

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JAMES ANDRADE,
Appellant

v.

D-07-154

DEPARTMENT OF CORRECTIONS,
Respondent

Appellant's Attorney:

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67 Batterymarch Street
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Respondent's Representative:

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Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant James Andrade (hereinafter the "Appellant") filed an appeal with the Civil Service Commission (hereinafter the "Commission") on April 13, 2007, claiming that the Department of Corrections (hereinafter "DOC" or "Appointing Authority") did not have just cause to suspend him for five (5) working days without pay. The appeal was timely filed. A hearing was held on May 8, 2008 at the offices of the Commission. Since no notice was received from either party to make the hearing public, the hearing was declared private. One (1) tape was made of the hearing and is retained by the

Commission.

FINDINGS OF FACT

Eight (8) exhibits were entered into evidence. Based upon the documents entered into evidence, the testimony of Lieutenant Corey Cotta (hereinafter "Lt. Cotta") and the testimony of the Appellant, I make the following findings of fact:

1. The Appellant began working for the DOC on July 19, 1998 as a Correction Officer I. He is a tenured civil service employee. The Appellant was assigned to the Souza-Baranowski Correctional Center until he was transferred to Old Colony Correctional Center (hereinafter "OCCC") in early 2006. (Testimony of Appellant)
2. Lt. Cotta began working for the DOC as a Correction Officer I on September 10, 1989. He became a lieutenant on November 30, 2003. His duties include supervising correction officers and sergeants, overseeing daily activities, checking posts, ensuring that staff complies with their respective post orders, directives, policies and other duties. (Testimony of Lt. Cotta)
3. Before the incident that is the subject of this case, the Appellant had been disciplined three (3) times:

January 20, 2000: Two (2) day suspension for an inaccurate report and responses during an investigation into the use of force;
August 12, 2003: Five (5) day suspension. Brought reading material into the facility; disobeyed a direct order twice to dispose of the magazine (Appellant's appeal to the Commission was denied, Docket No. D-04-28, February 1, 2007);
May 17, 2006: Five (5) day suspension for failure to report the use of force on an inmate until twenty (20) minutes later.
(Exhibit 8)
4. On August 22, 2006, Lt. Cotta was the Appellant's supervisor on the 3 p.m. to 11 p.m. shift.
5. At one point, Lt. Cotta went to the Dawes I Housing Unit control room (hereinafter "control room") to inspect the post orders for signatures. The control room is situated in the middle

of a large inmate common area, with thick glass on three walls, and a hole to talk through.

The common area is about ten feet in front of the control room. (Testimony of Lt. Cotta,

Testimony of the Appellant)

6. When he arrived he found the control room door unlocked, with Correction Officer John Keyes (hereinafter "CO Keyes") and the Appellant inside. Lt. Cotta asked them why the door was unlocked. (Testimony of Lt. Cotta)
7. The Appellant testified that he knew that both he and CO Keyes knew that Lt. Cotta was approaching the control room because they could hear his keys jangling. CO Keyes got up and opened the door to let him in. (Testimony of Appellant)
8. After Lt. Cotta's question, the Appellant became confrontational and warned CO Keyes to "be careful, you'll get written up for that." Lt. Cotta told the Appellant that if he had a problem with him he should speak to Captain Gordon (hereinafter "Cpt. Gordon"). (Testimony of Lt. Cotta)
9. After the Appellant continued to be confrontational, Lt. Cotta repeated that he should contact the captain.
10. While this exchange was going on, the common area surrounding the control room was full of inmates.
11. When Lt. Cotta informed the Appellant that he could be relieved to go see the Captain if there was a problem, the Appellant got up and said, "I would expect that from you it's cuntish." (Exhibit 2, Testimony of Lt. Cotta)
12. The Appellant denied making this statement. (Testimony of Appellant)
13. Lt. Cotta then went to the Dawes II Room and reported the incident to Cpt. Gordon. He was concerned that this incident had taken place in front of staff and inmates. In his experience,

he knew when inmates use conflict between officers to their advantage. (Testimony of Lt. Cotta)

14. Lt. Cotta filed a confidential report on the incident that same day. (Exhibit 5)
15. Before the August 22, 2006 incident, there had been other confrontations between the Appellant and Lt. Cotta. On or about August 20, 2006, the Appellant's duties included "pat downs" during inmate movement. That day, the Appellant reported to his post without the department required latex gloves (Testimony of Lt. Cotta, Testimony of the Appellant)
16. When Lt. Cotta informed the Appellant that it was his responsibility to have gloves in order to perform the task, and that he still had time to do so before the scheduled inmate movement, the Appellant refused to get some. Due to safety precautions, he had to be relieved from performing pat downs that day. (Testimony of Lt. Cotta, Testimony of the Appellant)
17. Around that same time, the Appellant called Lt. Cotta for a roll of toilet paper. Lt Cotta said that it could be awhile because he had to locate some. Toilet paper is given out on Tuesdays, one roll per inmate. Finding additional rolls on weekends is difficult. (Testimony of Lt. Cotta, Exhibits 3 and 5).
18. On August 23, 2006, the DOC notified the Appellant that he was suspended for five (5) days for his conduct on August 22, 2006, a violation of Rules 6(a), 6(d), 8(a) and 19(b) of the Blue Book. (Exhibit 4).
19. The Appellant had received a copy of the Blue Book on July 21, 1998, the day he was hired. (Exhibit 7)
20. The Blue Book Rules state:

6(a) states, in part, "Correctional goals and objectives can best be achieved through 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, as become correctional professionals. You should control your temper, exercise the utmost patience and discretion ...”

6(d) states, in part, “Relations between supervising and subordinate employees should be friendly in aim yet impersonal and impartial to such a degree that no subordinate employee may justly feel himself favored or discriminated against. 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 ...”

8(a) states, in part, “Relations with inmates may be twofold, that of counselor and disciplinarian simultaneously, which will require your utmost tact and diplomacy. Your leadership ability may be enhanced by the professional image you project.”

19(b) states, in part, “Efforts will be taken to ensure that orders are reasonable and considerate, however, if you disagree with the intent or wording of an order, time permitting, you may be heard and the order withdrawn, amended, or it may stand. Without such prompt action on your part, no excuse will be tolerated that you did not comply with the order because it was faulty, unworkable, or for any other cause.”
(Exhibit 6).

21. A disciplinary hearing was held on March 16, 2007. Afterwards, the hearing officer recommended that the DOC recommendation for a five (5) day suspension be affirmed.
(Exhibit 2).

22. On March 28, 2007, after a hearing pursuant to G.L. c. 31 § 41, the appellant was notified that the DOC had denied his appeal of the five (5) day suspension. (Exhibits 2).

23. On April 11, 2007, the Appellant filed a timely appeal with the Commission.

CONCLUSION

The role of the Civil Service 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. Civ. 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); Commissioners of Civ. Serv. v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Appointing Authority’s burden of proof is one of a preponderance of the evidence which is established “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. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004).

The issue for 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, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The DOC has shown by a preponderance of the evidence that it had just cause to suspend the Appellant from employment for a period of five (5) days without pay. Lt. Cotta was a credible witness. His testimony establishes that the Appellant was disrespectful, confrontational

and unprofessional towards him before a fellow officer, and far worse - in the presence of several inmates. This is a serious violation of the rules of the Blue Book.

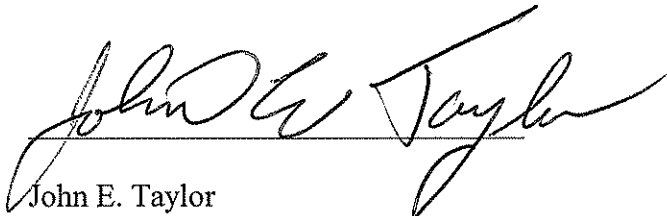
The Appellant cannot offer any evidence that would merit his use of vulgarity toward Lt. Cotta. Lt. Cotta tried to be fair and reasonable in his dealings with him. For example, the Appellant was unprepared for duty on August 22, 2006 when he didn't have gloves in order to perform pat downs. However, Lt. Cotta did not file a report against him. The Appellant argues that Lt. Cotta refused to answer him on the radio the next day because he was angry. There is no proof that Lt. Cotta actually heard the radio call.

The Appellant is a inconsistent witness. Although he stated that the control room is sound-proof , he also said that CO Keyes got up and opened the door when he head Lt. Cotta's keys as he was coming down the hall. He also maintains that it is not possible for the inmates to hear their exchange in the control room. If he and CO Keyes could hear Lt. Cotta's keys while they were in the control room, by the same token the inmates could hear his loud voice in the confrontation with Lt. Cotta.

For all of the above stated reasons, the Commission determines that by a preponderance of evidence, the Department of Correction had just cause for suspending the appellant for five (5) days without pay. There is no evidence of inappropriate motivations or objectives that would warrant the Commission reducing or overturning the Appellant's suspension.

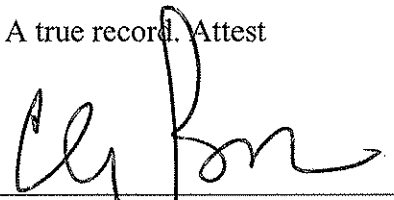
The Appellant's appeal filed under Docket No.D-07-154 is hereby *dismissed*.

Civil Service Commission


John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Taylor, Marquis, and Stein, Commissioners) on September 18, 2008.

A true record. Attest


Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

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