Decision mailed: 7/30/10
Civil Service Commission CB

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

WAYNE ALLARD,
Appellant

v.

Docket No.: D-08-171

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Wayne Allard (hereafter "Appellant") filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that Department of Correction (hereinafter "DOC," or "Appointing Authority") did not

have just cause for suspending him for five (5) days for (1) hiring a former inmate and (2) failing to disclose such action to the DOC, (3) failing to disclose that family funds were used to post bail for said former inmate and (4) being less than truthful in the ensuing DOC investigation. The Appellant filed a timely appeal at the Commission. A hearing was held on October 8, 2008 at the offices of the Commission. Two (2) tapes were made of the hearing and are retained by the Commission. Upon the Appellant's request, the hearing was made public. The witnesses were sequestered.

FINDINGS OF FACT

Thirteen (13) exhibits and a stipulation were entered into evidence. Exhibit 13 was filed post hearing as directed at the hearing. The DOC made an oral motion for sequestration of witnesses which was allowed and ordered; the Appellant's wife, Kelly Allard was the only witness sequestered. Based on these exhibits and the testimony of:

For the Appointing Authority:

- David Shaw, Correction Officer I, Investigator, Office of Investigative Services

For the Appellant:

- Appellant, Sergeant Wayne Allard, Correction Officer II
- Kelly Allard

I make the following findings of fact:

1. The Appellant, Sergeant Wayne Allard, a tenured civil service employee, has been employed by the DOC since 1991. (Testimony of Appellant; Exhibit 10, The Appellant Letter)
2. He received a copy of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (hereinafter "Blue Book") on October 22, 1991, when he began as a DOC employee. It is noted that this is a check list form signed by the Appellant. However, there is an apparent oversight on the form since the DOC employee designated on the form as the

deliver of designated rules and regulations, failed to sign and date the form as required. (Exhibit 1)

3. The Appellant had no previous disciplinary history with the DOC. (Exhibit 7)
4. On January 31, 2007, an anonymous person placed a call to the DOC, alleging that the Appellant was making harassing phone calls to her sister who owed him money, and that he had employed a former inmate and paid him under the table. The caller also stated that the Appellant had posted a $5000.00 bond for this former inmate as well. The caller also stated that the Appellant is her aunt's husband. (Exhibit 5)
5. On February 7, 2007, DOC assigned David Shaw (hereinafter "Shaw") to investigate the allegations of this call. (Testimony of Shaw ,Exhibit 5)
6. During his investigation, Shaw discovered and alleged that Sunni (hereinafter "Sunni") was the caller. Shaw also determined that both Sunni and her sister, Ryanna (hereinafter "Ryanna") are the nieces of the Appellant's wife, Kelly Allard (hereinafter "Mrs. Allard" or "Kelly") (Testimony of Shaw)
7. It also appears that Kelly Allard's sister, Mona Lou, the mother of Sunni and Ryanna is deceased. (Testimony of Mrs. Allard)
8. In the course of the investigation, Shaw discovered that allegedly the former inmate (hereafter "FI") and Ryanna were romantically involved from summer 2006 to February 2007 and may have subsequently been married. (Exhibit 5, Testimony of Shaw, Appellant and Mrs. Allard)
9. Investigator Shaw interviewed the Appellant on February 9, 2007, without giving him any advance notice of the interview itself or its subject matter. The Appellant was at work and received a "tap on the shoulder" and told to report to a room, where the interview took place. Lt. Hammond of the DOC- Office of Investigative Services and a union representative were also

present for this recorded interview. Investigator Shaw had a brief discussion with the Appellant "off-tape" prior to beginning of the recording.(Testimony of Shaw and Appellant)

10. Investigator Shaw has an unusual interview style. He speaks very, rapidly running his words together, so that he may not be easily understood. He does not follow his questions in a clear chronological sequence so that it is unclear whether he is asking a particular question about knowledge or state of mind held at a point in the past or currently held. His syntax is at times confusing or misleading; for example his verb tense may be reasonably derived from the context of his prior questions and yet his syntax or verb tense, if heard correctly may indicate otherwise. For example, the Appellant was asked if he knew the "FI" he answered yes and described hiring him for 1 week-end to work the ice business at the Loudon raceway in NH, in the summer or fall of 2006. Then rapid-fire he was asked- Q. Who is he? A. He's one of my wife's niece's boyfriends. He was then asked –Q. Did you know anything about him, other than he was your wife's niece's boyfriend when you hired him? He answered, A.-Not really, no. However, I had to replay the CD 3-4 times and found that Shaw may have used the present tense of the verb (Do) instead of the past tense (Did). I found it confusing and I assumed from the context that the past tense "Did" was the intended word, to indicate what he knew when he hired him. It is confusing and I can't determine whether this type of interview style is accidentally or intentionally misleading. Also, when the Interviewer Shaw derived an answer that although unclear or incomplete; he felt was a factual admission, a contradiction or otherwise disadvantageous to the Appellant, he left it in the unclear state. He rarely clarified or nailed down a fact that formed the basis of these charges. (Testimony and demeanor of Shaw, reasonable inferences, Ex. 5-CD)
11. The Appellant also has an unusual way of phrasing his answers which may have been confusing to the investigator at the interview or the cross-examiner at the commission hearing. He also

mixes his verb tenses and misuses pronouns or what would ordinarily be commonly used or colloquial phrases. The Appellant claimed that he did not have a good memory and tried to answer questions to the best of his memory, off the top of his head, without any time to reflect or review his records. He repeated that, at the interview, he was not sure of certain details and the time line without checking with his wife and the records. A good example of his phraseology is his statement that he paid the "FI" in cash, "under the table", the same way all the other workers were paid. However, what he meant by the phrase: "under the table" was that it was under the $500 limit of the tax table, otherwise he would have to send "FI" a "W-9" form. He further explained that it's all done "over the board", according to the tax laws. Shaw only focused on the "under the table" part of the answer as if it was somehow an admission to some unknown tax law reporting violation. I believe that the Appellant may have been referring to an IRS-1099 form for reporting of nonemployee compensation if over a certain limit, and not a W-9. The Appellant was not given any advance notice of the interview or the subject matter. The circumstances at this surprise interview including the confusing styles of the interviewer and interviewee was not conducive to the distillation of accurate facts. (Testimony and demeanor of Appellant, Ex. 5-CD, Ex. 12, reasonable inference)

12. Investigator Shaw has an inclination toward taking a statement by the Appellant out of context and misconstruing it or comparing it to other statements, also taken out of context to show some alleged inconsistency. However, given the fact that the Appellant was: nervous, unprepared, professed a bad memory, needing records to be reviewed, speaks in uncommon syntax or phraseology, and facing Shaw's formidable interview style; he was remarkably forthright and consistent in the interview. The Appellant relayed that he and his wife met FI briefly in the summer of 2006, for a handshake introduction by Ryanna so that he could be hired to work an

event for their ice business. It is noted that at the interview the Appellant could not remember if FI had worked one or two events that summer-fall. Shaw tried to mold this slight indefiniteness into some form of inconsistency or a "less than truthful" response. Kelly Allard had run the ice business with him and they each had separate personal accounts used for the business, and including cash kept by his wife at home for the business expenses. They did not have any joint banking accounts. His wife did most of the book-keeping, banking and related activities. His wife's mother had lived with them for several years while dying from cancer. She did eventually die in a hospice, in October, 2006. His wife had difficulty caring for her mother at home, while also trying to get some time to work as a social worker. His wife tried to rely on her niece Ryanna to help care for her mother at home. However, this was difficult as emotional turmoil and "chaos" resulted as both Ryanna and Ryanna's sister Sunni kept demanding money from the estate of their own mother, (Mona Lou), in the amount of ($1,200 ?). This money was expected from Kelly Allard since Kelly was the administrator of estate of her sister Mona Lou. In any event there was only $5,000 in proceeds from a life insurance policy which was consumed by funeral-burial expenses and the $1,200 remainder was held for other expenses so there was no money left to pay to either Ryanna or Sunni. This emotional turmoil and conflict between Kelly and Sunni and Ryanna continued right through the time of Kelly's mother's funeral in October, 2006 and presently. Kelly Allard had not told the Appellant that, under pressure from Ryanna, she had given $5,000 in cash to Ryanna for her boyfriend's ("FI") bail on a new arrest and arraignment, in August, 2006. However, at the time of the funeral in October, 2006, FI's criminal matters and the $5,000 posted bail were transferred from the District Court to Middlesex Superior Court. At that time, Kelly Allard told the Appellant about FI's arrest and the $5,000 bail money loan to Ryanna. At that point, the Appellant realized that FI was a former inmate. The

Appellant saw FI, sometime around the time of the funeral and told him that he did not want FI to have any contact with him or his family in the future. The Appellant then left all of the dealings regarding trying to get the loaned $5,000 bail money back, up to his wife, Kelly. Kelly made a number of telephone calls since then to Ryanna to attempt the repayment. However, it was eventually realized by both Kelly and the Appellant, that the prospects for repayment seemed bleak. The Appellant never made any contact with Ryanna, FI or anyone else regarding the repayment or the original loan. The Appellant was "skeptical" after belatedly learning about the loan, but believed that it was his wife's family and she would have to deal with it. The Appellant clearly and repeatedly told Shaw in the interview that he only learned about FI's arrest and his wife loaning the bail money to Ryanna, sometime in the fall of 2006. However, Shaw wouldn't give up on it and kept trying to trip up the Appellant and implicate him in a joint giving of the bail money loan to Ryanna. For example, after being clearly told of first learning of it from his wife in the fall of 2006; Shaw asked the Appellant, Q.- **"So you guys did it collectively?"**, thereby forcing the Appellant to explain it yet again. Shaw also wrongly testified at this hearing that the Appellant and his wife [jointly] filed the $5,000 bail bond in the court. Shaw also tried various techniques to ingratiate himself with the Appellant during the interview like congratulating him on his long-term relationship (14 years), with his wife and commiserating with him over the unlikely collection of the $5,000 loan to Ryanna. Shaw also described to the Appellant near the end of the interview, the very serious criminal record of convictions and incarcerations, including felonies, on FI's record. (Exhibits, Testimony and demeanor of Appellant, Kelly Allard and Shaw, Ex. 5-CD, reasonable inference)

13. Investigator Shaw, in the company of Lt. Hammond interviewed the FI at the Middlesex Superior Court house. The interview was recorded. The FI was not sworn for this interview. The

FI was accompanied by Ryanna but she refused to identify herself as being present for this interview. (Testimony of Shaw, Ex. 5-CD)

14. During this recorded interview, Investigator Shaw repeatedly asked the FI blatantly leading and suggestive questions, as if he were seeking confirmation of facts or information against the Appellant. The interview's first question was- Q. You worked for Correction Officer Wayne Allard, Correct? And another question- Q. At the time you started working for him this past summer, was he aware you were a former inmate of the Mass-DOC? Then followed up with the question -Q. How was he aware? It is noted the FI's meandering answer contained the statement: I told him **"I ended up doing some time for something stupid."** And another- Q. When you got arrested for your present pending issues now, did Wayne and his wife offer the money for bail? It is interesting to note however, that the FI did not take this suggestion and stated that the bail money loan had been negotiated between Ryanna and Kelly. And another- Q. You worked for him a couple of times, "under the table?" (It is noted that Shaw injected this phrase "under the table" into the question, it had not been used before that point) And another question regarding repayment of the bail loan- Q. Did he call you? Shaw after receiving what he believed to be information against the Appellant; responded "Very good". Shaw asked the FI if he was married to Ryanna at the time of his recent arrest and as the FI was fumbling for an answer, Shaw provided the word "engaged" to which the FI readily agreed that he was engaged at that time. Shaw summarily listed facts at the conclusion of the interview which he felt the FI had "confirmed" which were all against the Appellant. Those alleged "confirmed" facts: The FI worked for him during the summer; he knew he was an ex-inmate when he hired him; he paid him under the table; the FI is now married into the family and that he had threatened the FI over the phone over the repayment of the bail loan. It is noted however that the FI certainly

equivocated over the threatening phone calls. Ironically, the FI stated that one of telephone calls was a voice message left on his cell phone; yet, the FI inexplicably **did not save the message**. Shaw mysteriously pronounced the FI married into the family without the benefit of a clear statement from the FI, a marriage certificate and with an acknowledgement of an ongoing "feud" in the family. Shaw's conduct of this taped interview, standing alone, is strong evidence suggesting Shaw's predisposition against the Appellant and his motive to quickly confirm alleged facts against the Appellant, despite the obvious incredible source of the information and the strong circumstantial evidence surrounding it which bode against its reliability and credibility. (Exhibits and testimony and demeanor of witnesses, reasonable inferences, Testimony of Shaw, Ex. 5-CD)

15. Investigator Shaw relied on information received from FI at this Middlesex Superior Court interview and from other hearsay information from him and Ryanna to formulate the factual basis for the charges against the Appellant. Shaw has relied on the truthfulness and accuracy of this hearsay information as the basis of these charges. This investigation against the Appellant, by Shaw was initiated by an anonymous telephone call received by the DOC on January 31, 2007. Shaw later determined that the anonymous caller was most likely Sunni, sister of Ryanna. (Exhibits, Testimony of Shaw, Ex. 5, -CD)
16. Investigator Shaw admitted in his testimony that he based his finding of when the Appellant allegedly knew that FI was a former inmate (prior to hiring him), entirely on the statements of Sunni, Ryanna and the FI. (Testimony of Shaw)
17. Subsequent to the investigation and charges in this present matter another related complaint was filed with the DOC, against the Appellant. That civilian complaint filed against the Appellant was for alleged misconduct; was filed by Ryanna on behalf of the FI. Ryanna alleged that the

Appellant had threatened the FI in an attempt to have the FI change his testimony relative to this investigation and present charges. By letter dated August 15, 2007, the Appellant was notified by DOC Acting Deputy Superintendent Timothy Hall that the subsequent civilian complaint was **not sustained**. This unsustained subsequent complaint alone, is strong evidence that Ryanna and the FI held deeply felt animosity and ill will against the Appellant and his wife Kelly. The motive for this subsequent complaint as well as for the original "anonymous" telephone complaint could be to cause the Appellant employment problems including loss of his job. Another motive might also be the use of the complaint(s) as leverage to extract a financial payment and/or forgiveness of the bail money loan. The motive might also be simple spite or vindictiveness arising out of the continuing "family feud".(Exhibits and testimony, Exhibit 13, reasonable inferences)

18. Ryanna has a criminal record of a total of nine (9) court charged offenses between 1996 and 2003. They are: motor vehicle offenses, A&B Dangerous Weapon (2Cts.), Disorderly Conduct, Resisting Arrest, Assault and Battery and Mayhem. On May 29, 1997, she was found guilty of A&B Dangerous Weapon (razor blade), committed for 6 months and found guilty of Mayhem, probation until 11/15/01 probation terminated. On May 15, 2001 she was also found guilty of Disorderly Conduct and Resisting Arrest and placed on probation until it was terminated on 12/23/03.(Exhibit 5)

19. FI has a very long and serious criminal record for court charged criminal offenses, including felonies and convictions, from 1989 to 2006. These offenses are too lengthy to list but include drug offenses, property offenses (e.g. Larceny) and crimes of violence, (e.g. Carjacking, A&B d/w, Armed Robbery, Armed Robbery mask and gun, A&B police officer, Abuse Prevention Act, and Threats). He was incarcerated: for 1 Year on 8/19/04, for 4 Years and 1 day on 1/06/05

(2 Cts.). (Exhibit 5)

20. FI was arraigned on eight (8) charges in Middlesex Superior Court on 10/17/2006 and the bail bond was transferred from the District Court. These charges include six (6) felony charges including Carrying a Firearm w/o a License, Firearm violation with 1 prior violent or drug crime, Possession of a Large Capacity Firearm, Habitual Criminal, Firearm w/o FID Card and A & B with a Dangerous Weapon. (Exhibit 5)

21. The DOC investigator David Shaw is not a disinterested or reliable witness. His repeated attempts to manipulate the Appellant into admitting to a set of inculpating facts at the interview is some evidence of either his bias against the Appellant or his predisposition against and/or his overzealousness to confirm the alleged facts and charges against the Appellant. This predisposition or inclination against the Appellant becomes even more obvious when contrasted with Shaw's lenient and accommodating interview of the FI. Shaw effectively tried to dictate the FI's answers by his over the top leading and suggestive questions. All of Shaw's questions suggested some answer which could be used against the Appellant. However, the FI failed to follow Shaw's lead on some of these questions. For example, Shaw asked the FI - Q. When you got arrested for your present pending issues now, did Wayne and his wife offer the money for bail? It is interesting to note however, that the FI did not take this suggestion and stated that the bail money loan had been negotiated and arranged between Ryanna and Kelly. Undaunted, Shaw testified to his wished for answer anyway. He testified at this hearing that the Appellant and his wife filed the $5,000 bail bond for FI. For contrast, Shaw during his interview of the Appellant repeatedly attempted to manipulate the Appellant into admitting that he and his wife had **"collectively"** posted the bail bond money for FI in court. These repeated attempts were made by Shaw, despite the Appellant's previous repeated explanation that his wife had given the bail

money to Ryanna and that he had only learned about it from his wife, months after the fact in the fall of 2006. Shaw's contrasting handling of the interviews with the Appellant and the FI are described more fully elsewhere in this decision. Shaw's foundational facts are primarily from the unreliable hearsay sources of Ryanna and the FI. I find Investigator Shaw not to be a reliable and disinterested witness. Shaw's testimony and reports as it conflicts with the Appellant's testimony and reports carry no weight or probity. (Exhibits, testimony and witnesses' demeanor, reasonable inferences)

22. The Appellant objected to any hearsay information being admitted as evidence which had been derived from Sunni the FI or Ryanna; whether in documentary or testimonial form. This hearing officer took the objection *de bene* for all such evidence, subject to later argument in the post-hearing proposed decisions. All said evidence is now excluded for DOC purposes for a variety of reasons. Firstly, the referred to persons failed to appear as witnesses, without explanation or justification. They were never sworn under oath and subject to cross-examination. This hearing officer did not have the opportunity to observe their demeanor and gauge their responses, especially under cross-examination. All of the known surrounding circumstances weigh heavily against their credibility and reliability as witnesses, especially the long criminal records for serious offenses for the FI and Ryanna. They were highly motivated to cause serious harm to the Appellant and his wife Kelly and repeatedly attempted to do so. Instead of being grateful for the help provided to them by Ryanna's aunt Kelly, they acted with animosity and ill will toward her. These two are irresponsible, dangerous, deceitful, disreputable, discredited, ungrateful and vindictive convicted criminals. It is highly unlikely that if they had appeared as witnesses, that their testimony would have been considered favorably for the DOC. All of the alleged evidence, hearsay, attributed to them is unreliable and given no weight or probative value for DOC

purposes and therefore is excluded from evidence for DOC purposes. (Exhibits, testimony and demeanor of witnesses, reasonable inferences)

23. On March 10, 2008, DOC issued a "Notice of Charges and Hearing" letter to the Appellant, alleging a list of ten (10) specific and numbered factual allegations or violations. That letter also stated the specific language of, the DOC policy, rules and regulations violated. The latter claimed that he had violated the General Policy, Rule 1, 8(c), 19(c) as well as G.L. c. 269 §6A[1]. However, the letter did not state the language of G.L. c. 269 §6A. Joe Santoro, DOC Labor Relations Advisor was designated as the hearing officer. The hearing date of April 1, 2008 was set. (Exhibit 2)

24. Apparently the hearing date was continued from April 1, 2008. Joseph S. Santoro, the Labor Relations Advisor, presided over the disciplinary hearing on April 22, 2008. The issue was whether Appellant violated the DOC's policy, rules, regulations and the state statute as cited in the charge letter dated March 10, 2008. However, the hearing decision letter, dated July 7, 2008 does not address the ten (10) specific factual allegations listed in the "Notice of Charges and Hearing" letter of March 10, 2008. It does however recite by unnumbered statement in the body of the letter of what are eight (8) factual allegations. The letter then states: "I find that you engaged in the conduct as charged, in violation of the following Rules and Regulations Governing All Employees Of the Massachusetts Department of Correction:"the letter then states as violated, the DOC's policy, rules, regulations and the state statute[miscited]. (Exhibits 2, 10)

25. The violated DOC Policy, Regulations, Rules are as follows:

> General Policy I Nothing in any part of these rules and regulations shall be construed to relieve an employee...from his/her constant obligation to render good judgment, full and prompt obedience of all provisions of law...Improper conduct affecting or reflecting upon any correctional institution or

1 It appears that this citation in the letter is a mistake, as there is not a G.L. c. 269 §6A. It is presumed that the citation was intended to be G.L. c. 268 §6A.

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."

Rule1 You must remember that you are employed in a disciplined service which requires an oath of office...Employees should give dignity to their position..."

Rule 8(c) You must not associate with, accompany, correspond with any inmate or former inmate except for a chance meeting without specific approval of your Superintendent, DOC Department head or the Commissioner of Correction. Any other outside inmate contact must be reported to your Superintendent, DOC Department head or Commissioner of Correction.

Rule 19(c) Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. Pending investigation into the circumstances and your possible involvement therein, you may be detached from active duty forthwith, however, without prejudice and without loss of pay.
(Exhibit 8)

G.L. c. 268 §6A ...whoever shall willfully make false report to the...board or commissioner, shall testify or affirm falsely to any material fact in any matter wherein an oath or affirmation is required or authorized, or who shall make any false entry or memorandum upon any book, report, paper or statement of any company making report to any of the said departments or board or said commissioner, with intent to deceive the department or board or commissioner, or any agent appointed to examine the affairs of any such company, or to deceive the stockholders or any officer of any such company, or to injure or defraud any such company, and any persons who with like intent aids or abets another in any violation of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both such fine and imprisonment.

26. The DOC informed the Appellant of its hearing decision in a letter dated July 7, 2008. The DOC found the Appellant hired a former inmate to work for him and failed to notify the DOC in violation of Rule 8(c). The DOC also found that he had been less than truthful when questioned about his knowledge of the former inmates status and filed a false incident report regarding the extent of his knowledge of the former inmate in violation of Rule 19(c). (Exhibit 10)

27. The Appellant was suspended for five (5) days for (1) hiring a former inmate when you were aware he was a former inmate and paying the inmate "under the table" and (2) failing to report such action to the DOC, (3) failing to report contact with the former inmate and failing to report to the DOC, that family funds were used to post bail for said former inmate and (4) being less than truthful in the ensuing DOC investigation in the interview and subsequent filed report. (Exhibit 10)

28. It appears from a reading of DOC Rule 8(c) that the intent is to prevent any contact between a DOC employee and a former inmate, except for a chance meeting without specific approval. This language implies that the rule is prospective in effect and that if an employee anticipates some future contact, the employee must report it and seek prior approval. However, the Appellant did not know the FI was a former inmate at the time he hired him and paid him in the summer of 2006. He only learned this information sometime in the fall of 2006. However, the last part of Rule 8(c) clearly states that any other outside inmate contact must be reported. The Appellant admits now that he should have reported it when he learned of it in the fall of 2006. (Exhibit 10 testimony of Appellant)

29. **G. L. Chapter 31: Section 1. Definitions** "Basic merit principles", shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions. (administrative notice)

30. At the Commission held the hearing on October 8, 2008; The Appellant and Mrs. Allard testified

and were cross-examined by the DOC. The FI, Ryanna and Sunni did not testify at the hearing. (administrative notice)

31. At the hearing before the Commission, the Appellant testified that his father and he own an ice business. His father ran it for 25 years and he has run it with his wife for 5-6 years. The family sells ice a few times per year, at the events at the Loudon raceway in NH. They depend on friends and family to help out and work these events. (Testimony of Appellant)
32. The Appellant testified that an accountant prepares the business taxes each year. He further testified that his accountant said not to report compensation of workers unless the amount exceeded the limit on the IRS tax table. (Exhibit 12)
33. The Appellant testified that no worker was ever compensated more than $600 the reporting threshold of the IRS tax table. (Testimony of Appellant)
34. The Appellant and Mrs. Allard testified that she met the FI in a brief introduction during the spring/summer of 2006, but did not know he had a criminal background. (Testimony of Appellant and Mrs. Allard)
35. The Appellant testified that Ryanna asked Mrs. Allard and him if they would hire her boyfriend, "Joe" as he needed a job/money. (Testimony of Appellant)
36. The FI was uncertain and told Investigator Shaw that: "I believe" I worked for the Appellant on two occasions, once in July and once in September. (Exhibit 5)
37. The Appellant testified that he had only had a brief, introduction to "Joe", prior to hiring him for the week-end event in the summer of 2006 and did not know that he had a state criminal record (or any kind of record) at the time he paid him to help with the ice business. The Appellant never encountered him "in the system" and never was assigned at an institution where the FI was incarcerated. (Testimony Appellant and Mrs. Allard)

38. Mrs. Allard testified that her niece Ryanna approached her about borrowing money sometime in August, but would not tell her initially what the money was for, although eventually she learned it was for bail for the FI. (Testimony of Mrs. Allard)

39. Mrs. Allard testified that she loaned the money to Ryanna because she was family and desperately needed her help in caring for her mother. (Testimony of Mrs. Allard)

40. Mrs. Allard testified she had the cash on hand because they (her and her husband) had just finished their ice season. (Testimony of Mrs. Allard)

41. Mrs. Allard testified that she did not initially tell her husband, the Appellant, about loaning the money to her niece. (Testimony of Mrs. Allard)

42. The Appellant testified that his wife told him some time in the fall of 2006 that she had loaned the money to her niece, but could not recall exactly when, but it was around the time of his mother in law's death and the superior court bail transfer of FI. Mr. Allard confirmed this fact (Testimony of Appellant and Mrs. Allard)

43. The Appellant testified that he was skeptical of his wife having loaned the money to Ryanna, after the fact when he learned about it, but supported his wife's decision to help her family. (Testimony of Appellant)

44. Mrs. Allard testified that she was not familiar with the DOC Blue Book rules and that she did not think it would affect her husband's job if she loaned her niece money.

45. The Appellant and Mrs. Allard both testified that they keep their money separate and do not have a joint checking account. They both testified that Mrs. Allard takes care of paying all the bills. (Testimony of Appellant and Testimony of Mrs. Allard)

46. Mrs. Allard testified that she had also loaned money to Sunni's boyfriend Greg in the past to buy a car and that money had not been paid back. This fact was confirmed by the Appellant in his

recorded interview. (Testimony of Appellant and Mrs. Allard)

47. Mrs. Allard said that this money from her sister Mona Lou's estate ($5,000 in life insurance) became a family problem, all but $1,200 had been spent for funeral and burial expenses and she held the $1,200 for other expenses. Both Ryanna and Sunni felt they were entitled to some of this money, and she believed they were trying to get back at her by filing the complaint against her husband, the Appellant. They were mad at her and were fighting her for the $1,200. (Testimony of Mrs. Allard)
48. Mrs. Allard testified that neither Ryanna nor Sunni, her nieces have ever paid back any of the money she loaned to them. (Testimony of Mrs. Allard)
49. The Appellant testified credibly that he has never called or contacted Ryanna or the FI or anyone else regarding the money owed. (Testimony and demeanor of Appellant)
50. Mrs. Allard testified that she has called her niece a few times about paying back the money, but never the FI. (Testimony of Mrs. Allard)
51. The Appellant admitted that when he later found out in the Fall of 2006, that the FI was a in fact a former inmate, he did not then report the contact to the DOC. (Testimony of Appellant)
52. Appellant testified that he did not fully understand the reporting requirements of contact with former inmates; yet when he learned of FI being a former inmate, he had no further contact with him, but admitted that he should have reported the past contact anyway, when he learned about it in the fall of 2006. (Testimony of Appellant)
53. The Appellant testified that when he said he had paid the former inmate "under the table" in his interview with the Shaw, he meant under the IRS tax table. (Testimony of Appellant)
54. The Appellant was asked to write a report regarding his contact with the former inmate. (Exhibit 5)

55. The Appellant testified that he wrote the report the morning after he was interviewed and did not have the opportunity to talk with his wife prior to confirm the correct dates involved, as she had been at the hospital with their son. (Testimony of Appellant)

56. The Appellant testified that he was mistaken about the date he put in his report regarding when his wife told him about loaning the money. Yet, the date is not material because both dates were after his wife had secretly loaned the bail money to Ryanna and the bail bond had already been posted in the district court. Kelly Allard told the Appellant about the bail loan to Ryanna after the transfer of the FI's posted bail to Middlesex Superior Court in October, 2006. (Testimony of Appellant and Mrs. Allard, reasonable inference)

57. The Appellant and his wife Kelly Allard are both good witnesses. They were straight forward and responsive in their testimony. After listening to the CD of his interview and observing him as a witness, I believe that he is being honest and forthcoming. If anything he volunteers too much and speaks sometimes with mixed pronouns and verb tenses. He is not cautious and precise in his language choice. He presents himself as someone who tries to follow the rules and it is not surprising that he has been a 17 year DOC employee without any prior discipline. He appears to be hard working and easy going. His answers rang true. He and his wife were consistent in their testimony, without appearing to be artificially prepared. They corroborated each other's testimony, which was also consistent with all of the other credible evidence in the record. They appear as a normal married couple, working through some difficult circumstances. The only criticism might be their questionable judgment in maintaining any contact or relationship whatsoever, with Kelly's two nieces Ryanna and Sunni and Ryanna's associate the FI. I find them both to be reliable and credible witnesses.(Exhibits and testimony, demeanor and testimony of Appellant and Mrs. Allard)

58. The DOC alleges as one of its charges that the Appellant filed, as ordered, a confidential incident report, after he was interviewed on or about February 12, 2007 which contained some inaccuracies or inconsistencies ("less than truthful").The DOC claims the report varies from what was stated in the interview of February 9, 2007. However, the DOC failed to produce sufficient evidence to show that the confidential incident report contained any false statement made with intent to deceive. I find no material or substantive false statement in that report. The Appellant and his wife testified at this hearing and were subjected to vigorous cross-examination. Their versions were consistent and corroborative of each other and the other credible evidence in the record. The DOC on the other hand relied on the wholesale hearsay information provided by two irresponsible, dangerous, disreputable, discredited, ungrateful and vindictive convicted criminals, to base their case against a veteran DOC officer of 17 years with no prior discipline. It can not get any more absurd than that. Why the DOC acted with such obvious discrimination against one of its own Officers and in favor these two discredited and convicted hearsay informers is a mystery. The Appellant, once given a real opportunity to explain or rebut any claimed inaccuracy or inconsistency contained in the report with the interview; did so. Any claimed inaccuracy or inconsistency was substantially conjured up or manipulated into existence; whether attributed to misunderstanding, mistake, memory, or motive. They were unintentional, minor or immaterial and easily explained by the Appellant or attributed to the unusual circumstances of this surprise interview, as previously described. The term "less than truthful" was never defined for this hearing or clearly understood and any ambiguity is resolved in the favor of the Appellant, the person charged. The DOC has failed to meet its burden of production and persuasion by a preponderance of the credible evidence in the record on this charge, as well as the other charges. (Exhibits, Ex. 5, testimony, demeanor of witnesses, reasonable inference,

administrative notice)

CONCLUSION OF THE MAJORITY (BOWMAN, MARQUIS and MCDOWELL)

A majority of the Commissioners disagree with the conclusion of the hearing officer, noted below as the conclusion of the minority. Respectfully, the record, when viewed by an unbiased mind and guided by common sense and the law, provides *overwhelming* evidence justifying the Appellant's five-day suspension.

The Appellant had contact with a former inmate on at least two occasions and he failed to report this contact to his superintendent. The first contact occurred when the inmate worked for the Appellant in July or September of 2006. The Appellant testified that he learned that the individual was a former inmate in October, and that he should have reported this contact. Yet the record is clear that the did not report this contact until he filed an incident report in February 2007, three days after he was interviewed by investigators, and four months after the date on which he claimed he learned of the former inmate's status. Thus, even if the Commissioner chooses to disregard the overwhelming evidence that the Appellant knew that the individual was a former inmate when he employed him, there is still no dispute that the Appellant failed to report the inmate contact for a period of four months after he acknowledges that he was aware of his status.

The Appellant's wife also lent the inmate$5,000 for bail purposes. In his initial interview with DOC investigators, the Appellant stated that he and his wife discussed whether or not to lend the inmate money. Although the Appellant claimed at the Civil Service Commission hearing that he did not learn of the loan until after the fact, he admitted to knowing of the loan as early as October 2006. He did not report the loan until he submitted the above-referenced incident report in February 2007, four months later. Thus, even if the hearing officer chooses to believe that the

Appellant did not know about the loan until after the fact, there is no question that he knew of the purpose of the loan by early October.

Finally, the Appellant's argument that he was unsure of the meaning of the rule that you can not associate with, accompany, correspond or consort with any inmate or former inmate without DOC approval, is facially absurd.

The Appellant violated DOC rules and regulations and was untruthful during the course of his investigation regarding this matter. No amount of revisionism can change that. The Appellant's appeal should be dismissed.

For the Majority:

Christopher C. Bowman
Chairman

CONCLUSION OF THE MINORITY (HENDERSON, STEIN)

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 Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). *See* Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civ. Serv. *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

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." Murray *v.* Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton *v.* Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof at the Commission's de novo hearing is one of a preponderance of the evidence which 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). In reviewing an appeal under G. L. c. 31, § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Falmouth *v.* Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The appointing authority is afforded some clear guidance in successfully completing its task of properly investigating and disciplining an employee for misconduct, by reference to basic merit principles defined in the civil service law. **G. L. Chapter 31: Section 1. Definitions** "Basic merit principles", shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political

affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

The issue before the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown *v.* Arria at 334. *See* Commissioners of Civ. Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster *v.* Stratton at 727-728.

Considering the totality of the circumstances surrounding this investigation, issued charges and resulting findings and discipline; the Appellant handled the situation admirably and appropriately. The DOC investigation itself is suspect. Starting with an "anonymous" telephone call, and a surprise or ambush interview of the Appellant, in a misguided attempt to quickly "confirm" adverse information derived from two convicted and previously incarcerated Choosing to believe these two disreputable and discredited sources over the explanation of a seventeen year DOC officer, with no prior discipline is bizarre. This choice alone, absent some very strong substantiating or corroborating evidence is suspect. There is no such evidence here; all of the so called evidence was derived from these two very unreliable sources. It would seem that this choice by the DOC adversely affects the public interest by impairing the efficiency of public service. Should a DOC officer be worried about the barest of allegations, from the least reliable of sources? It also does not seem that the DOC employed honesty and good faith in its

investigation process of and the charging of the Appellant. criminals, who held strong personal animosity toward the Appellant and his wife.

The Appellant used good judgment, did not fail to give dignity to his position, and fulfilled his obligation to render full and prompt obedience of all provisions of law. There was absolutely no evidence presented that the Appellant violated any IRS or other rules in the manner in which he pays for the services performed by non-employees for his ice business, including his one-time payment to the former inmate. The Appellant testified that he did not mean anything illegal or untoward when he stated the former inmate was paid "under the table." The Appellant further testified that he received accounting advice instructing him and his wife to do this and the same accountant handles all of their taxes. The Allards do not file separate tax returns for their ice business. Appellant did not violate any tax law; he was simply following the advice of his accountant. The testimony of the Appellant and his wife, and a business record check showed that the FI worked for only one weekend and was paid less than $600 and not the two week-ends and an amount over $600 reporting threshold. The DOC has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant violated the General Policy or Rule 1.

Further, the DOC has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant violated Rule 8(c). The DOC alleges that the Appellant violated this rule when he failed to report that he had hired a former inmate and also when he failed to report that his wife had loaned money to her niece, the purpose of which was for bail for the former inmate. The findings here clearly show that the Appellant barely knew the FI when he hired and paid him for one week-end work, in the summer of 2006. He was introduced to him as "Joe" his wife's niece's boyfriend. He was also unaware that his wife had loaned money to her niece, later

determined to be for the FI's bail bond in the summer of 2006. The Appellant later learned about the loan and realized the FI was a former inmate in the fall of 2006, when the bail bond was transferred to superior court. His wife told him about this loan, after the fact, at the time of her mother's funeral in October, 2006. This was a chaotic and stressful time for the Appellant, and primarily his wife. The Appellant did not know Reading this rule, it is unclear what level of contact must be reported- contact with relatives and friends of inmates. Most of Rule 8(c) talks about contact with inmates in the workplace. The Appellant testified that he wasn't sure what he was supposed to report – what constituted a chance encounter, or whether he was supposed to report a past unknowing contact after the FI's status was learned, yet also after the relationship had been terminated. He was also not aware of whether he had to report contact with county inmates or just state inmates. The DOC investigator, David Shaw, was unable to fully explain exactly what needs to be reported under Rule 8(c) and testified that employees are not given any further instructions or guidance as to what constitutes inmate contact that must be reported and when. Mrs. Allard testified that her niece requested a loan and she did not know the purpose of the loan, but still gave it to her niece anyway. She did not inform the Appellant of this loan until months later, around the time of her mother's funeral. Knowledge or actions of his wife cannot be imputed to the Appellant. This fails to meet the necessary showing for a charge of violation of Rule 8(c). The DOC has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant knowingly violated Rule 8(c).

In addition, the Appellant contends that the DOC failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant violated Rule 19(c), which states in part, "Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry,

you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself." The Appellant responded to the best of his abilities in his ambush interview with the Department and when writing his report. Under the circumstances, I find that his mistakes in the timeline of events and his inarticulate responses to questions can be attributed to his unpreparedness, confusion and nervousness, and not to any intent to be deceptive or misleading in his report and interview. There is a strong indication that Investigator Shaw was strongly predisposed to believe the two criminal informants and disbelieve the Appellant, prior to his interview. Investigator Shaw is found to be unreliable and not a disinterested witness. The two hearsay, alleged witnesses Shaw chose to believe, without any corroboration; have also been found to be very unreliable and motivated by personal animosity or vindictiveness. The DOC has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant violated Rule 19(c).

The DOC failed to produce sufficient evidence to show that the confidential incident report contained any false statement made with intent to deceive. I find no material or substantive false statement in that report. The Appellant and his wife testified at this hearing and were subjected to vigorous cross-examination. Their versions were consistent and corroborative of each other and the other credible evidence in the record. The DOC on the other hand relied on the wholesale hearsay information provided by two irresponsible, dangerous, disreputable, discredited, ungrateful and vindictive convicted criminals, to base their case against a veteran DOC officer of 17 years with no prior discipline. It can not get any more absurd than that. Why the DOC acted with such obvious discrimination against one of its own Officers and in favor these two discredited and convicted hearsay informers is a mystery. The Appellant, once given a real opportunity to explain or rebut any claimed inaccuracy or inconsistency contained in the

report with the interview; did so. Any claimed inaccuracy or inconsistency was substantially conjured up or manipulated into existence; whether attributed to misunderstanding, mistake, memory, or motive. They were unintentional, minor or immaterial and easily explained by the Appellant or attributed to the unusual circumstances of this surprise interview, as previously described. The term "less than truthful" was never defined for this hearing or clearly understood and any ambiguity is resolved in the favor of the Appellant, the person charged. The DOC has failed to meet its burden of production and persuasion by a preponderance of the credible evidence in the record on this charge, as well as the other charges.

Based on all of the above, I concluded that DOC did not have just cause to suspend the Appellant from employment for five (5) days and that the appeal should be allowed.

For the minority:
Civil Service Commission

Daniel M. Henderson
Commissioner

For all of the reasons stated in the conclusion of the majority, the Commission, by a 3-2 vote (Bowman, Chairman, - Yes; Marquis, Commissioner – Yes; McDowell, Commissioner – Yes; Henderson, Commissioner – No; Stein, Commissioner – No) dismissed the Appellant's appeal under Docket No. D-08-171.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the

case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice sent to:
Valerie McCormack, Esq. (for Appellant)
Heidi D. Handler, Esq. (for Appointing Authority)