleborough Court, wherein bail was re-established and conditions were added to protect Ms. A as follows if bail was posted: GPS monitoring with exclusion zones of victim's residence and employment; stay away from victim; no abuse of victim; do not possess firearms; refrain from alcohol with random testing; and "*Defendant is not to be released without GPS." (A.Ex. 18)(emphasis in original) In or about December 5, 2016, the Appellant posted a cash bond. On December 15, 2016, the Appellant's bail was revoked for an unspecified "violation of terms of release". (Id.) The Appellant's trial for the assault and battery and strangulation or suffocation charges was scheduled for January 26, 2017. However, on the hearing date, Ms. A, "after colloquy with the court", raised the marital

privilege not to testify against her husband, and the case was dismissed "for failure to prosecute [without] prejudice." (Id.)

18. By letter dated September 15, 2016, the Respondent informed the Appellant, "[it] has come to the Department's attention that you are currently in custody and unavailable to report for work. Accordingly, you are considered off the payroll until further notice." (R.Ex. 4)

19. On September 16, 2016, DOC began an investigation of the Appellant's arrest. The investigation was conducted by Correction Officer Green of the DOC Office of Investigative Services. On September 26, 2016, CO Green submitted a detailed 88-page report of his investigation to the Chief of the DOC Office of Investigative Services. CO Green's report indicated, in part, that he obtained and analyzed:

    the State Police report related to the Appellant's September 15, 2016 arrest;

    Easton PO Wheeler's report related to the September 15, 2016 incident;

    photographs taken of the Appellant and Ms. A on September 15, 2016 in connection with the Appellant's arrest;

    Ms. A's written statement given to the police on September 15, 2016;

    an interview of Ms. H at the gas station store;

    court records regarding the September 15, 2016 charges against the Appellant;

    911 audio recordings involving Ms. A at the gas station store on September 15, 2016;

    audio recordings of certain calls made by the Appellant while he was in custody between September 15 and September 22, 2016;

    video recordings of the gas station store and exterior gas pumps area between approximately1:37 a.m. and 5:20 a.m. of September 15, 2016;

    DOC Incident Reports relating to the Appellant's September 15, 2016 arrest;

records of the Appellant's employment at DOC, including his disciplinary history;

the Appellant's license to carry a firearm;

the September 15, 2016 letter from DOC to the Appellant indicating that he was off the payroll because he was in custody and unavailable to work;

the Internal Investigations Waiver form that the Appellant signed asserting his constitutional rights against self-incrimination when he was scheduled to be interviewed by CO Green; and

the Appellant's Board of Probation (BOP) record.
(R.Ex. 4; *see also* Testimony of Green)

CO Green called the law enforcement officers involved in the Appellant's arrest on September 15, 2016 to schedule their interviews. However, the officers did not respond prior to September 26, 2016, the date of CO Green's investigation report. (R.Ex. 4)

20. The Appellant's BOP indicates that:

a restraining order was issued against the Appellant on August 26, 2015 at the request of Ms. A and the order ended on September 8, 2015;

he was arraigned on August 26, 2015 for assault and battery and the case was dismissed in May 2016;

the Appellant was also arraigned on August 26, 2015 for destruction of property, for which he received a continuance without a finding (CWOF), and the case was dismissed in May 2016.

he was arraigned for an OUI on July 14, 2016, which case was open at the time the Appellant was arrested on September 15, 2016 for assault and battery of a household member and strangulation or suffocation[7]; and

the Appellant was arraigned for assault and battery and for strangulation or suffocation on September 15, 2016 in regard to the matters underlying the instant appeal.
(R.Ex. 4)

21. Prior to September 15, 2016, the Appellant's DOC disciplinary record consisted of:

2003 letter of reprimand ("no call, no show");

[7]There is no evidence in the record about the court disposition of the OUI charge against the Appellant.

2011 letter of reprimand ("refused to remain on duty; refused forced overtime"];

January 2015 letter of reprimand ("failed to provide medical evidence"); and

August 26, 2015 five (5)-day suspension and "Last Chance Warning" ("arrested for assault and battery on a family member (domestic); destroyed property less than $250; took actions that put family in fear; restraining order and assault charges dismissed").
(R.Ex. 4; *see also* R.Ex. 10)

22. Audio recordings of the Appellant's phone calls while he was held in NCCC after his September 15, 2016 arrest include:

    September 20, 2016, approximately 11:49 a.m. – the Appellant called his father and asserted that Ms. A had been attacking him. His father told the Appellant, in part, that he needed to "get help" because of the way he reacts and that he (Appellant's father) had contacted the DOC Employee Assistance Services unit to get help. The Appellant said, in part, that he wanted to obtain a restraining order against Ms. A to counter a court order against him;

    September 20, 2016, approximately 4:18 p.m. – the Appellant called Capt. S at Old Colony Correction Center (OCCC), admitting that he threw Ms. A's phone away. He also asked Capt. S if "Mark" got "those things" out of the closet and Capt. S said that he did;

    September 20, 2016, approximately 4:32 p.m. – the Appellant called his mother and told her, in part, that Ms. A was driving 100 mph and threatened to kill them both. He admitted that he grabbed the steering wheel and Ms. A bit him and that he had grabbed her by the throat. He also stated that Ms. A needed to do the same thing as before and not testify and end a restraining order[8];

    September 21, 2016, approximately 8:41 a.m. – the Appellant called Capt. S. and said, in part, that the court order ordering him to stay away from Ms. A needed to be removed and Capt. S stated that his wife would talk to Ms. A;

    September 21, 2016, approximately 1:26 a.m. – the Appellant called his cousin and said that Ms. A was driving 100 mph on the highway, she stopped, he got out and started walking and that Ms. A tried to run him down;

    September 22, 2016, approximately 12:32 p.m. – the Appellant called Capt. [S], who said, in part, that this was the "third" incident between the Appellant and Ms.

[8] Presumably the Appellant was referencing the order to stay away from Ms. A and not abuse Ms. A issued by the court during his arraignment as there is no information in the record indicating that Ms. A sought and received a separate civil restraining order.

A and that the Appellant may want to resign before he is fired[9]. The Appellant said, in part, that he was going to file charges against Ms. A as collateral. Capt. [S] said that he and his wife would talk to Ms. A to "see where she is at";

September 22, 2016, approximately 12:45 p.m. – the Appellant called a female DOC employee stating, in part, that Ms. A was driving dangerously, they got into a struggle and he admitted he "grabbed [Ms. A] by the throat", asserting that Ms. A had hit him with a mug, bit him and tried to run him down; and

September 22, 2016, approximately 8:49 p.m. – the Appellant called the female DOC employee and admitted that on September 15, 2016, he had choked Ms. A and pulled her hair, asserting he did so to protect himself.
(R.Ex. 4)

23. When CO Green conducted an interview of Ms. H on September 22, 2016, they were at the gas station store. Ms. H asked that the interview not be recorded and stated,

Ms. A said that the Appellant had beaten her up on the highway that night and it was not the first time he had done that;

Ms. A said that she was scared to leave the Appellant because they have two (2) young children and she did not know how the children would be affected by that;

Ms. H did not think that Ms. A was under the influence of alcohol when Ms. A was in the gas station store with her and that Ms. A did not slur her words;

she (Ms. H) recalled that Ms. A had an injury to her harm but she asserted that she did not recall if Ms. A had other injuries; and

she (Ms. H) recalled that the Appellant's elbow was bleeding.
(R.Ex. 4)

After interviewing Ms. H, CO Green searched the property outside the store to see if he could find the Appellant's keys. He did not find the keys. (R.Ex. 4)

24. On September 26, 2016, CO Green completed his investigation report, finding that the Appellant violated DOC General Policy 1, Rule 1, Rule 19 and 103 DOC 238, the latter being the DOC's Policy for the Prohibition of Sexual Assault, Domestic Violence, Harassment and Stalking. (R.Ex. 4)

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[9] CO Slattery testified that COs are, on occasion, informed by the union of the option to resign, rather than be disciplined.

25. DOC Deputy Commissioner Michael Grant concurred with CO Green's findings. (R.Ex. 4)

26. On September 26, 2016, Dep. Commissioner Grant wrote to the Appellant indicating that the investigation of his conduct on September 15, 2016 had been completed and that the matter was being referred for a Commissioner's hearing. (R.Ex. 4)

27. DOC Commissioner Thomas Turco informed the Appellant on September 26, 2016 that a hearing would be held on September 30, 2016 at the Norfolk County Correctional Center (NCCC), where the Appellant was being held, to determine whether:

    a. On or about September 15, 2016, you physically abused your wife[.]
    b. Your abuse of your wife included, but was not limited to: 1) pulling your wife by the hair and 2) putting your hands around your wife's neck and attempting to choke her.
    c. You squeezed your wife so tightly around her neck that it caused marks or bruising.
    d. Your wife sustained injuries from your abuse including, but not limited to, a bruise on her bicep and red marks on her arm, shoulder, chest, and neck.
    e. You ripped a clump of hair out of your wife's head.
    f. You threw your wife's cell phone, preventing her from using it.
    g. You took your wife's car keys, preventing her from operating her vehicle.
    h. You smashed the passenger side window of the above vehicle while you and your wife were inside.
    i. Your wife called 911 from a gas station in Easton and Easton Police officers responded. After the police spoke with you and your wife and observed injuries, you were arrested and charged with Domestic Assault and Battery/Family Household Member and Strangulation or Suffocation. (A.Ex. 2)

At the hearing, it would be determined whether such conduct violates:

> General Policy 1, which provides, in part, 'Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents or by their authority. All persons employed by the Department of Correction are subject to the provisions of these rules and regulations. Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will

> not be exculpated whether or not it is specifically mentioned and described in these rules and regulations. Your acceptance of appointment to the Massachusetts Department of Correction shall be acknowledged as your acceptance to abide by these rules and regulations ….'
>
> Rule 1, which provides, '[y]ou must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent.
>
> Rule 19(d), which states, 'It is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasingly so, according to rank.'
> (A.Ex. 1)

The notice also stated, in part,

> Your actions are also in violation of 103 DOC 238, the Department's Policy for the Prohibition of Sexual Assault, Domestic Violence, Harassment and Stalking, which states, 'The Commonwealth has a zero-tolerance policy for sexual assault, domestic violence, harassment and stalking occurring within or outside the workplace.' 103 DOC 238.01 The policy explains, 'M.G.L. Chapter 209, Section 1 … defines domestic violence as a form of abuse among family or household members, which includes those individuals who are or have been involved in a substantive dating relationship. Abuse is defined as 'the occurrence of one or more of the following acts between family or household members:'(a) Attempting to cause or causing physical harm; or (b) Placing another in fear of imminent serious physical harm; ….' 103 DOC 238.03(1). Moreover, the policy states, 'Department employees shall: (a) Ensure that they do not participate in any form of sexual assault, domestic violence or harassment, either within or outside the workplace. (b) Cooperate in the investigation of alleged sexual assault, domestic violence [sic] harassment by providing information they possess concerning such matters.' 103 DOC 238.04(3).
> (Id.)

Finally, the notice indicated that G.L. c. 31, ss. 41-45 were attached thereto. (Id.)

28. The DOC hearing was held on September 30, 2016. Present at the hearing were Administrative Prosecutor Amy Hughes; Investigator CO Green; CO Ted Slattery, then-Vice President of MCOFU; and the Appellant. The hearing officer wrote that CO Green

testified but, “Sgt. Adams did not testify at the hearing under advice of counsel and the Union. [The hearing officer] did not draw a negative or adverse inference from his decision not to testify.” (R.Ex. 2)

29. On October 3, 2016, the hearing officer sent Commissioner Turco a memorandum about the hearing, indicating that she found CO Green’s testimony about his investigation to be extensive and credible. Based on the evidence and her analysis thereof, the hearing officer found that the Appellant committed the actions described in Commissioner Turco’s notice of hearing to the Appellant and she found that such actions violated the cited rules and policies. (R.Ex. 2)
30. On November 30, 2016, Commissioner Turco wrote to the Appellant articulating the hearing officer’s findings regarding the Appellant’s actions on September 15, 2016, and his related conduct, and the hearing officer’s determination that such actions and conduct violated the cited rules and policies. Based thereon, Commissioner Turco terminated the Appellant’s employment. (R.Ex. 3)
31. On December 8, 2016, the Appellant filed the instant appeal. (A.Ex. 1; Administrative Notice)
32. At the Commission hearing in this case, the Appellant invoked his constitutional rights against self-incrimination, refusing to testimony regarding his September 15, 2016 arrest and related matters. However, he testified regarding other matters and that he was then attending Alcohol Anonymous meetings, counseling and a batterers program. (Testimony of Appellant)

Prior Discipline[10]

33. Prior to the incident described above, on August 26, 2015 the Appellant was arrested and an Abuse Prevention Order (AB) was issued against the Appellant. (R.Exs. 14 and 15) By letter dated September 1, 2015, DOC superintendent Saba informed the Appellant that if he was convicted of a domestic violence offense, "by operation of law", he would be barred from carrying and operating firearms as a Correction Officer as long as the ABO remained in effect. This letter added, in part,

> Given the extreme gravity with which the Department views such crimes of violence in domestic circumstances, after proper notice and hearing you will be subject to discipline up to and including termination …
>
> … This letter is not to be considered disciplinary in nature; however, the Department does reserve all rights to proceed against you administratively as may be appropriate in the future. …
> (R.Ex. 15)

The letter attached a copy of the DOC Policy for the Prohibition of Sexual Assault, Domestic Violence and Harassment, 103 DOC 238, and informed the Appellant of employee support programs. (Id.)

34. By letter dated September 9, 2015, Supt. Saba informed the Appellant that the ABO issued was vacated and that he was no longer barred from working an assignment that requires a firearm. (R.Ex. 16)

35. By letter dated March 17, 2016, Commissioner Higgins O'Brien informed that Appellant that, based on an investigation, a hearing would be held on April 19, 2016 to determine if he had violated the cited DOC rules and policies. The investigation found:

> 1. On August 26, 2015, police responded to your home and arrested you. You were charged with assault and battery on a family or household member,

[10] Although the Appellant invoked his constitutional right not to testify in connection with his 2016 arrest and related matters, he testified concerning his 2015 arrest, which I consider for the purpose of understanding that the Appellant's 2016 arrest was the second domestic violence incident for which the Appellant was disciplined.

assault and battery, and malicious destruction of property of $250.00. A restraining order also issued against you.

2. You did, in fact, maliciously[11] destroy property valued over $250.00

3. You did, in fact, take physical actions that were threatening and that placed your mother and wife in fear.

4. The restraining order was dismissed on September 8, 2015 at the request of the victim, and on November 5, 2015, the charges of assault and battery against a household member and assault and battery were dismissed upon payment of a fine, due to the victims' refusal to testify.

5. You pled to sufficient facts in connection with the malicious destruction of property charge, and that matter was continued without a finding for six (6) months.

6. You failed to properly report in writing the incident, and related court appearances to your Superintendent or DOC Department Head, as required.

7. You had police contact on July 23, 2015, that you failed to report to the Department in any manner, as required.

8. You were less than truthful when interviewed by a Department investigator regarding the above-matters.
(R.Ex. 13)

The March 17, 2016 letter also stated that the Appellant's conduct violated General Policy 1, Rule 1, Rule 2(b) (regarding the prompt written notice to DOC of an employee's involvement with law enforcement pertaining to an investigation, arrest or court appearance), Rule 19(c) (regarding responding to questions in an investigation), and the DOC Policy for the Prohibition of Sexual Assault, Domestic Violence, and Harassment at 103 DOC 238 (stating, in part, that the state has "a zero-tolerance policy for sexual assault, domestic violence, harassment and stalking occurring within or outside the workplace …" and that employees are required to "promptly" report in writing if they are the named defendant or subject of an [ABO]). (Id.)

[11] At the April 19, 2016 DOC hearing, the DOC Prosecutor amended the "malicious" allegations to "wanton", without objection from the Appellant or his representative. (R.Ex. 14)

36. On May 2, 2016, a hearing officer reported to Deputy Commissioner Grant that she sustained the findings of the investigation and found that the Appellant's conduct violated the cited rules and policies. The hearing officer's report was a detailed review of the allegations against the Appellant and she made detailed credibility assessments finding the Appellant's testimony to be flawed, lacking in corroboration and inconsistent. (R.Ex. 14)

37. By letter dated June 1, 2016, Commissioner Turco informed the Appellant that he sustained the findings of the hearing officer's report and suspended him for five (5) days. Further, Commissioner Turco wrote,

> [a]dditionally, I am imposing a **Last Chance Warning** that any violation of *any* Department rule, policy, or regulation may lead to termination of your employment with the [DOC].
> (R.Ex. 10)(emphases in original)[12]

This letter also informed the Appellant of the right to appeal to the Commission. (Id.) The Appellant did not appeal Commissioner Turco's decision.[13] (Administrative Notice)

Other DOC Employees Disciplined for Domestic Violence

38. According to the records produced by the Respondent, since 2003 approximately seventy (70) Correction Officers have been disciplined in connection with domestic violence. Of

[12] The precise meaning of "last chance warning" is unclear. CO Slattery testified that the Respondent sometimes refers to "last chance agreements" or to "final warnings" in its discipline documents. He defined a "last chance" agreement as a phrase indicating that a disciplinary settlement refers to a specific time period and issue. He defined a "final warning" as a phrase indicating that the discipline is more "global" and has no time limit. (Testimony of Slattery) Given that the Appellant's 2015 domestic violence incident occurred only one (1) year before his 2016 domestic violence incident and that Commissioner Turco's decision referenced future violations of "any" DOC policies or rules, the reference to a "last chance warning" does not alter the results here.

[13] Commissioner Turco's June 1, 2016 decision letter to the Appellant listed the rules that the Appellant was found to have violated via the DOC hearing but the list did not include the Respondent's domestic violence rule referenced in the notice of hearing sent to the Appellant. Nonetheless, Commissioner Turco found that the Appellant had been charged with assault and battery on a family or household member, a restraining order was issued and more. Therefore, the allegation of the Appellant's 2015 domestic abuse was sustained by Commissioner Turco.

the seventy (70), approximately[14] 80% of the Correction Officers were disciplined for one instance of domestic violence; most of the others were disciplined for mostly a repeated instance of domestic violence. Approximately twenty (20) of the seventy (70) Correction Officers disciplined for domestic violence were disciplined with a one (1) day of suspension, approximately nine (9) were disciplined for three (3) days, approximately 14 received five (5)-day suspensions, and a handful received ten (10), fifteen (15), twenty-five (25) or thirty (30)-day suspensions. Pursuant to some settlement agreements, parts of some of the suspension days were held in abeyance for one (1), two (2), or three (3) years. Four (4) of the suspensions included "last chance agreements". (A.Exs. 20, 21 and 23)

39. According to the records in evidence, the Respondent terminated the employment of nine (9) of the disciplined Correction Officers; eight (8) of the nine (9) whose employment was terminated were disciplined for only one (1) domestic violence incident. Two (2) of the COs whose employment was terminated were convicted of domestic violence-related crimes. Another two (2) of the COs whose employment was terminated were terminated during their employment probation period. (Id.) In non-probationary period and non-conviction terminations, the following COs were terminated after one (1) domestic violence incident:

> 1) a CO was specifically disciplined for domestic violence that occurred in 2009 and 2010; he was terminated in 2013 when he "failed to properly notify dept of court appearance" without specifically stating that the 2013 court appearance involved domestic violence (A.Ex. 20 (#33));

[14] Although these determinations are intended to reflect the final outcome in each disciplinary matter, approximations are used to account for some distinctions between the cases. For example, 1) one CO was disciplined on one occasion for multiple domestic violence related incidents on divers dates that had not been reported; 2) discipline was modified following arbitration or appeal; and 3) some of the wording of the discipline in A.Ex. 20 is unclear.

> 2) a CO was terminated for only one (1) incident of domestic violence in 2008 and his termination was upheld in arbitration (A.Ex. 20 (#53));
>
> 3) a CO was terminated for only one (1) incident of domestic violence in 2012, which termination was upheld by this Commission (A.Ex. 20 (#24));
>
> 4) a CO was terminated for only one (1) domestic violence incident in 2009 but this Commission reinstated the CO with a four (4) month suspension (A.Ex. 20 (#41)); and
>
> 5) a CO was terminated for one (1) incident of domestic violence in 2009, years after he had received letters of reprimand for unrelated misconduct and a brief suspension for using profanity at other COs (A.Ex. 20 (#22).

40. Much of the information in the record does not describe the specific acts of domestic violence committed by the approximately seventy (70) COs, any injuries their victims sustained and any property damage they caused. Neither did the information produced always indicate if restraining orders were issued against the COs, the duration of any such orders, and the reasons such orders were ended. Similarly, the information produced does not indicate the disposition of criminal charges against the COs, if any, except in the two (2) instances in which a CO was terminated following his criminal conviction. In seventeen (17) of the domestic violence incidents involving approximately seventy (70) COs, discipline was issued pursuant to settlement agreements; eight (8) of the settlement agreements are in the record. In five (5) of the eight (8) settlement agreements, certain details of the domestic violence are provided by notice letters sent to the CO:[15]

    1. In 2016, a notice letter charged CO-A as follows:

> … you engaged in an argument with your son's mother, during which you pushed her purse over the counter, smashed your watch and 'flipped over' a piece of a sectional couch.

[15] CO Slattery, Appellant's witness and then-Vice President of MCOFU, testified under a subpoena duces tecum, that whether or not there is a notice letter with some detailed information is available depends upon the point in the disciplinary process the parties reached a settlement agreement.

> As the argument continued, your son became involved and you punched him in the face.
>
> You challenged your son to a fight and engaged in a physical altercation where you grabbed him by the waist and 'suplexed' him to the floor.
>
> … you were arrested by the [redacted] police and charged with Simple Assault and Disorderly Conduct. These charges were subsequently dismissed.
> You failed to properly report the court dates associated with your arrest to the Department.
> (A.Exs. 23 (#52); *see also* A.Exs. 20 and 21 (which includes Disciplinary Histories produced by Respondent)[16]

CO-A was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A settlement agreement between the parties resulted in a five (5)-day suspension, of which part would be held in abeyance for one (1) year. (Id.) This is the only domestic violence discipline of CO-A in the record. (Administrative Notice)

2. Also in 2016, a notice letter charged CO-B as follows:

> … [redacted] police responded to your residence in connection with a domestic incident with your girlfriend. You were later arrested and charged with assault and Battery (sic) on a family or household member, and intimidation of a witness.
> You did, in fact, push your girlfriend.
> You did, in fact, hit your girlfriend.
> … you appeared in [redacted] Court and agreed to pre-trial probation [for one year], on both criminal charges. You also agreed to administrative supervision and to attend a batterers' program.
> (A.Exs. 23 (#69); *see also* A.Exs. 20 and 21)

CO-B was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A "last chance" settlement agreement between the parties resulted in a fifteen (15)-day suspension such that "any future violation of the Department's policies, procedures or post orders … after a hearing … shall constitute just cause for … termination. … " (Id.) This is the only domestic violence discipline of CO-B in the record. (Administrative Notice)

3. In 2015, a notice letter charged CO-C as follows:

> … you were arrested by the [redacted] Police Department for assault and battery, domestic. You did, in fact, commit a domestic assault and battery.

[16] I take Administrative Notice that the term "suplexing" is defined as, "[a] move in which a wrestler lifts an opponent over his or her shoulder before falling backwards, driving the opponent to the mat." https://en.oxforddictionaries.com/definition/suplex (January 3, 2019)

As a result of the above-mentioned incident, a restraining order issued against you. This order remains in effect until [eight (8) months after the incident]. (A.Ex. 23 (#68); *see also* A.Exs. 20 and 21)

CO-C was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A settlement agreement between the parties resulted in a five (5)-day suspension. (Id.) This is the only domestic violence discipline of CO-C in the record. (Administrative Notice)

4. In 2016, a notice letter charged CO-D as follows:

   … you were involved in a domestic dispute with your wife and became enraged. During this dispute, you yelled at your wife and spit in her face. You also attempted to hit her with a board. Your teenage son intervened by jumping on your back, causing you both to fall on the bed and the floor.
   During the aforesaid incident, you punched and/or kicked several doors, causing damage.
   You were under the influence of marijuana and/or prescription medications at the time of this incident.
   … you were arrested by [redacted] Police and charged with four misdemeanors. You were arraigned on these charges on [date redacted]. On [date redacted], your wife invoked her marital privilege not to testify against you and all charges were dismissed.
   The aforesaid conduct is unbecoming a correction officer.
   (A.Exs. 23 (#40); *see also* A.Exs. 20 and 21)

CO-D was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A "last chance" settlement agreement between the parties resulted in a five (5)-day suspension. In addition, the parties agreed that CO-D "will continue to attend substance abuse treatment until otherwise directed by a counselor. [CO-D] will provide proof of counseling to the Department upon request. Failure to comply with this counseling provision may result in additional administrative action. … [A]ny further violations of the Department's [Domestic Violence Policy] shall constitute just cause for [CO-D's] termination. … This provision shall remain in effect for three (3) years …." (Id.) This is the only domestic violence discipline of CO-D in the record. (Administrative Notice)

5. In 2016, a notice letter charged CO-E as follows:

   … On or about [date redacted], during an interaction with your daughter's mother, your inappropriate conduct resulted in a police response and led to your arrest.

   During the above interaction, you struck your daughter's mother in the face.

   On or about [date redacted], you were arrested and subsequently charged with simply (sic) assault (domestic) and disorderly conduct. Pursuant to a plea agreement, you pled guilty to the disorderly conduct charge and the assault charge was dismissed. …

(A.Exs. 23 (#61); *see also* A.Exs. 20 and 21)

CO-E was charged with violating the same or similar DOC rules and/or policies as the Appellant here. A settlement agreement between the parties resulted in a five (5)-day suspension, part of which would be held in abeyance as long as CO-E "does not engage in any further misconduct in one (1) year." This is the only domestic violence discipline of CO-E in the record. (Administrative Notice)

41. CO Slattery, a thirty (30)-year CO who then had been Vice President of MCOFU for four (4) years, testified pursuant to a subpoena duces tecum from the Appellant.[17] Mr. Slattery produced a number of settlement agreements in cases involving domestic violence dating back to 2013[18]. Having been involved in a number of them, Mr. Slattery explained the union's role in reaching the settlement agreements, how at least some of the agreements were reached and the meaning of the agreements (e.g. a five (5)-day suspension, with three (3) days of suspension held in abeyance for one (1) year). Mr. Slattery also clarified the difference between a "last chance agreement" and a "final warning", indicating that the former applies to a specific time period and involves the matter for which the CO was disciplined whereas the latter is more "global" and has no time limit. (Testimony of Slattery)

Other Matters

41. On June 2, 2017, the Appellant filed a complaint at the Mass. Commission Against Discrimination (MCAD) *alleging*, in part,

> … On August 25, 2015, I was arrested for a domestic violence incident. Following this arrest, I applied for FMLA leave for alcohol treatment.
>
> On August 31, 2005, I commenced an FMLA leave until October 7, 2015.

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[17] Although Mr. Slattery appeared in response to the Appellant's subpoena, the Appellant argues in his post-hearing brief that Mr. Slattery should have been disqualified from testifying about his confidential communication with the Appellant even though he acknowledges that union-member privilege is, at best, unsettled in Massachusetts. (Post-Hearing Brief, p. 38, n. 5)

[18] Mr. Slattery testified that he searched the previous ten (10) years of records for settlement agreements in cases involving domestic violence but only found the ones dating back to 2013.

> In November 2015, I returned to the workplace following my FMLA leave.
>
> In May of 2016, I served a 5 day suspension for conduct unbecoming.
>
> On April 10, 2016, I requested transfer which was date stamped by Respondent on April 21, 2016.
>
> In June 2016, … I was approved for intermittent FMLA after resubmitting paperwork in order to complete treatment programs for my alcoholism and domestic violence.
>
> On September 15, 2016, I was arrested for a domestic violence incident.
>
> On November 30, 2016, I was terminated for a violation of the domestic violence policy.
>
> I believe that due to my alcoholism and use of FMLA my employment was targeted for termination. Therefore I charge Respondent with discrimination on the basis of disability. (A.Ex. 19)(*see also* A.Exs. 13 – 17)

42. The Respondent's policy regarding disability are contained in 103 DOC 206, which provides generally, in part, that it is "committed to maintaining a work environment that is free from illegal discriminatory behavior with regard to both hiring and the terms and conditions for employment, including, but not limited to, promotions, terminations, transfers, job assignments and discipline, including behavior which creates a hostile, offensive, humiliating or intimidating work environment and sexual harassment …." It defines disability, in part, as "(a) A physical or mental impairment, which substantially limits one or more major life activities; (b) a record of such impairment; or (c) being regarded as having such impairment. Unless specifically stated to the contrary, disability in this policy shall be synonymous with the term 'handicap' as used in M.G.L. c. 151B, s. 1 (16), (17) and its implementing regulations as set forth in 804 C.M.R. s. 3.01 (5)." (A.Ex. 24) Under 103 DOC 206, an employee may request a reasonable accommodation for a disability. (Id.)

43. With respect to transfers, 103 DOC 230.05 provides, "[t]he Department shall consider an employee's discipline history prior to a transfer, promotion or reassignment and they may be denied based on the date of the incident which resulted in discipline being imposed." (A.Ex. 11) If a CO has received a discipline above a letter of reprimand, the CO cannot be transferred for one (1) year. (Testimony of Slattery and Appellant) There are no transfers for mental health purposes or stress. A CO may be transferred to thirty (30) days if there is a staff conflict but after that, the CO would have to bid for a transfer pursuant to the collective bargaining agreement and seniority. (Testimony of Slattery)
44. The Appellant alleges that he sought a transfer because he was suffering from stress at work in the performance of staff before he was terminated, in addition to the usual stress in the DDU. He alleges that he reported the staff problems to his direct supervisor, who reviewed video surveillance and spoke to the staff but the remedy was apparently short-lived. The Appellant did not report the staff with whom he was having problems to the Deputy Superintendent or Superintendent. (Testimony of Appellant)

Applicable Law

Pursuant to G.L. c. 31, § 43, a "person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . . ." The statute provides, in pertinent part:

> 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 the 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 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.

G.L. c. 31, § 43.

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." Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Comm'rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); 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. of Brockton v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, 488 (citing 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).

While the Commission makes *de novo* findings of fact, "the Commission's task, however, is not to be accomplished on a wholly blank slate." Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). "Here, 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.'" Id. at 823-24 (citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)).

"The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006)." Clark v. Boston Housing Authority, 24 MCSR 193 (2011), Clark v. Boston Housing Authority, Suffolk Superior Court, C.A. No. SUCV2011-2554E, *aff'd.* (Feb. 13, 2015). In a civil case, the Massachusetts courts have held that even a party asserting his or her rights against self-incrimination under the U.S. or Massachusetts Constitutions "may be the subject of a negative inference by a fact finder where the opposing party … has established a case adverse to the person invoking the privilege. Quintal v. Commissioner of the Dep't of Employment & Training, 418 Mass. 855, 861 (1994), quoting Custody of Two Minors, 396 Mass. 610, 616 (1986)." Town of Falmouth, at 826-27 (citations omitted).

Under certain circumstances, the Commission may modify the discipline issued to a tenured civil service employee. "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." Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006). The Commission is also guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" as well as the "underlying purpose of the civil service system … to guard against political considerations,

favoritism and bias in governmental employment decisions. ” Id. (and cases cited). Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. *See* Boston Police Dep't v. Collins, 48 Mass.App.Ct. 408, 412 (2000).

Credibility

Although the Appellant declined to testify about matters related to his September 15, 2016 arrest, based on his other statements, I find that the Appellant's credibility was limited. When interviewed by Trooper Flynn, the Appellant asserted that he did not recall what happened after he got out of the car on Rte. 24. However, while he was in jail after the arrest, he admitted in some calls that he had grabbed the steering wheel and grabbed Ms. A by the throat, in other calls the Appellant accused Ms. A of driving 100 mph, hitting him in the head with a mug and trying to run him over. Had the Appellant reported such grave assertions about Ms. A to the police on the night of his arrest, these statements would have had some support but the Appellant did not make these assertions until he was in jail. Other calls the Appellant made while incarcerated further diminish his credibility. For example, the Appellant asked others to speak to Ms. A to see if she would refuse to testify against him in the impending criminal trial like she had in regard to his 2015 arrest for domestic violence; the implication was clearly to undermine the prosecution of the criminal charges against him. In one (1) call, the Appellant told his father than he wanted to obtain a restraining order against Ms. A in an apparent effort to counter a court order against him. In his testimony at the Commission, the Appellant complained that he was starting to have problems with staff at work before he was terminated but he testified that he did not report the staff to the Dep. Superintendent or Superintendent the staff with whom he was having problems when the efforts of his immediate supervisor had limited effect. In addition,

there is no supporting documentation in the record in this regard. When answering questions about his 2015 domestic violence incident, the Appellant minimized many aspects of his conduct.

I find EPD Officer Wheeler to be credible. At the time of the September 15, 2016 domestic violence, he had been a member of the EPD for nine (9) years, he was a field training officer and a member of a regional SWAT team. His testimony was straightforward and consistent with his report. When he did not know the answer to a question, he said so. For example, he was asked how the 911 call to the EPD was made and he stated that he did not know. His timely report and his testimony indicated that he gave full consideration to the statements and injuries of both the Appellant and Ms. A before determining that the Appellant was the primary aggressor. Before asking the Appellant what happened, he told him what Ms. A had said. The police photographs of injuries confirmed Officer Wheeler's testimony and report.

I find Trooper Flynn, who arrested the Appellant on September 15, 2016, to be credible. Although he had been member of the State Police for only one year since completion of the State Police academy at the time of the Appellant's arrest on September 15, 2016, he had additional experience as a police officer, having worked at the Marshfield police department for three (3) years. His testimony was clear and consistent with his timely report and the photographs taken of injuries. In addition, although Trooper Flynn testified that he spoke to at least one (1) of the EPD officers at the gas station, the officer told him that the case involved a "domestic" incident but the officer did not tell Trooper Flynn what the Appellant and Ms. A had told the EPD officers, leaving Trooper Flynn to make his own assessment. When Trooper Flynn did not know or recall the answer to a question, he stated so. For example, when he was asked if he asked the Appellant why he needed to get out of car that night, as the Appellant alleged, Trooper Flynn

said that he could not recall if he asked the Appellant why. Moreover, Trooper Flynn's testimony reflected common sense, stating that if the Appellant was simply defending himself that night, he could have walked away when the car stopped.

I find CO Green, who investigated the Appellant's September 15, 2016 domestic violence incident, to be credible. CO Green has received forty (40) hours of investigation training and, at the time of events here, he had been assigned to the DOC Internal Affairs division for approximately three (3) years. Prior to that, he was a facility investigator at another DOC facility for a couple of years. CO Green's investigation report was a lengthy and well-documented report and his testimony was largely consistent therewith. For the report, CO Green obtained the EPD and State Police reports, information and photographs, as well as recordings of the 911 calls involving Ms. A, and analyzed the information in depth. He obtained and reviewed many audio recordings of the Appellant's calls from jail and video recordings from the gas station convenience store (from varying camera angles) where the Appellant and Ms. A went after the domestic violence on Rte. 24. He interviewed the gas station cashier and he called the officers who wrote the police reports to interview them but they did not respond before CO Green concluded his investigation on September 26, 2016. However, CO Green testified that he concluded that both the Appellant and Ms. A had been drinking on September 15, 2016 although the police reports did not so find.

I find CO Slattery to be credible. He provided consistent interpretations of DOC rules, policies and practices regarding disciplinary matters pertaining to domestic violence and settlements related thereto, explaining the union's role in such disciplinary matters and settlements. He recalled, albeit with admitted limitations, the domestic violence disciplinary matters and settlements in which he was involved over the four (4) years he has served as

MCOFU Vice President. Further, he clarified how and why different terms were used in the various settlement agreements and the meaning and purpose of such terms.

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant for his conduct in connection with his September 15, 2016 arrest, which conduct violated the cited DOC rules and policies. In addition, I draw an adverse inference from the Appellant's decision not to testify at the Commission hearing about the events of September 15, 2016 and related subsequent matters, his decision not to testify at the DOC hearing, and his decision not to answer questions during the DOC's investigation.

The evidence in the record concerning the Appellant's domestic violence on September 15, 2016 and related matters is detailed and damning. While Ms. A was driving on a state highway late at night on September 15, the Appellant was sitting in the passenger seat and tried to grab the steering wheel and attempted to force the car off the road and pull the keys out of the ignition. The Appellant also tried to throw Ms. A's cell phone out the passenger window but the window was closed so the Appellant injured his elbow. In the car, the Appellant beat Ms. A and tried to choke her. Ms. A attempted to stop the Appellant's attack. The car ended up in the breakdown lane. The Appellant got out of the car and pulled Ms. A out of the driver's seat, pulled her hair, and tried to choke her again. During the abuse, the Appellant threw Ms. A's cell phone and keys into the woods, cutting off her ability to get help or escape. Thereafter, they returned to the car and, using the Appellant's keys, drove to an exit off the highway and stopped at the Alltown Mobil gas station in Easton, where they arrived at approximately 1:40 a.m.

At the gas station, Ms. A entered the convenience store and asked Ms. H, the cashier, to borrow her cell phone. Ms. H offered her the phone and Ms. A called the Easton Police

Department (EPD) to report the abuse while standing next to the cashier. However, during Ms. A's call to the police, the Appellant entered the store and stood next to Ms. A. As a result, Ms. A hung up the phone and handed it back to the cashier. Shortly thereafter, the EPD dispatcher called Ms. H's phone and asked to speak to the person who had called them and hung up before the call was over. Ms. H handed her phone to Ms. A. The dispatcher informed Ms. A that she was sending the police to the store because it was EPD policy to do so under the circumstances. The dispatcher then spoke to Ms. H, asking Ms. H if Ms. A appeared to be upset and Ms. H said that Ms. A did appear to be upset. Two (2) EPD officers arrived at the store shortly thereafter. EPD Officer Wheeler spoke with Ms. A and noted that she had "bruises all over her arms, red marks around her neck, her ears and nose were bleeding, and she looked visibly shaken." EPD Officer Kitsos photographed Ms. A's injuries. One of the photos shows a clump of Ms. A's hair that was "twice the size of a golf ball" that Officer Wheeler saw fall from Ms. A's hair as she put her fingers through it. At Officer Wheeler's request, Ms. A drafted an affidavit describing the Appellant's abuse. Thereafter, Officer Wheeler told the Appellant what Ms. A reported and he noticed that the Appellant's elbow was bleeding. The Appellant told Officer Wheeler that he smashed the car window with his elbow but he did so in an attempt to get out of the car. He admitted pulling Ms. A's hair but said he did it because she was trying to bit him. The Appellant alleged that Ms. A had been drinking but Officer Wheeler did not observe that Ms. A was intoxicated. The Appellant disclosed to Officer Wheeler that that he had been involved in another domestic violence incident.

The State Police were informed of this matter since the abuse occurred on a state road. At or about 2:35 a.m., Troopers Flynn and Lucas arrived at the gas station and spoke with the EPD officers. Thereafter, Trooper Flynn spoke first with the Appellant and then Ms. A. The

Appellant alleged that he and Ms. A were arguing on the way home, that Ms. A pulled over into the breakdown lane on Rte. 24, and that when he grabbed the keys from the ignition, Ms. A bit his bicep. Trooper Flynn observed red marks on the Appellant's right bicep. The Appellant further alleged that he broke the passenger window with his elbow when he was trying to get out of the car and that he did not recall how he got to the gas station from there. Trooper Flynn detected a "strong odor of an alcoholic beverage" coming from the Appellant's mouth. In speaking with Ms. A, Trooper Flynn noted that the bruises on her arm and red marks on her neck were consistent with what she reported. Trooper Flynn concluded that the Appellant was the "primary aggressor", placed him under arrest for domestic assault and battery under and strangulation or suffocation, and transported him to the Milton State Police Barracks, where he was processed, photographed and fingerprinted. A bail commissioner was called and informed the state Police that the Appellant should not be released, rather, that he should be detained until he appeared in court later that morning. For obvious reasons, the State Police took the Appellant's license to carry a firearm and made arrangements to obtain the Appellant's pistol at home and to search the house for any other guns. Trooper Flynn's report specifically noted, "The remainder of [the Appellant's] firearms are stored at his supervisor's house … [The Appellant] said he has stored them there since he was last arrested for Domestic A&B last summer." R.Ex. 4. Ms. A remained at the store for the rest of the night, always standing or sitting close to the cashier, clearly in fear, only leaving at approximately 5:15 a.m. when a tow truck arrived to transport the car. [19]

The Appellant's reprehensible conduct continued after he abused Ms. A in 2016 and after his related arrest. In court later that morning, the Appellant was ordered not to abuse Ms. A but,

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[19] Since the Appellant threw Ms. A's keys away on Rte. 24, they used the Appellant's keys to drive the car to the gas station. It is unclear what happened to the Appellant's keys thereafter but Ms. A apparently had no keys and needed the tow truck in order to transport the car home.

in addition, he was held without bail until December 14, 2016 because of his prior arrest for an OUI in another court. The charges against the Appellant were transferred to the court in which the OUI charge was pending, where the court set bail and explicitly stated that the Appellant was not to be released without a GPS monitoring device. While the Appellant was in custody, he made a number of calls to his parents and others asserting that Ms. A had been the aggressor on Sept. 15, that she tried to run him down, and that she hit him in the head with a mug, for example, even though he had not made such assertions to police at the time of his arrest. During phone conversations with his father, the Appellant's father told him that he needed help. During other phone conversations, the Appellant admitted that he pulled Ms. A's hair, tried to grab the steering wheel and grabbed Ms. A's throat. In other such calls, a colleague said that this (the 2016 incident) was not the second, but the third time the Appellant had abused Ms. A, urging the couple to separate and stating that the Appellant should consider resigning. The Appellant said that Ms. A needed to decline to testify against him at the criminal trial scheduled for January 2017, as she had done in 2015 when the Appellant faced similar criminal charges and a colleague said that he and his wife would talk to Ms. A to inquire in that regard. Thereafter, in early December, the Appellant posted bail but his bail was revoked thereafter for an unspecified "violation of terms of release". In light of the Appellant's phone calls, it is no surprise that Ms. A invoked her marital privilege not to testify against the Appellant at trial and the case was dismissed and the Respondent had just cause to discipline the Appellant. Collectively and clearly, these actions by the Appellant in relation to his 2016 arrest constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and the Respondent was justified to discipline him therefor.

The Appellant alleges that his termination constitutes disparate treatment since other DOC employees disciplined for domestic violence have not been terminated. A review of the evidence adduced here indicates that the majority of the approximately seventy (70) DOC employees who have been disciplined for domestic violence have been suspended for various time periods and a small number of them have been terminated for one (1) incident of domestic violence. There is little evidence in the record about the details of many of the domestic violence incidents, the outcome of related criminal cases and restraining orders, and the injuries to victims. However, it is clear that in disciplining COs charged with domestic violence, the Respondent considers each case and it has terminated the employment of a small number of COs after one (1) domestic violence incident. In the instant case, the Appellant was charged with domestic violence in two (2) occasions only a year apart. The Respondent has established by a preponderance of the detailed evidence in the instant case that the Appellant committed domestic abuse in 2016 and violated cited DOC rules and/or policies, which the Respondent found merits termination. The Appellant's egregious conduct leading to his 2016 arrest and his conduct thereafter in connection with that arrest, noted above, warranted appropriate discipline. That the criminal charges against the Appellant in 2016 were dismissed does not undermine the Respondent's decision to discipline the Appellant since the Appellant, through his phone calls from jail, was able to communicate indirectly with Ms. A to invoke the marital privilege, as she did one (1) year earlier, depriving the prosecution of its one percipient witness. Given the Appellant's conduct in connection with his 2016 arrest, his second incident of domestic violence in a year, the Respondent's decision to discipline the Appellant by terminating his employment does not constitute disparate treatment. Since the findings of fact and interpretation of the

pertinent law herein are similar to those of the Respondent, I find no reason to modify the discipline.[20]

The Appellant also avers that the Respondent terminated him for taking FMLA time to obtain treatment for his alcoholism and domestic violence and denied his request for a transfer, which constitute discrimination on the basis of a disability. In so far as the Appellant alleges his transfer request was wrongfully denied, I note that 103 DOC 230.05 requires the Respondent to consider an employee's discipline history before the employee is transferred, promoted or reassigned and that the employee's request "may be denied based on the date of the incident which resulted in discipline being imposed." A.Ex. 11. The Appellant also asserts that the Respondent was required to offer him a reasonable accommodation for a disability under the circumstances. The Appellant reports filing an MCAD claim in this regard and the Commission will not further comment thereon.

Conclusion

For the reasons asserted herein, Mr. Adams' appeal under Docket No. D1-16-205 is hereby ***denied***.

Civil Service Commission

/s/

Cynthia Ittleman
Commissioner

[20] The Respondent argues that courts have overturned arbitrators' decisions restoring law enforcement officers to work after termination for committing domestic violence as against public police, citing Commonwealth DOC v. MCOFU and Paul Brouillete, Superior Court C.A. No. 10-4286F (2012), Connolly, J. However, the instant case does not involve an arbitration. Further, the Respondent relies on City of Boston v. Boston Police Patrolmen's Association, 443 Mass. 813, 823 (2005) to assert that a correction officer can be terminated for felonious misconduct and conviction not required. In the instant case, it is unclear if the Appellant was charged with a felony domestic assault and battery in connection with his arrest on September 15, 2016.

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 17, 2019.

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 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. 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 to:
Howard Fine, Esq. (for Appellant)
Amy Hughes, Esq. (for Respondent)