

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

D-13-107 (Bohenko)  
(3-Day Suspension & Reassignment)

ERIN BOHENKO,  
EDWARD SLATTERY &  
SHAMUS P. PECK,  
Appellants

D-13-108 (Slattery)  
(3-Day Suspension & Reassignment)

D-13-111 (Peck)  
(3-Day Suspension)

v.

DEPARTMENT OF CORRECTION,  
Respondent

Appearance for Appellants Erin Bohenko,  
Edward Slattery and Shamus Peck:

Joseph A. Padolsky, Esq.  
Louison, Costello, Condon & Pfaff, LLP  
101 Summer Street, 4<sup>th</sup> Floor  
Boston, MA 02110

Appearance for Respondent:

Amy Hughes, Esq.  
Department of Correction  
P.O. Box 946: Industries Drive  
Norfolk, MA 02056

Commissioner:

Christopher Bowman

**DECISION**

Pursuant to the provisions of G.L. c. 31, § 43, the Appellants, Erin Bohenko, Edward Slattery, and Shamus Peck (“Sgt. Bohenko”, “Mr. Slattery”, and “Lt. Peck”), are appealing the decision of the Department of Correction (“Department” or “DOC”) to suspend each of them for three days and to involuntarily transfer<sup>1</sup> Sgt. Bohenko and Mr. Slattery. Sgt. Bohenko and Mr. Slattery are appealing the three-day suspension and transfer; Lt. Peck is appealing the three-day suspension.

---

<sup>1</sup> The Department contends that Bohenko and Slattery were “reassigned” and not “transferred”.

A full hearing was conducted over four (4) days on September 4<sup>th</sup> and 23<sup>rd</sup>, 2013; October 23, 2013; and November 8, 2013.<sup>2</sup>

As no written notice was received from either party, the hearing was declared private. The hearing was digitally recorded and both parties were provided with a CD of the proceedings.<sup>3</sup> Both parties submitted post-hearing briefs in the form of proposed decisions on December 9, 2013.

### **FINDINGS OF FACT**

Based upon the twenty-two (22) documents entered into evidence, the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Lieutenant David Shaw;
- Correction Officer Kathleen Kunst;
- Captain Jean Parent;
- Correction Officer Brenda Wilder;
- Hearing Officer Kiernan Sullivan;

*Called by the Appellants:*

- Sergeant Erin Bohenko;
- Lieutenant Timothy Bariamis;
- Correction Officer Edward Slattery;
- Lieutenant Shamus Peck;
- Lieutenant Scott Rickert;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

---

<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

<sup>3</sup> 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

1. Erin Bohenko was appointed on February 6, 1994 as a Correction Officer I at MCI-Shirley Medium. In February 2009, she was promoted to Sergeant (Correction Officer II) (Stipulated Facts)
2. Sgt. Bohenko's prior disciplinary record consists of a one (1)-day suspension from an incident in 1996. (Stipulated Fact)
3. Edward Slattery was appointed on January 22, 1987 as a Correction Officer I. Mr. Slattery has served as an elected union steward for the Massachusetts Correction Officers Federated Union (MCOFU) for eleven (11) years, many of which were served as Chief Steward at MCI-Shirley Medium. As a result of the allegations giving rise to the instant appeal, Mr. Slattery was also moved from MCI-Shirley Medium to Souza Baranowski Correctional Center Maximum Security Facility. (Testimony of Mr. Slattery).
4. Mr. Slattery's disciplinary history consists of four (4) letters of reprimand and a one (1)-day suspension. (Stipulated Facts)
5. Shamus Peck was appointed on June 25, 2000 as a Correction Officer I. Lt. Peck was promoted to Sergeant in 2009 and promoted to lieutenant in 2013. (Testimony of Lt. Peck).
6. Lt. Peck's prior disciplinary record consists of six (6) prior instances of discipline including two (2) letters of reprimand, two (2) one-day suspensions, one (1) three-day suspension, and one (1) five-day suspension. (Testimony of Lt. Peck).
7. Timothy Bariamis is a Lieutenant at MCI-Shirley Medium. He has been in a live-in romantic relationship with Kathleen Kunst, a Correction Officer I at MCI-Shirley Medium, since 2008, before she was hired by the DOC. (Testimony of Lt. Bariamis and Ms. Kunst.)
8. In 2009, Ms. Kunst attempted to bring an umbrella into MCI-Shirley where she was working. (Testimony of Ms. Kunst and Exhibit 15)

9. Sgt. Bohenko, who was working the “trap” that day, saw Ms. Kunst with the umbrella, and informed her that she could not bring the umbrella into the facility. Ms. Kunst did not enter the facility with her umbrella. (Exhibit 15)
10. Six months later, Ms. Kunst was scheduled to work in the Health Services Unit (HSU) at MCI-Shirley. Since it was raining, she brought an umbrella to work with her. Aware that nurses were now allowed to bring umbrellas into the HSU, Ms. Kunst contacted the Captain on duty (Captain McGonagle) and asked him if she could also bring her umbrella into the facility. Captain McGonagle granted her permission to bring the umbrella beyond the “trap” and into the HSU. (Testimony of Ms. Kunst)
11. When Ms. Kunst entered the facility with the umbrella, the “trap officer” contacted Sgt. Bohenko to advise her of what had occurred. (Testimony of Sgt. Bohenko)
12. Approximately twenty (20) minutes into her shift, Ms. Kunst received a phone call from Sgt. Bohenko. Sgt. Bohenko screamed at her (Kunst) and at one point called Ms. Kunst a “fucking liar.” (Testimony of Ms. Kunst)
13. On August 18, 2010, after the above-referenced incident with the umbrella, an anonymous letter was sent to internal affairs from a staff member at MCI-Shirley. The anonymous letter alleged that Sgt. Bohenko screamed at Ms. Kunst, would scream at other staff members that would stick up for Ms. Kunst, and that other officers were afraid to approach Sgt. Bohenko in fear they would be yelled at. The letter listed names of officers who were witnesses to this alleged behavior so they could substantiate the allegations against Sgt. Bohenko. (Exhibit 15)
14. An investigation was opened in which the Department interviewed Ms. Kunst, Lt Bariamis, Sgt. Bohenko and each of the identified witnesses to the alleged misconduct. (Exhibit 15)

15. All of the officers named as witnesses in the letters were interviewed in the course of the investigation and denied witnessing the type of behavior alleged in the anonymous letters.  
(Exhibit 15)
16. After the initial interviews, a lieutenant at DOC contacted internal affairs and alleged that the previously interviewed witnesses were intimidated by the presence of MCOFU representative Edward Slattery and wished to be re-interviewed off state property. This lieutenant was instructed to write an incident report identifying which officers she was alleging to be intimidated by Mr. Slattery. The lieutenant submitted her incident report but did not identify the employees who were intimidated. She was subsequently ordered to provide the names of those individuals. The identified individuals were then re-interviewed at which time they denied being intimidated and/or wanting to be re-interviewed. (Exhibit 15)
17. Prior to the lieutenant submitting her report, a second anonymous letter was sent to internal affairs on August 30, 2010. Similar to the first letter, this second letter accused Sgt. Bohenko of creating a hostile work environment for Ms. Kunst, and again named other officers as witness to this alleged behavior. (Exhibit 15)
18. The 2010 investigation concluded with a finding that the alleged violations against Sgt. Bohenko were not sustained because only Ms. Kunst and the anonymous letters reported the alleged behavior and the alleged witnesses had not actually witnessed what was alleged.  
(Exhibit 15)
19. Lt. Bariamis was reprimanded for failing to report allegations of workplace violence and the other lieutenant was reprimanded for interfering with an investigation. (Exhibit 15)
20. A copy of the investigative report was forwarded to the Union Hall where it was made available to all Union members, including Sgt. Bohenko. (Testimony of Sgt. Bohenko)

21. In March 2012, Ms. Kunst won a day shift bid. Captain Parent planned to assign her to the HSU where Sgt. Bohenko was the supervisor. (Testimony of Captain Parent)
22. Upon learning that Captain Parent planned to assign Ms. Kunst to the HSU, Sgt. Bohenko approached Captain Parent as he was doing the end of shift count outside of the control room. She said that she had heard that he planned to assign Ms. Kunst to the HSU and asked if this was true. Captain Parent advised Sgt. Bohenko that this was true. Sgt. Bohenko expressed to Captain Parent that she did not want Ms. Kunst to work in the HSU. She was angry about it. Sgt. Bohenko asked Parent, “do you know that I have a problem with her?” (Testimony of Captain Parent)
23. Captain Parent told Sgt. Bohenko that Ms. Kunst would be working in the HSU and that she does an excellent job wherever she works; Sgt. Bohenko became angry and said, “don’t put her in there because if you put her in there I am not working there.” Captain Parent explained to Sgt. Bohenko that that is not how it works and that she (Ms. Kuntz) is going to be working in the hospital (i.e, the HSU). At that time, Sgt. Bohenko became angry and stated, “if you put her over there, I am not working there, find someone else to work there.” When Captain Parent asked Sgt. Bohenko what the problem was, she stated, “she is a fucking asshole, she is not working over there.” Captain Parent told Bohenko, “you do what you have to do, I’ll do what I have to do.” (Testimony of Captain Parent)
24. Captain Parent subsequently decided not to put Ms. Kunst in the HSU because he did not want to make problems between Sgt. Bohenko and Ms. Kunst worse. (Testimony of Captain Parent)
25. Prior to the confrontation with Sgt. Bohenko, Captain Parent had already informed Ms. Kunst that she was being assigned to the HSU. Accordingly, a few days after the

confrontation with Sgt. Bohenko, when Ms. Kunst realized she was not assigned to the HSU, she asked Captain Parent why. Captain Parent explained to Ms. Kunst that Sgt. Bohenko had approached him and did not want Ms. Kunst working over there, and that he did not want to put the two of them in that situation in light of whatever was going on between them.

(Testimony of Captain Parent)

26. A few weeks later, on April 6, 2012, two hospital trip details were announced. Ms. Kunst was first on the list. (Testimony of Ms. Kunst)

27. Ms. Kunst called into control and put her name on a list to be hired for the trip.

Approximately 20 minutes later, Lt. Peck called Ms. Kunst and asked her if she was going on the trip. Ms. Kunst indicated that did not know, control had not called her yet. She asked Lt. Peck if she was going with him. Lt. Peck said, “no, you aren’t going with me, Erin is going with me.” Lt. Peck proceeded to tell Ms. Kunst, “I’m just going to tell you right now, there are four of us going in one van. Erin is going and I’m not going to talk to you, I’m not even going to look your way, so it is going to be a really long hour trip in to the hospital. Are you sure that you still want to go.” Ms. Kunst replied that she still wanted to go, and Lt. Peck asked her if she knew her way around Boston. When Ms. Kunst replied that she did not, he said, “oh good, because you are going to be driving.” Lt. Peck said, are you sure that you still want to go now, and Ms. Kunst said, “yup, I’m still going to go.” (Testimony of Ms. Kuntz)

28. Ms. Kunst’s conversation with Lt. Peck made Ms. Kunst feel horrible. (Testimony of Ms. Kunst)

29. Eventually, one of the two hospital trips was canceled and Ms. Kuntz ended up not going on the trip for that reason. (Testimony of Lt. Rickert)

30. On April 10, 2012, Ms. Kunst was working an overtime shift in the chow hall, as were Sgt. Bohenko and Lt. Peck. Ms. Kunst was posted on one side of the chow hall and Sgt. Bohenko and Lt. Peck were posted on the other side. It appeared to Ms. Kunst that Lt. Peck and Sgt. Bohenko were talking about her, looking at her and laughing about her.
31. On her way back to her post, Ms. Kunst stopped to speak to another correction officer. While Ms. Kunst and the other correction officer were talking, Lt. Peck and Sgt. Bohenko walked past them. There was a verbal exchange between Lt. Peck and Ms. Kunst that included obscenities. (Testimony of Ms. Kunst and Lt. Peck)
32. On April 18, 2012, after becoming aware of these recent incidents involving Ms. Kuntz, Lt. Bariamis submitted an incident report with allegations against Lt. Peck, Sgt. Bohenko and others. (Exhibit 2)
33. After the investigation was underway into the allegations in Lt. Bariamis's report, three anonymous letters were sent to the MCI-Shirley IPS Unit. The letters were sent after the internal investigation interviews with Lt. Bariamis and Ms. Kunst, both which took place on April 30, 2012. (Exhibit 2)
34. During the first week of May 2012, Ms. Kunst was by the mailbox in the Chow Hall approximately 10 feet away from the phone when it rang and Mr. Slattery answered it. Mr. Slattery said, "Kathy you have a phone call." Ms. Kunst walked toward Mr. Slattery to get the phone, and Mr. Slattery opened his hand and dropped the phone on the floor (the phone has an approximately 8 foot cord). The phone hit the floor and bounced off the floor. Ms. Kunst bent over and picked it up. This was in front of staff and inmates. Ms. Kunst felt "total humiliation" at that point. Ms. Kunst felt this was done intentionally to humiliate her.



35. On July 24, 2012, Ms. Kunst requested and had a private meeting with Captain Parent to discuss the allegedly “retaliatory events” and the “excessive stress this has caused Lt. Bariamis” and herself, “which are negatively affecting her health.” Ms. Kunst further informed Captain Parent that she was fearful that her coworkers would not come to her aid in the event of inmate-related incidents. Captain Parent advised her to submit a report when she returned from her days off. (Exhibit 2)
36. On July 27, 2012, Ms. Kunst submitted an incident report regarding “continued harassment she is receiving from staff at MCI Shirley.” (Exhibit 2)
37. After completing an investigation, DOC charged Sgt. Bohenko for violating various Department rules for: unprofessional behavior toward Ms. Kuntz; lowering the morale of Ms. Kuntz by making her feel ostracized and disrespected in the workplace; intimidating and/or harassing Ms. Kuntz; being untruthful when questioned about the investigation regarding these allegations. (Stipulated Facts)
38. Lt. Peck was charged with violating various Department rules by: attempting to pressure Ms. Kuntz into backing out of a hospital detail that she was entitled to work; making a veiled threat to Ms. Kuntz by stating “let’s not have any issues”; making Ms. Kuntz feel ostracized and disrespected (for the events in the chow hall and immediately thereafter); and being untruthful during the investigation. (Stipulated Facts)
39. Mr. Slattery was charged with violating various Department rules for creating a demeaning, embarrassing and intimidating work environment for Ms. Kuntz by intentionally dropping the receiver of the phone in front of inmates and fellow employees while she was walking toward the phone; and for being untruthful when asked about these allegations during the investigation. (Stipulated Facts)

*Relevant DOC Rules*

40. General Policy I, provides, in part, “Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/ her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents, or by their authority. All persons employed by the Department of Correction are subject to the provisions of these rules and regulations. Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations. Your acceptance of appointment to the Massachusetts Department of Correction shall be acknowledged as your acceptance to abide by these rules and regulations.”
41. Rule 6(a) provides, in part, “[c]orrectional 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.” (Exhibit 1).
42. Rule 6(b), provides, in part, “[d]o not foster discontent or otherwise tend to lower the morale of any employee.”
43. Rule 19(c) provides, in part, “[s]ince 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.” Exhibit 1.

44. Rule 19(d) provides, “[i]t is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasingly so, according to rank.”
45. The Department’s Prevention and Elimination of Workplace Violence, 103 DOC 237, states, in part, “It is the Department’s policy to have zero tolerance for workplace violence in any form.” 103 DOC 237.01. Further, the policy explains that workplace violence includes, but is not limited to, “Bullying, intimidation, harassment...;[or] any behavior that communicates by any means...a direct or indirect threat of physical harm, violence, harassment, or intimidation.” 103 DOC 237.02. Exhibit 3.

*Legal Standard*

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (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, rev.den., 426 Mass. 1104 (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).

### *Analysis*

The parties offer starkly different versions of what occurred here. According to DOC, Ms. Kunst, a Correction Officer since 2009, has been disrespected, harassed and ostracized by the Appellants, including Sgt. Bohenko, since at least 2010. DOC contends that this behavior stems from an animus that Sgt. Bohenko developed toward Ms. Kunst after Ms. Kunst went outside the chain of command and effectively overruled Sgt. Bohenko's decision regarding whether umbrellas could be brought into a DOC facility by employees. According to DOC, other employees, including the two (2) other Appellants here, have disrespected and ostracized Ms. Kunst out of a displaced loyalty for Sgt. Bohenko, their long-time colleague.

According to Sgt. Bohenko, the 2010 incident was an unexceptional event that was not particularly troubling to her, then or now. She argues that she did not harbor any ill-will toward Ms. Kunst at the time and that she has not said or done anything that could be construed as ostracizing, harassing or disrespecting Ms. Kunst. All of the Appellants, including Sgt. Bohenko, argue that they are the victims here, having been subject to fabricated or exaggerated

allegations by Ms. Kunst, all of which has been complicated, to their detriment, by the involvement of Ms. Kunst's live-in boyfriend, who is a lieutenant at DOC.

In addition to a pre-hearing conference, four (4) days of hearing were convened on this matter, with one (1) day of hearing not going forward as a result of a witness initially failing to comply with a lawfully-issued subpoena. The parties submitted over twenty (20) exhibits including an extensive internal affairs investigation completed by DOC. Ten (10) witnesses, including the Appellants, offered sworn testimony. I have reviewed and considered all of the documents, listened (and re-listened) to the witness testimony; and carefully reviewed and considered all of the proposed findings and arguments in the post-hearing briefs submitted by the parties. I limited my findings, however, only to those necessary in deciding whether there was just cause for the discipline imposed here. (See Hamilton v. Dept. of Pub. Utils., 346 Mass. 130, 137 (1963) (While an agency must review all of the evidence in the record, "it need only record findings which were necessary for it to decide the issue and provide the courts with a basis for judicial review.") (emphasis in original))

Many of the findings most relevant to these appeals required a credibility assessment of percipient witnesses who offered divergent testimony regarding specific incidents. While I considered each incident, and the testimony offered, individually, a general assessment regarding the overall credibility of the most relevant witnesses is warranted here. It is the function of the hearing officer to determine the credibility of the testimony presented before him.

See Embers of Salisbury, Inc. v. Alcohol 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) (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their

relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Generally, Ms. Kunst was a good witness. Even with the three (3) Appellants in close proximity, she maintained her composure, listened carefully to the questions posed, and provided plausible, consistent answers during her direct testimony and cross examination. Importantly, she candidly acknowledged events and statements that could potentially portray her in a bad light. She acknowledged using profane language at one point and fibbing about being upset over a deceased relative. As part of my assessment, I also considered whether Ms. Kunst had any role in submitting the anonymous letters referenced in the findings. While it is more probable than not that Ms. Kunst was at least aware of these letters, this alone was not sufficient to change my overall assessment of her credibility.

Sgt. Bohenko's testimony was undercut by her insistence that the 2010 incident involving Ms. Kunst and her going outside the chain of command was a non-event which was quickly forgotten. It was not. Based on the credible testimony of Ms. Kunst, Sgt. Bohenko called Ms. Kunst on the phone that day and berated her for going outside the chain of command, at one point calling Ms. Kunst a "fucking liar." Further, based on almost all of the witness testimony and the statements made to DOC investigators by DOC employees, Sgt. Bohenko's continued ire for Ms. Kunst was well known at the DOC facility where they both worked. The suggestion by Sgt. Bohenko (and the other Appellants) that Ms. Kunst turned a non-event into something bigger than it was, is false -- and is a disturbing attempt to paint Ms. Kunst as paranoid and unstable. She is neither.

Lt. Peck was not a good witness. While he sought to portray himself as an innocent victim incapable of engaging in the misconduct alleged here, his behavior during these proceedings showed otherwise. At the conclusion of one day of hearing, I was engaged in a colloquy with both counsel regarding efforts to compel a certain DOC employee to appear and testify before the Commission on behalf of the Appellants. When DOC Attorney Amy Hughes asked whether I wanted DOC to assist, Lt. Peck abruptly interjected and admonished Attorney Hughes not to have any contact with one of their witnesses. His tone and demeanor were troubling. On another day of hearing (November 8, 2013), Attorney Hughes had left the room in order to ask a rebuttal witness to come into the hearing room and testify. While Attorney Hughes was outside the room, Lt. Peck, apparently referring to the reaction of Attorney Hughes during the prior witness's testimony, stated, "Did you see the look on Amy's face?; her eyes got hot!". Finally, at one point during his testimony, he cavalierly and inexplicably stated words to the effect "when I win this hearing". It is not surprising that Lt. Peck's prior discipline includes a three (3)-day suspension for engaging in a physical confrontation with another officer and a written reprimand for a verbal confrontation with another staff member.

Mr. Slattery's testimony before the Commission was limited and was primarily related to an incident in which he dropped the receiver of the phone when Mr. Kunst was walking towards it. While I did not credit his version of what occurred in that incident, it did not detract from other parts of his testimony which I deemed credible.

Based on the findings, I have concluded that the three Appellants, to varying degrees, did engage in misconduct that resulted in Ms. Kunst feeling disrespected and ostracized, a chilling prospect for any employee working in a confined facility who relies on his/her colleagues for support in life-threatening situations.

In 2010, Ms. Kunst, who had been employed less than two (2) years, arrived at work on a rainy day with an umbrella. She received permission from the Captain in charge to bring the umbrella into the Health Services Unit (HSU). Aware that Sgt. Bohenko had denied Ms. Kunst permission to do so only six (6) months ago, an unnamed “trap officer” decided to contact Sgt. Bohenko and inform her that Ms. Kunst had brought an umbrella into the facility. That triggered an angry reaction from Sgt. Bohenko who was irate that Ms. Kunst had gone outside the chain of command and received permission to do something she prohibited only six (6) months earlier. Sgt. Bohenko called Ms. Kunst in the HSU, screamed at her, and at one point called her a fucking liar.

In August 2010, based on an anonymous letter, DOC initiated an investigation into whether Sgt. Bohenko was berating staff, including Ms. Kunst. That investigation revealed a lack of evidence to sustain the allegation of harassment.

In 2012, DOC initiated another investigation after Ms. Kunst filed a report alleging mistreatment. Those allegations form the basis of the discipline imposed here and I address them in chronological order.

In March 2012, Ms. Kunst won a desired day shift bid in the HSU, the same location where Sgt. Bohenko was the supervisor. Upon learning of this, Sgt. Bohenko intervened, informed the Captain (Captain Parent) responsible for making this assignment that she had a problem with Ms. Kunst; told him not to grant the assignment to Ms. Kunst; and, if he did, Sgt. Bohenko would refuse to work there and referred to Ms. Kunst as a “fucking asshole.” Although he initially rebuffed Sgt. Bohenko’s demand, Captain Parent eventually relented and did not grant Ms. Kunst the desired day shift assignment in the HSU.



Sgt. Bohenko acknowledges that she told Captain Parent that she wanted to be reassigned if Ms. Kunst transferred to the HSU, but she denies ever telling (or asking) the Captain not to assign Ms. Kunst to the HSU day shift and denies using the profane language to describe Ms. Kunst. I did not credit this portion of Sgt. Bohenko's testimony. Captain Parent had a vivid recollection of this conversation and he had no ulterior motive in offering testimony that was adverse to Sgt. Bohenko. Sgt. Bohenko prevented Ms. Kunst from obtaining a coveted day shift assignment in the HSU. There is no excuse for this type of retaliatory behavior which, standing alone, justifies disciplinary action against Sgt. Bohenko.

In April 2012, Ms. Kunst's name was initially on a detail list to accompany inmates to Tufts Medical Center, a routine occurrence. Lt. Peck was also scheduled for the detail and he was aware that Sgt. Bohenko was also scheduled to be in the van. Lt. Peck inexplicably took it upon himself to contact Ms. Kunst via telephone, inform her that Sgt. Bohenko would be in the van and that it would be a really long trip as he would not speak to or look at her. This is the same type of childish, brutish behavior exhibited by Lt. Peck as part of the proceedings before the Commission. The conversation had an unsettling effect on Ms. Kunst who felt horrible after the conversation ended. This action, standing alone, justifies disciplinary action against Lt. Peck.

Also in April 2012, Ms. Kunst was working the chow hall at which time she concluded that Lt. Peck and Sgt. Bohenko, who were stationed on the opposite side of the room, were talking about and laughing at her. Shortly thereafter, Lt. Peck and Sgt. Bohenko walked past Ms. Kunst. There was a verbal exchange in which both Lt. Peck and Ms. Kunst used profanity. In regard to both of these incidents, I have limited my findings only to what a preponderance of the evidence, including reasonable inferences, established. I was unable to conclude whether Sgt. Bohenko and Lt. Peck were actually talking about and laughing at Ms. Kunst. Similarly, I was unable to

conclude who initiated the profane exchange between Lt. Peck and Ms. Kunst in the hallway outside the chow hall or what was actually said.

In May 2012, Mr. Slattery was in the chow hall and answered an incoming phone call that was for Ms. Kunst. As Ms. Kunst was walking toward the phone to take the call, Mr. Slattery opened his hand, dropped the phone on the floor, causing it to hit and bounce off the floor. In front of inmates and other employees, Ms. Kunst had to bend over and pick up the phone. I did not credit Mr. Slattery's testimony that he placed the receiver on top of the phone and did not intend to embarrass or intimate Ms. Kunst. Mr. Slattery's explanation has evolved over time, first telling DOC investigators that he didn't recall taking the phone call, then equivocating on whether he remembered and then testifying before the Commission that he did remember taking the call and specifically remembered placing the receiver on top of the phone. Mr. Slattery is a long-time colleague and friend of Sgt. Bohenko. Through his testimony, it was clear to me that he did not trust Ms. Kunst and believed that she was making false allegations against his friend and colleague. In this context, his actions were inappropriate and warranted discipline.

Having determined that it was appropriate to discipline the Appellants for their misconduct, I must determine if DOC was justified in the level of discipline imposed.

The Commission is guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system ... to guard against political considerations, favoritism and bias in governmental employment decisions." Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the

Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

“The ... power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.” Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” E.g., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

Here, after a de novo hearing at which I reviewed all of the documentary evidence and listened to the testimony of percipient witnesses, I have concluded, similar to DOC, that the Appellants engaged in misconduct by disrespecting, ostracizing and harassing a fellow employee. While there was not sufficient evidence to support two of the underlying alleged incidents, my findings, particularly in regard to the intent of the Appellants, is consistent with the findings and conclusions of DOC.

Further, a three (3)-day suspension is warranted against Sgt. Bohenko given the serious nature of her misconduct, which included retaliating against a fellow DOC employee by interfering with her obtaining a desired day shift assignment in the HSU. More generally, rather than putting an end to the shenanigans against Ms. Kunst, it appears that Sgt. Bohenko, a superior officer, did nothing to dissuade fellow officers from ostracizing Ms. Kunst as a show of displaced loyalty to her.

A three (3)-day suspension is also warranted against Lt. Peck. He has a considerable disciplinary history for misconduct that includes prior confrontations with fellow correction officers. His actions here fall far short of what is expected of a superior officer at DOC and a three (3) day suspension is consistent with the principles of progressive discipline.

Mr. Slattery has received four letters of reprimand and a recent one (1)-day suspension for an off-duty incident unrelated to the instant matter. While a three (3)-day suspension against Mr. Slattery is arguably too severe, I am mindful that the Commission's modification of a short term suspension should be exercised sparingly. (See Boston Police Dep't v. Joseph Donovan and Mass. Civ. Serv. Comm'n, Suffolk Superior Crt, Civil Action No. 96-4869-E (“[w]ithin such minor and close bounds [as with a three-day suspension], the Commission is less justified and more disruptive of legitimate departmental calibration of discipline.”))

Mr. Slattery and Sgt. Bohenko are also challenging what they allege is an involuntary transfer to another facility. The actions taken by DOC here are more consistent with a reassignment, for which the Commission has no jurisdiction over for the reasons below.

First, the Appellants have not served as tenured employees since prior to October 14, 1968. G.L. c. 31, § 43 only grants procedural protections to employees have been transferred without their written consent if they were a tenured employee on or before October 13, 1968, which the Appellants were not.

In order to invoke the protection of another section of the civil service law, G.L. c. 31, § 35, the Appellants are required to establish that they were “transferred” within the meaning of the civil service law.

The Civil Service Commission has defined the term "Transfer" as a "change of employment under the same appointing authority from a position in one class to a similar position in the same

or another class or a change of employ in the same position, under the same appointing authority, from one geographical location to a different geographical location, provided that a different geographical location shall be one which is both more than a commuting distance from the employee's residence than its prior location and more distant from the employee's residence than his prior location..." Sullivan v. Dep't of Transitional Assistance, 11 MCSR 80 (1998).

A series of other Commission decisions has established the difference between a transfer and a reassignment and that the Commission lacks jurisdiction over those appeals involving a reassignment.

In Appellant v. Department of Revenue, 1 MCSR 28, 29 (1985), the Commission dismissed the Appellant's appeal on the grounds that the action being appealed was a reassignment as opposed to a transfer. In that case, the employee's position in the Worcester office was eliminated and he was reassigned to the Cambridge office. The employee claimed that this change in duty was effectively a transfer. The Commission found that the distances to Cambridge or to Worcester from the employee's home were approximately equal. It further found that that the reassignment did not affect the employee's job title, duties, grade or salary.

In McLaughlin v. Registry of Motor Vehicles (CSC Case No. G-01-1461 (2004)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but a reassignment. In McLaughlin, the Appellant was not transferred to a different position, but merely relocated to a different branch office while keeping the same job title, duties and pay.

In Sands v. City of Salem, 21 MCSR 502, 504 (2008)), the Commission, citing Sullivan, determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Sands, the Appellant, a Hoisting Equipment Operator,

was no longer able to perform some of the essential duties in his previously held position. Therefore, in order to make reasonable accommodations for his medically documented permanent disability, he was reassigned to perform cemetery-related duties in the Cemetery Department. Although his distance of travel from his residence was greater than previously, the Commission concluded that the change in travel did not impose an unreasonable hardship on the employee.

In McQueen v. Boston Public Schools (21 MCSR 548, 551 (2008)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In McQueen, the Appellant was reassigned from one elementary school to another. In dismissing his appeal, the Commission considered that the Appellant retained the same position of junior custodian and retained the same rate of pay in his new position.

In Anderson v. Saugus Public Schools (CSC Case No. D-09-381) (2010), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Anderson, the Appellant retained her title of Principal Clerk; she did not face any reduction in pay nor had she been assigned to a work location that resulted in a longer commute. While her functional duties had changed, those duties still fell clearly within the clerical series. Even if the functional duties were substantially different, as they were in the Sands case, the Commission concluded that this alone would not constitute a transfer that is reviewable by the Commission.

In Haye and Simone v. Methuen Public Schools, 23MCSR 122 (2010), the Commission determined that it lacked jurisdiction to hear appeals in that the action did not constitute a transfer, but, rather, a reassignment. In Haye and Simone, the Appellants were both permanent

junior building custodians. They were reassigned to building custodian positions different from those in which they had been serving. Each of them continued to serve in junior building custodian positions without any loss of compensation. Mr. May, who had previously worked in the functional title of “building custodian / store delivery person” and Mr. Simone, who had previously worked as building custodian / system-wide groundskeeper”, each had been reassigned to positions as junior building custodians in one of the elementary schools in the Methuen Public Schools.

In Breen v. Gardner School Department, 25 MCSR 154 (2012), the Commission determined that it lacked jurisdiction to hear the appeal in that the action did not constitute a transfer, bur, rather, a reassignment. In Breen, the Appellant was a Senior Clerk / Typist. She was laid off, then reinstated to her permanent civil service title of Senior Clerk / Typist. A subsequent arbitration decision, related to another employee, addressed provisions of the collective bargaining agreement related to the assignment of clerks to various positions in the School Department. Although the Appellant was assigned to a different work location, her permanent title of Senior Clerk/ Typist was not disturbed.

In Bedard v. Marlborough Public Schools (CSC Case No. G-13-225 (2013)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action did not constituted a transfer, bur, rather, a reassignment. In Bedard, Ms. Bedard’s permanent civil service title was not disturbed, she continued to perform administrative duties that were consistent with the clerk series, she suffered no reduction in pay and her new work location was only a couple of miles away from her prior work location.

Here, the Appellants' permanent civil service title has not been disturbed, they continue to perform duties that are consistent with their respective titles, they suffered no reduction in pay and they have not shown that their new work location is beyond a commuting distance. As such, the actions that occurred here were reassignment and not transfers. Moreover, the Commission is not inclined, given the nature of the offenses here, to second-guess a rational and justified decision by DOC intended to ensure the safety and protection of its employees.

For all of above reasons, the actions of the Department of Correction are affirmed and the appeals of the Appellants under Docket Nos. D-13-107, D-13-108 and D-13-111 are *denied*.

Civil Service Commission

---

Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein) on February 6, 2014.

A True Record. Attest:

---

Commissioner

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

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

Notice to:  
Joseph Padolsky, Esq. (for Appellants)  
Amy Hughes, Esq. (for Respondent)