

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RIGAUBERT AIME
Appellant

v.

D-11-206

DEPARTMENT OF CORRECTION,
Respondent

Appellant’s Attorney:

Regina M. Ryan, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer Street
Boston, MA 02110

Respondent’s Attorney:

Earl Wilson, Esq.
Senior Labor Relations Specialist
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman^{1,2}

DECISION

The Appellant, Rigaubert Aime (hereinafter “Aime” or “Appellant”), pursuant to G.L. c. 31, § 43, is appealing the decision of the Massachusetts Department of Correction (hereinafter “Department” or “DOC”), as the Appointing Authority, to suspend him for one (1) day without pay from his employment as Correction Officer I for violating Rules 6(a), 6(d), and 19(d) of the

¹ This case was heard by Commissioner Daniel Henderson, whose term expired before drafting a decision. Pursuant to 801 CMR 1.00(11)(e), this case was reassigned to Commissioner Christopher Bowman, who reviewed the CD, notes, and exhibits, and drafted a decision.

² The Commission acknowledges the assistance of Law Clerk Beverly J. Baker in preparing this decision.

Rules and Regulations Governing All Employees of the Massachusetts Department of Correction.

The Appellant filed a timely appeal with the Civil Service Commission (hereinafter “Commission”) on June 21, 2011. A pre-hearing was held on June 30, 2011. A full hearing was held on September 13, 2011. The hearing was digitally recorded. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Eighteen (18) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Anne Manning, Deputy Superintendent, Lemuel Shattuck Hospital Correctional Unit, DOC;
- Donna M. Driscoll, Captain, Lemuel Shattuck Hospital Correctional Unit, DOC;
- Douglas Adams, Lieutenant, Lemuel Shattuck Hospital Correctional Unit, DOC;

For the Appellant:

- Rigaubert Aime, Appellant

I make the following findings of fact:

1. At all relevant times, the Appellant, Rigaubert Aime, was a tenured civil service employee in the position of Correction Officer I. The Appellant has been employed by the Department since September 1995. (Testimony of Appellant)

2. At all relevant times, the Appellant was employed at the Lemuel Shattuck Hospital Correctional Unit (hereinafter "Shattuck"). Shattuck is a Department facility within the Department of Public Health's Shattuck Hospital. Shattuck consists of a twenty-nine (29) bed inpatient unit known as "8 North" and an outpatient treatment area that is open Monday through Friday from 9:00 a.m. to 5:00 p.m. There are approximately eighty (80) Department employees assigned to Shattuck. The 8 North unit is staffed twenty-four hours on three shifts, by anywhere from seven (7) to fifteen (15) employees. The outpatient treatment area is staffed by approximately fifteen (15) employees on a single "day" shift. At all relevant times, the Appellant worked the 11:00 p.m. to 7:00 a.m. shift. (Testimony of Manning)
3. Prior to the incident at hand, the Appellant received three (3) Letters of Reprimand and a five-day suspension for violation of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. (Joint Exhibits 13 – 17)
4. Lt. Douglas Adams holds the position of Superintendent's Special Investigator at Shattuck. Lt. Adams was assigned to investigate a dispute that occurred between Aime and Lt. Michael Jeghers on June 25, 2010. An interview was initially scheduled for December 23, 2010, but the Appellant was out sick that day and then on an extended period of leave, lasting several months. Lt. Adams rescheduled the investigatory interview with the Appellant for March 8, 2011 at 6:00 a.m. Lt. Adams notified the Appellant at least one week in advance of this meeting, so that the Appellant could have the opportunity to secure Union representation if desired. (Testimony of Adams)
5. As of March 8, 2011, there was no Union steward regularly scheduled to work the 11:00 p.m. - 7:00 a.m. shift. (Testimony of Manning, Driscoll, Adams)

6. Lt. Adams' practice when scheduling interviews on the 11:00 p.m. – 7:00 a.m. shift was to provide at least one week notice in order to afford the employee ample time to secure Union representation or, alternatively, to allow another employee from the shift to sit with the interviewee. (Testimony of Adams, Driscoll)
7. A few days prior to the investigatory interview scheduled for March 8, 2011, the Appellant advised Lt. Adams that CO Robert Henderson, a Union steward who normally worked 9:00 a.m. - 5:00 p.m., would be attending the interview as the Appellant's Union representative. (Testimony of Adams)
8. On March 7, 2011, Captain Paul Craven called Shattuck Superintendent Raymond Marchilli at CO Henderson's request, to ask if he (Henderson) would be compensated for coming in early to attend the Appellant's interview with Lt. Adams or if, in the alternative, he could have his hours changed to 6:00 a.m. - 2:00 p.m. After speaking with Superintendent Marchilli, Cpt. Craven informed CO Henderson that he (Henderson) would not receive compensation for coming in early and would not have his schedule changed. (Joint Exhibit 10)
9. In the case of employees on the 11:00 p.m. – 7:00 a.m. shift seeking union representation, it was the past practice to grant a union representative, upon request, an accommodation with respect to his or her shift schedule. Such accommodations have been allowed since this incident took place. (Testimony of Manning)
10. On March 7, 2011, the day before the Appellant's scheduled interview with Lt. Adams, CO Henderson informed Lt. Adams that he would not be representing the Appellant at the meeting, citing Superintendent Marchilli's refusal to provide CO Henderson with additional compensation or alter his shift. Cpt. Driscoll subsequently learned that CO Henderson would

not be attending the meeting with the Appellant. It is unclear if DS Manning was aware of that information. However, none of these individuals knew whether CO Henderson had notified the Appellant prior to March 8, 2011 that he (Henderson) would not be attending or whether the Appellant had secured alternate representation. (Testimony of Adams, Driscoll; Joint Exhibits 9 & 10)

11. At approximately 5:50 a.m. on March 8, 2011, Cpt. Driscoll called Lt. Hawkins, the 11:00 p.m. – 7:00 a.m. shift commander of the 8 North unit of LSHCU. During the conversation, Lt. Hawkins was instructed to have the Appellant report to Lt. Adams' office for the investigative interview. When the Appellant failed to appear, approximately ten minutes later, a second call was made by Cpt. Driscoll to Lt. Hawkins. Lt. Hawkins informed Cpt. Driscoll that the Appellant was making a telephone call. At Lt. Adams' request, Cpt. Driscoll instructed Lt. Hawkins to have the Appellant report to Adams' office, where the Appellant could make a phone call. (Testimony of Adams; Joint Exhibit 11)
12. The Appellant arrived at the Personnel Building without a Union representative at approximately 6:07 a.m. The Appellant was allowed to make a phone call from Lt. Adams' office and spoke with CO Henderson. Henderson informed the Appellant that he would not arrive until at least 7:00 a.m. to represent him. The Appellant was then allowed to make another phone call from the Locksmith's outer office. (Testimony of Adams; Joint Exhibit 11)
13. The Appellant met with Lt. Adams in Lt. Adams' office. Lt. Adams advised the Appellant that he wished to proceed with the interview, despite the absence of CO Henderson, because the Appellant had been given ample time to secure Union representation. Lt. Adams offered

to have another officer from the 11:00 p.m. – 7:00 a.m. shift accompany the Appellant during the interview. The Appellant was not receptive to Lt. Adams' offer. (Testimony of Adams)

14. Lt. Adams communicated his intention for the meeting to go forward, in the absence of the Union representative. Lt. Adams repeatedly asked the Appellant if he was going to participate in the interview, to which the Appellant did not respond. Ultimately, Lt. Adams asked the Appellant to simply answer "yes" or "no" as to whether he would participate, to which the Appellant did not respond. (Testimony of Adams, Manning)
15. DS Manning normally works from 9:00 a.m. to 5:00 p.m. She had come to work at approximately 6:00 a.m. that morning, because she knew that the Appellant was scheduled to be interviewed by Lt. Adams. She did not have a prescheduled meeting with the Appellant, but she planned on speaking to him after his meeting with Lt. Adams. It was DS Manning's intention to hand deliver a Letter of Reprimand that the Department had mailed to the Appellant, but which the Appellant indicated he had never received. In addition, DS Manning wanted to discuss a report made by Lt. Hawkins, the 11:00 p.m. – 7:00 a.m. shift commander. In that report, Lt. Hawkins had indicated that the Appellant had refused to acknowledge or respond to him when Lt. Hawkins made inquiries to him about operations on the shift. Superintendent Marchilli had instructed DS Manning to meet with the Appellant due to concern that, by refusing to respond to his superior officer, the Appellant was creating operational and safety concerns in the running of the shift. Cpt. Driscoll planned to join DS Manning's meeting with the Appellant. (Testimony of Manning, Driscoll)
16. DS Manning's office is directly across the hallway from Lt. Adams' office. Cpt. Driscoll's office is located approximately fifteen feet from DS Manning's office, on the same side of the corridor. (Testimony of Manning, Driscoll)

17. At approximately 6:15 - 6:30 a.m., DS Manning observed the Appellant open the door to Lt. Adams' office. She heard Lt. Adams ask the Appellant several times if he (the Appellant) was going to participate in the interview and noted that the Appellant was failing to respond. Accordingly, DS Manning stood and walked directly across the hall to the entrance to Lt. Adams' office and stated that since it was clear that the Appellant was not willing to participate in the interview, the meeting between Lt. Adams and the Appellant was over. (Testimony of Manning, Driscoll, Adams)

18. DS Manning then instructed the Appellant to meet with her in her office to discuss another matter. The Appellant did not respond verbally, but shook his head in the negative and started to walk away. DS Manning then instructed the Appellant not to walk away while she was speaking to him and repeated that he was to meet with her in her office. The Appellant stopped, looked at DS Manning while shaking his head in the negative, turned away from DS Manning and continued to walk away, towards the exit. DS Manning reiterated her directive, stating that she had to meet with the Appellant to discuss operational matters. The Appellant then responded "no" and that he wanted a Union representative. DS Manning then informed the Appellant that the meeting was not disciplinary in nature and that a Union representative was not required. The Appellant responded by saying "I am intimidated." (Testimony of Manning; Joint Exhibits 5 - 7)

19. Cpt. Driscoll had been in her office preparing for the meeting with DS Manning and the Appellant. Her door was partially open. She was exiting her office when she heard DS Manning making the statement that since it was clear that the Appellant was not willing to participate in the meeting with Lt. Adams, that the meeting was concluded. Cpt. Driscoll heard and observed the interaction between DS Manning and the Appellant. Following the

Appellant's statement that he was intimidated, Cpt. Driscoll reiterated what DS Manning had said about the meeting not being disciplinary in nature. (Testimony of Manning, Driscoll; Joint Exhibits 5 - 7)

20. At no point did DS Manning yell at the Appellant or otherwise act in an unprofessional manner. (Testimony of Manning, Driscoll)

21. The Appellant then asked if he could call someone on duty at 8 North to attend the meeting with him. This request was granted and approximately ten minutes later, CO Kenneth Beers, the Chief Steward for the Union arrived to attend the meeting with the Appellant, DS Manning, and Cpt. Driscoll. Although it was not his regular shift, CO Beers was working the 7:00 a.m. – 3:00 p.m. shift that day, either on an overtime basis or as a result of a shift arrangement made with another officer. (Testimony of Manning, Driscoll; Joint Exhibits 5, 7)

22. At approximately 7:00 a.m., DS Manning, Cpt. Driscoll, CO Beers and the Appellant met in DS Manning's office. DS Manning then informed the Appellant that she considered his earlier conduct in the hallway to be insubordinate and that she would be reporting the matter to Superintendent Marchilli. The Appellant responded by denying that he had been insubordinate and stating, "it will be your word against mine." (Testimony of Manning, Driscoll, Appellant; Joint Exhibit 8)

23. At this point, CO Beers then requested to speak with the Appellant in the hallway. The request was granted and several minutes later, CO Beers and the Appellant returned to DS Manning's office. (Testimony of the Appellant, Manning, Driscoll; Joint Exhibit 8)

24. Upon returning to DS Manning's office, the Appellant's demeanor changed. He told DS Manning that he did not mean any disrespect and that in the past, she had treated him courteously. (Testimony of Manning, Driscoll; Joint Exhibit 8)
25. CO Beers then asked if DS Manning would reconsider reporting the incident in the hallway. However, DS Manning informed CO Beers that because the Appellant's conduct in the hallway had been overtly insubordinate, she could not fail to report it. (Testimony of Appellant, Manning, Driscoll; Joint Exhibit 8)
26. The meeting then continued and DS Manning provided the Appellant with the Letter of Reprimand, which the Appellant claimed he had not received. DS Manning also discussed the matter of the Appellant's conduct with respect to Lt. Hawkins. DS Manning informed the Appellant that he could not refuse to respond to the Shift Commander when the Shift Commander makes inquiries as to the unit's operation. DS Manning reminded the Appellant of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. The meeting concluded after approximately fifteen minutes. (Testimony of Manning, Exhibit 8)
27. DS Manning spoke clearly and was a good witness. Though her responses were slightly hesitant at times, she struck me as being genuinely concerned about the daily operations of LSHCU and the Appellant. I credit her testimony (Testimony, demeanor of Manning)
28. Cpt. Driscoll was a good witness and I credit her testimony in its entirety. She responded clearly and consistently to the questions she was asked. (Testimony, demeanor of Driscoll)
29. Lt. Adams offered clear and straightforward answers to the questions posed to him. I credit his testimony. (Testimony, demeanor of Adams)

30. The Appellant spoke very rapidly and was difficult to understand at times. At times, he interrupted before a question could be completed and gave answers that were unresponsive to the question posed. The Appellant testified that DS Manning opened the door and entered Lt. Adams' office in a hostile manner. However, the Appellant failed to explain how DS Manning could observe the Appellant's interactions with Lt. Adams with the door closed. Furthermore, the Appellant did not describe why he characterized DS Manning's behavior as "hostile." (Testimony, demeanor of Appellant)
31. As a result of the above-referenced rule violation, Superintendent Marchilli imposed a one (1) day suspension. (Joint Exhibit 4)

CONCLUSION

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d

923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (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, 133 N.E.2d 489 (1956).

"The commission's task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision,'" which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). *See* Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification

for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). *See also* Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

Here, the Appellant was issued a one-day suspension for insubordination for an incident related to his interaction with a Deputy Superintendent at DOC. The interaction between the Appellant and the Deputy Superintendent is inexorably tied to a meeting (which did not go forward) which both parties agree was related to a disciplinary matter. The Appellant, prior to and at the start of that meeting, exercised his right to request union representation. Ultimately, that meeting did not go forward because no union representative was available.

A review of the record indicates that the Deputy Superintendent was aware that the aborted meeting was disciplinary in nature. With that meeting now canceled, the Deputy Superintendent asked the Appellant to join him in her office to discuss "operational" issues. The evidence clearly shows that the nature of that planned discussion was related to additional disciplinary matters related to the Appellant, for which the Appellant was entitled to have a union representative present.

When asked to enter the Deputy Superintendent's office, the Appellant initially shook his head and walked away. After being joined by a union representative, the Appellant eventually met with the Deputy Superintendent and apologized regarding their prior interaction.

The Commission has long held that DOC is a paramilitary organization where lawful orders must be obeyed and, more generally, employees must treat their superiors and fellow employees respectfully. That longstanding edict remains unchanged.

Here, however, DOC was well aware that the Appellant had exercised his right to have a union representative present well before his interaction with the Deputy Superintendent. He exercised that right during the initial meeting which the Deputy Superintendent knew was disciplinary in nature. Having accepted that the Appellant could refuse to participate without a union representative, DOC then sought to have a different conversation, also related to a disciplinary matter. It was in this context that the Appellant initially shook his head and walked away, which DOC determined was insubordination. In that context, I am hard-pressed to find that his actions constituted insubordination.

For this reason, I conclude, that DOC, has not shown, by a preponderance of the evidence, that the Appellant engaged in insubordination and his appeal under Docket No. D-11-206 is hereby *allowed*. He shall be entitled to all appropriate payment of pay and benefits associated with the 1-day suspension, which is now rescinded as a result of this decision.

Civil Service Commission

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on May 3, 2012.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice:

Regina M. Ryan, Esq. (for Appellant)

Earl Wilson, Esq. (for Appointing Authority)