

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

CHRISTOPHER AMENTA,
Appellant

v.

D1-17-160

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

James Simpson, Esq.
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Framingham, MA 01702

Amy Hughes, Esq.
Department of Correction
Division of Human Resources
Industries Drive, P.O. Box 946
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Commissioner:

Cynthia A. Ittleman

DECISION

Christopher Amenta (Mr. Amenta or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on August 11, 2017, under G.L. c. 31, ss. 42 and 43, challenging the decision of the Department of Correction (Respondent) to terminate Mr. Amenta's employment. A prehearing conference was held in this regard on September 17, 2017 at the offices of the Commission. A full hearing¹ was held on October 31, 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

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

and the parties received a CD of the recording.² The parties submitted post-hearing briefs. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Respondent's Exhibits (R.Ex.) 1 through 9 and the Appellant's Exhibits (A.Ex.) 1 through 7 were entered into evidence at the hearing. At the hearing, the Respondent was ordered to produce additional documents, which it produced and which have been entered into the record as Respondent's Post Hearing Exhibits (R.PH.Exs.³). Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Steven Silva, Superintendent, Souza-Baranowski Correctional Center
- Keith Nano, Deputy Superintendent, North Central Correctional Center

Called by the Appellant:

- Mrs. Amenta
- Mrs. C
- Ms. L, friend of the family⁴
- Christopher Amenta (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:

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

³ The documents produced by the Respondent in response to the order at hearing are: details regarding discipline issued in 2000, 2001, 2002 and 2003, 2010 and 2015, a 2007 settlement agreement, and a 2017 sixty (60)-day suspension.

⁴ Ms. L testified briefly, asserting that she was in the hotel room of Mrs. Amenta and Mrs. C while Mrs. Amenta and Mrs. C allegedly used the Appellant's cell phone but that she was in the shower and, therefore, she did not observe them allegedly using the Appellant's cell phone. (Testimony of Ms. L)

1. The Appellant was hired by the Department on September 6, 1998 and was a tenured civil service employee as a Correction Officer I (CO I) assigned to the Souza Baranowski Correctional Center (SBCC) at the time of his termination. (Testimony of Appellant)
2. The incident that led to the Appellant's termination and the instant appeal occurred on or about May 1, 2017, while the Appellant was on a sixty (60)-day suspension for his conduct on October 19, 2016. On October 19, 2016, the Appellant was working at the SBCC, a maximum security facility, and he had an altercation with a Sergeant. In a letter dated January 6, 2017, following an investigation and DOC hearing concerning the altercation, then-Commissioner Turco found, in part, that the Appellant,

... made inappropriate and insubordinate comments to a Sergeant while on duty. For example, [the Appellant] made comments to him about being late, [the Appellant] referred to him as "Mr. Mcxxxxy", and [the Appellant] requested music to get the "xxxxiness" out of the air.

[The Appellant] engaged in a verbal and physical altercation with the Sergeant while on duty. Initially, the altercation between [the Appellant] and the Sergeant was mutual as [they] grabbed each other's uniform tops, pushed each other, and fell to the floor.

Once on the floor, however, [the Appellant] punched the Sergeant in the face twice. ...

[The Appellant] caused serious injury to the Sergeant ...

[The Appellant] lied to [his] Lieutenant about what transpired ... In particular, [the Appellant] told the Lieutenant that [the Appellant] and the Sergeant had just been horse playing and there were no issues....

[The Appellant] failed to properly report [his] October 19, 2016 altercation with the Sergeant.

[The Appellant] lied and [was] less than forthcoming when questioned by the Superintendent's Special Investigator about this incident. ...

The above-stated conduct is in violation of the following Rules and Regulations Governing All Employees of [the Department]:

General Policy I, ... "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 ... Improper conduct affecting or reflecting upon any correctional institution or the Department ... in any way will not be exculpated ...

Rule 1 ... You 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] ... Employees should give dignity to their position ...

Rule 6(a) ... "Correctional goals and objectives can be best achieved thorough (sic) the united and loyal efforts of all employees. In your working relationships with coworkers you should treat each other with mutual respect, kindness and civility ... You should control your temper, exercise the utmost patience and discretion, and avoid all collusions, jealousy and controversies in your relationships with co-workers ..."

Rules 6(b) ... "Do not foster discontent or otherwise tend to lower the morale of any employee, and be particularly discreet ... when discussing personal matters of yourself ...

Rule 6(c) ... "The duties assigned to you should demand your entire attention. ..."

Rule 6(d) ... "Relations between supervising and subordinate employees should be friendly in aim yet impersonal and impartial You shall readily perform such duty as assigned, and must exhibit at all times, the kind of respect toward your superior which is expected and required in correctional service. ..."

Rule 7(c) ... "Any [Department] ... employee who is found ... flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge."

Rule 19(c) ... "... You must respond fully and promptly to any questions or interrogatories relative to the conduct of ... another employee or yourself. ..."

Rule 19(d) ... "It is the duty and responsibilities of all institution and [Department] employees to obey these rules and official orders ..."

This behavior also violates the Department's Policy for the Prevention and Elimination of Workplace Violence, 103 DOC 237, which provides, in part:

Workplace Violence – includes but is not limited to ...: 1) Bullying, Intimidation, harassment, stalking, ... or physical assault and/or battery; and ... Any behavior that causes disruption of workplace productivity 103 DOC 237.02 ..."

"... All allegations, reports, incidents, or threats of workplace violence must be immediately reported to the Superintendent, Division Head or designees

verbally and follow up with a confidential incident report before the end of the shift. ...”

Finally, [the Appellant’s] conduct violates 103 DOC 215.13, the [Mass. DOC] Conflict of Interest and American Correctional Association Code of Ethics policy, which states, ... “members shall maintain relationships with colleagues to promote mutual respect within the profession and improve the quality of service,” and “Members shall respect, promote, and contribute to a workplace that is safe, health and free of harassment in any form.” ... (R.Ex. 7)(emphasis in original)

3. The Appellant’s Sergeant at the time of the Oct. 19, 2016 altercation was Brian Nano, brother of Deputy Superintendent Keith Nano at the SBCC. (R.Ex. 1) Sgt. Nano was also disciplined as a result of the altercation. (R.Ex. 2) Dep. Supt. Keith Nano worked at the SBCC briefly from 2016 to 2017. (Testimony of Keith Nano)
4. On March 28, 2017, the Appellant, the Department and the Appellant’s union signed a “Last Chance Settlement Agreement” regarding the Oct. 19, 2016 altercation, which provided, in part, as follows,

... [the Appellant] will receive a sixty (60) day suspension. ...
... any future incidents of unprofessional conduct and/or conduct unbecoming of a correctional professional, in violation of the General Policy and/or Rule 1 of the Rules and Regulations Governing All Employee (sic) of the [DOC], as determined by the Commissioner of the Department after a hearing pursuant to G.L. c. 31, s. 41, shall constitute just cause for Christopher Amenta’s termination. Christopher Amenta and MCOFU expressly waive their right to appeal ... This paragraph shall remain in effect for two (2) years ...
... Christopher Amenta will be reassigned to MCI-Concord ...
MCOFU and Christopher Amenta agree that they will not pursue any claims which may be pending relative to this specific matter ...
... It is understood that this Last Chance Settlement Agreement is without any admission of liability or wrongdoing by any party.
.... (R.Ex. 7)

5. As indicated by a cover letter dated April 6, 2017, attached to the Agreement, the Appellant was to serve the 60-day suspension from March 29 to June 20, 2017. (R.Ex. 7)

6. The Appellant signed the last chance agreement so that he would not be terminated.
(Testimony of Appellant)
7. On May 1, 2017, the Appellant was serving his 60-day suspension and was in Florida to visit amusement parks with Mrs. Amenta, his wife⁵; Mrs. C, his mother-in-law; his minor daughter; and Ms. L, a family friend. (Testimony of Mrs. Amenta) Mrs. C contributed \$2,500 to the trip by check dated April 6, 2017. (A.Ex. 3) The Appellant's mother reportedly contributed \$2,500 in cash. (Testimony of Mrs. Amenta and Mrs. C)
8. On May 1, 2017, at or about 3:26 p.m., a posting appeared on the Appellant's Facebook page stating, "Just wanted to thank the Nano's for making our Disney Vacation possible" and included a photograph of the Appellant's minor daughter apparently at an amusement park-related event. (R.Ex. 6)
9. Dep. Supt. Keith Nano was told about the posting on the Appellant's Facebook page and Dept. Supt. Nano told Supt. Silva about it. (Testimony of Dep. Supt. Nano) A couple of other Correction Officers told Supt. Silva about the posting and printed it out.
(Testimony of Silva; R.Ex. 6) Supt. Silva looked at the posting and saw no other person's name on it so he believed the Appellant posted it on his own Facebook page. Further, Supt. Silva found the Facebook posting to be a distraction to several staff members. At the DOC hearing, Supt. Silva stated that Dep. Supt. Nano found the Facebook posting to be highly offensive. (R.Ex. 2) Supt. Silva told Dep. Supt. Nano not to get involved in the matter other than writing a report. (Testimony of Silva) Asked at the DOC hearing why the Facebook posting was not investigated, the hearing officer wrote in her report that Supt. Silva answered that "investigations do not always occur when there is an 'overt' act as in this case." (R.Ex. 2)

⁵ Mrs. Amenta works at the Department.

10. The Appellant deleted the posting not long after it was posted. He received a comment about it contacted his union. (Testimony of Appellant)

11. On May 3, 2017, Dep. Supt. Keith Nano prepared a Confidential Incident Report stating, in part,

On May 2, 2017 during my tour of duty at SBCC, it was brought to my attention that a derogatory or inflammatory comment about me from an employee had reportedly been seen on a social media website. Specifically, ... that [the Appellant] had posted a family vacation photo and had attached the comment to the effect of “I would like to thank the Nano’s for making this vacation possible”. This appeared to be a reference to the suspension Officer Amenta was currently serving following an incident which occurred at SBCC some months ago involving him and Officer Brian Nano, my younger brother. His apparent reference to me was unclear, however, as I was not involved in the incident. Nor was I involved in investigating the matter, or in the imposition of any discipline. I reported this matter to my supervisor, Superintendent Silva, as it appeared to be related to a formal staff disciplinary matter (R.Ex. 5)

12. Supt. Silva found that the Appellant’s conduct in this regard was unprofessional and unbecoming a Correction Officer, that it disrupted the workplace and that the posting was a big insult to the whole Department. (Testimony of Silva)

13. DOC did not conduct an investigation of the May 1, 2017 posting on the Appellant’s Facebook page, although he reported it to his supervisor, Dep. Commissioner Paul Henderson. (Stipulation)

14. 103 DOC 522 is the Department’s Internal Affairs Unit Policy, which discusses investigations. Section 522.03 states, in part,

It is the Department’s philosophy that all complaints of staff misconduct are to (sic) systematically examined and investigated when warranted to discover truth. ... (PH.Exs.)⁶

⁶ The Appellant avers that the DOC did not follow 103 DOC Rules and Responsibilities policy 239.04. However, that policy pertains to the role of the Internal Affairs Unit regarding allegations of discrimination and retaliation and the role of Superintendents, Division Heads and Supervisory personnel regarding the same. The Appellant states that Dep. Supt. Nano testified at the Commission that the Facebook posting was “harassing and disturbing”. The

15. By letter dated May 19, 2017, DOC notified the Appellant that there would be a hearing on June 1 at 11:00 a.m. regarding the May 1, 2017 Facebook posting, stating the provisions of cited applicable DOC rules that it was alleged the Appellant's posting violated. (R.Ex. 1)
16. The June 1, 2017 DOC hearing was held. It was attended by Supt. Silva, Appellant's Attorney James Simpson, a union representative, Mrs. C, Mrs. Amenta, and the Appellant. Ms. C and Mrs. Amenta were sequestered witnesses. (R.Ex. 2)
17. On June 15, 2015, the DOC Hearing Officer, Annabelle Cisternelli, sent a lengthy memo about the June 7 hearing, which concluded that the Department established, by a preponderance of the evidence, that the Appellant's Facebook posting violated General Policy 1, rule 6(a), (b) and (d) of the Rules and Regulations Governing All Employees of the [Department]. (R.Ex. 2)(*supra*)
18. By letter dated August 1, 2017, Commissioner Turco informed the Appellant that his employment was terminated based on the findings in the hearing officer's detailed report and a Last Chance Agreement signed by the Appellant on March 28, 2017 following his fight with Sgt. Nano. (R.Ex. 3)
19. The Appellant filed the instant appeal with the Commission on August 11, 2017.
(Administrative Notice)
20. At the Commission hearing, the Appellant alleges that, while his family was inside a hotel room where they stayed on May 1, 2017 and he was at the pool, his mother-in-law

Appellant further avers that 103 DOC 239 defines harassment as one type of discrimination, requiring an investigation, *inter alia*. However, Dep. Supt. Nano's confidential report made no such statement. Moreover, as noted above, Dept. Supt. Nano's report stated that he believed the posting was directed at his brother, Sgt. Nano, with whom the Appellant had been involved in a fight that led to his (the Appellant's) sixty (60)-day suspension, not Dep. Supt. Nano, and, thus, related to the disciplinary matter, not harassment of Dep. Supt. Nano.

was learning how to use Facebook and his wife, who allegedly uses his phone and Facebook account, posted the photo on his cell phone and that his mother-in-law intended to insert text that thanked the “Nanas” (the name by which the Appellant’s daughter refers to her grandmothers) for the vacation because his daughter’s grandmothers had paid for a significant part of the vacation but the smart phone auto-correct function changed it so that it appeared to thank the “Nano’s”, which name appeared in the auto-correct function because the Appellant had communicated with Brian Nano online previously. I find that the attempted alternate explanations for the posting on the Appellant’s Facebook account have little credibility for the following reasons:

- a. The Appellant asserted that Sgt. Nano had attacked him first in their altercation, despite the notice of hearing that states that the altercation was mutual until they were on the floor where the Appellant punched Sgt. Nano twice. (R.Ex. 7)
- b. At the time of their vacation, the Appellant was on a 60-day suspension for the altercation with Sgt. Nano and used obscene epithets to insult the superior officer. (R.Ex. 7)
- c. Although there is concrete evidence (a copy of a check) in the record of the contribution of the Appellant’s mother-in-law, there is no documentary evidence of the contribution by the Appellant’s mother since the Appellant asserts that the contribution was in cash. (Testimony of Appellant and Mrs. Amenta; Administrative Notice)
- d. Mrs. Amenta said that she and Mrs. C used the Appellant’s phone to instruct Mrs. C how to use Facebook because Mrs. Amenta’s phone was being charged. However, Mrs. Amenta used her own cell phone (while it was charging) to send a photo to the Appellant’s cell phone in order to demonstrate how to post it on Facebook. (Testimony of Mrs. Amenta)
- e. Mrs. Amenta stated that he had deleted Brian Nano’s name from the contact list on the Appellant’s phone after May 1. However, a screen shot of the Appellant’s phone shows that Brian Nano’s name is still on the phone. (Testimony of Mrs. Amenta; R.Ex. 6)
- f. Mrs. Amenta and Mrs. C said that Mrs. C asked Mrs. Amenta how to post something on Facebook because she had recently bought a smart phone. However, at the Commission hearing, Mrs. C stated that she does not have a Facebook account or use one. (Testimony of Mrs. Amenta and Ms. C)

- g. Mrs. Amenta stated that she never had a Facebook account but Mrs. C and the Appellant said that she had her own FB account some time ago. (Testimony of Appellant and Mrs. C)
- h. Mrs. Amenta and the Appellant stated that Mrs. Amenta uses the Appellant's Facebook account and his phone. This information was not disclosed at the DOC hearing. When asked why, Mrs. Amenta said, hesitatingly, that she did not know. (Testimony of Appellant and Mrs. Amenta; A.Ex. 2)
- i. Mrs. Amenta has a Facebook application on her own phone. (Testimony of Mrs. Amenta) This indicates that Mrs. Amenta did not need to use the Appellant's phone to access Facebook.
- j. Mrs. Amenta stated that she used her own cell phone, while it was charging, allegedly to send a photo to the App's phone, indicating that one can use a cell phone when it's charging. (Testimony of Mrs. Amenta) This undermines Mrs. Amenta's need to use the Appellant's cell phone.
- k. Mrs. C's testimony varied at times, giving the appearance of an attempt to avoid being pinned down to a specific response. For example, asked if she showed Mrs. Amenta the wording she had written to post on Facebook, she said that she showed it to Mrs. Amenta but then said that Mrs. Amenta did not read it. (Testimony of Mrs. C)
- l. When Mrs. C was asked when Mrs. Amenta sent the photo of her daughter to the Appellant's phone purportedly so that Mrs. C could learn to post it on Facebook, Mrs. C said on one occasion that Mrs. Amenta sent it to the Appellant's phone at the time that Mrs. Amenta was teaching her how to use Facebook but then Mrs. C said that Mrs. Amenta had sent the photo to the Appellant's phone earlier. (Testimony of Mrs. C)
- m. When Mrs. C was asked if she read what she had written to post on Facebook before posting it, Mrs. C waived again, once saying that she did and once saying that she did not. (Testimony of Mrs. C)
- n. When Mrs. C was asked if she had typed "'s" on the proposed Facebook posting after she thought she had typed "Nana", so that the posting would refer to both grandmothers as allegedly intended, Mrs. C was uncertain but thought she read what she had typed and saw that she needed to add the "'s". (Testimony of Mrs. C)
- o. It is unclear why Mrs. C, who had not used Facebook (and, at the time of the CSC hearing, still did not use the Facebook application on her smart phone)(Testimony of Mrs. C), decided on May 1, 2017 to inquire about Facebook, of all the applications that may be accessible on a smart phone.
- p. When Mrs. C was asked why she would post something on Facebook thanking herself, as one of the two Nanans, for the vacation trip, she asserted that she

thought it was like a “shout out” to people that they were able to make this trip.

(Testimony of Mrs. C (at 2 hrs. 6 mins.))

21. The Appellant’s disciplinary record is as follows:

- a. 3/28/17 - Last Chance Agreement for unprofessional and/or conduct unbecoming a correction officer, sixty (60)-day suspension, and transfer to MCI-Concord “Referred to a Sgt as ‘Mr. Mcxxxxy’ and similarly insulting language. Work place violence – struck sergeant in the face twice, causing injury.”
- b. 10/15/15 – three (3)-day suspension with two (2) days held in abeyance affirmed at the Commission. “Verbal and physical altercation with another employee. Rude and disrespectful to co-worker, called him ‘lazy’ and ‘useless’. Failed to report workplace violence incident.”
- c. 6/15/11 – “terminated (reinstated with time served as [suspension] (6/5/10 thru 5/13/11) per AAA dtd. 5/13/11)(sic)[.] Brought personal laptop into facility; looked at porn websites; failed to operate doors on interlock system[.]”
- d. 10/4/05 – “ ... 3 day susp (combined & reduced to a 15 day sus. ... Parked truck in a fire land after being told not to do so twice.”
- e. 2/2/05 – “5 day susp (combined & reduced to a 15 day sus ... Refused direct order to blouse pants in boots[.]”
- f. 3/29/04 – “ ... 15 day susp (combined & reduced to a 15 day sus ...) Disrespectful and insubordinate to a superior officer failed to comply with orders[.]”
- g. 8/21/03 – 2 day susp (combined & reduced to a 15 day sus. ... Complaint filed with [police department]; became belligerent to police officer[.]”
- h. 3/13/03 – “ ... 10 day susp Sleeping and; (sic) or negligent in performing duties[.]”
- i. 2/8/02 – “letter of reprimand Removed state property [without] permission[.]”
- j. 1/4/02 – “5 day susp[.] Insubordinate; disrespectful to supervisor[.]”
- k. 11/15/01 – “1 day susp[.] Disrespectful behavior towards superior[.]”
- l. 5/30/00 - “letter of reprimand[.] Failed to do pat searches; neglect of duties[.]” (Exhibit 8)

Applicable Civil Service Law

G.L. c. 31, s. 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 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

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

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823

(2006) and cases cited. However, “[t]he 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. *Id.*, quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

Also under section 43, the Commission has “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. *See, e.g. Police Comm’r v. Civil Service Comm’n*, 39 Mass.App.Ct. 594, 600 (1996)(“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio ... accorded the appointing authority.”) *See also Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” Leominster v Stratton, 58 Mass.App.Ct. 726, 729 (2003); *see* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). *See also* Covell v. Dep’t. of Social Services, 439 Mass. 766, 787 (2003).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. On May 1, 2017, the Appellant posted on his Facebook account, “Just wanted to thank the Nano’s for making our Disney Vacation possible” and included a photograph of his daughter apparently at the park. (R.Ex. 6) At that time, the Appellant and his family (including his mother-in-law and a family friend) were on vacation at Disney.

Shortly after the Appellant’s Facebook posting, some of the DOC staff at the SBCC where the Appellant worked saw the posting online, causing a disruption. Dep. Supt. Nano was informed of it and he reported it to his superior, who instructed him to write a report about it but to otherwise have nothing to do with the matter. The Department did not conduct an investigation about the Appellant’s Facebook posting but conducted a hearing at which Supt. Silva, the Appellant, Mrs. Amenta and Mrs. C testified.⁷ The hearing officer’s detailed report concluded that the Appellant’s posting violated General Policy 1, Rule 6(a), (b) and (d) of the Rules and Regulations Governing All Employees of the [DOC].

Denying that he made the Facebook posting at issue, the Appellant puts forward an alternate scenario. Specifically, he asserts that Mrs. C posted the photograph and comments, with the assistance of Mrs. Amenta. However, I find that the credibility of the Appellant’s witnesses in this regard is compromised. For example, at the Commission hearing, the Appellant said that Sgt. Nano had attacked him first in their fight, despite the fact that the notice of hearing said that the fight was mutual until they were on the floor, when the Appellant punched the Sergeant twice. Although the Appellant said that he did not use his phone much while they were

⁷ The lack of a DOC hearing appears to be the sole “procedural” claim by the Appellant under G.L. c. 31, s. 42. A strict reading of DOC policy 522 (*infra*) does not require an investigation, per se, in regard to every disciplinary issue that arises. However, it would behoove the DOC to conduct them as a matter of course, whether the conduct was “overt”, as Supt. Silva is reported to have stated at the DOC hearing in this matter, or not.

in Florida on vacation, it was clearly available to him and, at least on one day of the vacation, he did not participate in all of the family activities. Mrs. Amenta said that she never had a Facebook account but Mrs. C and the Appellant stated that Mrs. Amenta had had a Facebook account, albeit some time ago. Mrs. Amenta said that she and Mrs. C used the Appellant's phone to show Mrs. C how to use Facebook because Mrs. Amenta's phone was charging. However, Mrs. Amenta had used her own cell phone, while it was charging, to send a photo to the Appellant's cell phone. Although Mrs. C said that she wanted to learn how to use Facebook, as of the date of the Commission hearing, Mrs. C did not have a Facebook account. The Appellant and Mrs. Amenta testified at the Commission that Mrs. Amenta uses the Appellant's Facebook account and his phone. However, the Appellant's case before the DOC did not include such a statement, which suggests that the statements were belatedly contrived. Mrs. Amenta has her own cell phone and supposedly accesses the Appellant's Facebook account from her phone. If that were the case, why would Mrs. Amenta need to use the Appellant's phone? In addition, Mrs. C's responses to questioning at the Commission hearing were, at times, evasive. Asked if she showed Mrs. Amenta the wording she had written on Facebook before posting it, she said that she showed it to Mrs. Amenta but then said that she did not. When Mrs. C was asked when Mrs. Amenta sent the photo of her daughter to the Appellant's phone, Mrs. C said that Mrs. Amenta sent it to the Appellant's phone when Mrs. Amenta was showing Mrs. C how to use Facebook but later said that Mrs. Ament sent the photo to the Appellant's phone earlier. When Mrs. C was asked if she read what she wrote on Facebook before posting it, Mrs. C said on one occasion that she did but then said that she did not. When she was asked if she typed " 's ", to indicate that the posting supposedly related to both grandmothers, Mrs. C said on one occasion that she did not but then said that she had. When Mrs. C was asked why she would post

something thanking herself for the trip, she said she thought it was like a “shout out” about the trip because the winter weather had been harsh, which I do not find credible. Given these doubts about testimony in support of the Appellant’s case, I find its credibility limited and that it undermines the alternate scenario offered by the Appellant.

The SBCC, where the Appellant was working at the pertinent time, is a maximum security facility. Staff distractions at such a DOC facility can be dangerous. A preponderance of the evidence shows that at least some SBCC staff were distracted by the posting and at least one staff person printed it out and showed it to Dept. Supt. Nano, who discussed it with his superior, and Dept. Supt. Nano was instructed to write a report about the posting. The Appellant’s posting reflected the Appellant’s continuing disrespect, at least, toward Sgt. Nano and reflected poorly on the SBCC and the DOC as a whole. As such, there is little doubt that the posting and its aftermath constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. In the context of a DOC facility, especially a maximum security facility, it is also a threat to the safety and security of the officers and inmates. Given the essential similarities between the Respondent’s findings and the findings herein and the lack of bias in the record, I find no reason to modify the discipline issued by the Respondent.

Compounding matters for the Appellant, at the time of his Facebook posting he was serving a sixty (60)-day suspension for a fight he had with Sgt. Nano. The Appellant, his union representative and the DOC signed a Last Chance Agreement relating to the fight. The Agreement stated, in part, that the Appellant and his union acknowledge that “any future incidents of unprofessional conduct and/or conduct unbecoming a correctional professional”, in violation of cited rules, after a hearing per G.L. c. 31, s. 41, shall constitute just cause for

termination and that the Agreement remained effective for two (2) years. (R.Ex. 7) The Appellant signed the Agreement to avoid being terminated. Unfortunately, on May 1, 2017, just a short while after the Appellant signed the Agreement, he entered the offending statement on his Facebook page, sealing his fate.

Conclusion

Accordingly, for the above stated reasons, the discipline appeal of Mr. Amenta, Docket No. D1-17-160, is hereby ***denied***.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Stein and Tivnan, Commissioners) on February 13, 2020.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in 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. 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:

James Simpson, Esq. (for Appellant)

Amy Hughes, Esq. (for Respondent)