

**THE COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

One Ashburton Place, Room 503

Boston, MA 02108

(617) 727-2293

**ANDREW BURNS,**

Appellant

Docket No.: D-06-121

v.

**DEPARTMENT OF CORRECTION,**

Respondent

Attorney for the Appellant:

Bradford Louison, Esq.

Louison, Costello, Condon and Pfaff,  
LLP

67 Batterymarch Street

Boston, MA 02110

Representative of Respondent:

Jeffrey S. Bolger

Department of Correction

Division of Human Resources

P.O. Box 946 Industries Drive

Norfolk, MA 02056

Commissioner:

John E. Taylor<sup>1</sup>

**DECISION**

The Appellant, Andrew Burns (hereinafter “Appellant”), pursuant to G.L. c.31 § 43, filed an appeal with the Civil Service Commission, (hereinafter “Commission”) on June 2, 2006,

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<sup>1</sup> Commissioner Taylor’s term on the Commission expired before he was able to draft a written decision. The matter was assumed by the Commission’s General Counsel, Angela C. McConney, Esq.

Pursuant to 801 CMR 1.11 (e), when a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of the evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence from the beginning.

claiming that the Department of Correction (hereinafter “DOC” or “Appointing Authority”) did not have just cause to suspend him without pay for three (3) days for verbally harassing an inmate on March 16, 2005, and then being untruthful to the DOC investigator during the investigation of his conduct. A hearing was held on April 16, 2008 at the offices of the Commission. The (2) audiotapes made of the hearing are retained by the Commission.

## FINDINGS OF FACT

Sixteen (16) exhibits were entered into evidence, including a VHS cassette. Based on these exhibits and the testimony of:

### *For the Appointing Authority:*

- Lieutenant Stephen Gatewood, Correction Officer III , Office of Investigative Services, MCI - Souza Baranowski;
- Sergeant William Boggs, Correction Officer II , MCI – Souza Baranowski

### *For the Appellant:*

- Appellant, Andrew Burns, Sergeant, MCI – Souza Baranowski

I make the following findings of fact:

1. The Appellant Andrew Burns, a tenured civil service employee, has been employed by the DOC since March 26, 2000. He has spent his entire DOC career at the MCI Souza Baranowski Correctional Center. (Testimony of Appellant)
2. He received a copy of the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction* (hereinafter “Blue Book”) on March 28, 2000. (Exhibit 6)

3. At the time of the incident on March 16, 2005, the Appellant had been a sergeant for three (3) years. (Testimony of Appellant)
4. He had no previous record of discipline. (Exhibit 3)
5. On March 16, 2005, the Appellant was working the 3 pm to 11 pm shift in the Special Management Unit (SPU). Due to a medical emergency around 4:30 pm, an inmate was removed from his cell to the Health Services Unit (HSU). The inmate later alleged that there was misconduct and physical abuse by the correction officers during the move. The inmate alleged that the Appellant called him racial slurs. (Testimony of Appellant)
6. The Appellant wrote three disciplinary reports against the inmate for conduct that occurred just before or during his transport from the SPU to the HSU. (Exhibits 14 and 15)
7. Lieutenant Stephen Gatewood (hereinafter "Gatewood") was assigned to investigate the inmate's allegations. He interviewed the inmate on May 6, 2005. He interviewed two other inmates thought to be witnesses on May 11, 2005. He later interviewed correction officers Scott Fisher, Ryan Marriott, Craig Daniels, Scott Lynde, Paul Ahern, Mark Ellia, Brian Boisse, William Descroches, Todd Smith, Richard Peterson, William Boggs, Timothy Raimond, Anthony Pacheco, and Christopher Wajda; Lieutenant Donald Ferrara; Sergeants Peter Peladeau, Timothy Crowley, and John Hennessey; mental health clinician Cristyn DeMerchant; and nurses Lori Watson and Joyce Murphy. (Exhibit 5)
8. None of those interviewed saw or heard racial slurs being used. None of them saw anyone physically abuse the inmate. Gatewood found that the interviewees were credible, and that the inmate's allegations had no merit. (Exhibit 5)
9. Videotape surveillance showed that the Appellant had left his position to go to the HSU trauma room at 10:24:27 pm. He went directly to the inmate's cell where he remained for

eighteen (18) seconds. He left HSU at 10:25:14 pm for a total of 47 seconds. (Exhibits 5 and 16)

10. When questioned about the abandonment of his post, the Appellant said that he had to leave in order to return a gurney to the HSU at approximately 10:24 pm. (Exhibit 5)

11. The video surveillance did not show the Appellant with a gurney at the relevant time. (Exhibits 5 and 16)

12. When showed the videotape, the Appellant then stated that the gurney was placed just outside the door and that he was going to let the HSU staff know that it was back. (Exhibit 5)

13. When asked why he was speaking to the inmate, he said, “to see what was going on, I said hey []<sup>2</sup> how you doing? That was the extent of my conversation, as a matter of fact []<sup>3</sup> said to me something along the lines of Saint Patrick’s Day, I kind of thought it was funny. I walked over and told the staff what was going on.” (Exhibit 5)

14. When informed that it was not apparent from the video that he was talking to the HSU staff, the Appellant said, “I was talking to staff the whole time I was in there.” When asked why he would go to the inmate’s cell if he had so many prior issues with him, the Appellant could not provide an explanation. Although he admitted that he told the inmate, “I’ll have a beer for you,” he emphatically denied making inappropriate comments to the inmate during this encounter. (Exhibit 5)

15. Gatewood concluded that while there was no evidence to substantiate the inmate’s allegations that abuse or inappropriate staff conduct had occurred, the Appellant was not forthright when he claimed that he reported to the HSU to return a gurney. (Exhibit 8)

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<sup>2</sup> The identity of the inmate is withheld in this decision.

<sup>3</sup> The identity of the inmate is withheld in this decision

16. He did not write a conclusion in regard to the verbal harassment in his report. However, when the DOC initiated disciplinary action against the Appellant, it included both the allegations of the verbal harassment and the lack of truthfulness. (Exhibit 8)
17. On September 21, 2005, the DOC issued a notice of hearing for April 13, 2006. (Exhibit 5)
18. James S. Santoro, the Labor Relations Advisor, presided over the disciplinary hearing on April 13, 2006. The issues were (1) whether the Appellant had verbally harassed an inmate in violation of Rule 8(a), and (2) whether the Appellant had been less than truthful when questioned about the incident in violation of Rule 19(c). (Exhibit 4)
19. The Rules are as follows:
- Rule 8(a) Relations with inmates may be twofold, that of counselor and disciplinarian simultaneously, which will require your utmost tact and diplomacy. For those employees having job responsibilities which require inmate contact, your attitude toward inmates should be friendly not familiar, firm not harsh, vigilant not unduly suspicious, strict not unjust. Your leadership ability may be enhanced by the professional image you project.
- Rule 19(c) Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. Pending investigation into the circumstances and your possible involvement therein, you may be detached from active duty forthwith, however, without prejudice and without loss of pay.
- (Exhibit 7)
20. Gatewood testified that the Appellant's statement to the inmate was not a very tactful or diplomatic comment to make to someone who is incarcerated and cannot have a beer even if he wished to do so. He also testified that the Appellant had no legitimate reason to vacate his assigned post and go to the HSU, and that his statements as to why he did so lacked credibility. (Exhibits 8 and 16)
21. The DOC informed the Appellant of its decision in a letter dated May 1, 2006. The DOC found that the Appellant had verbally harassed the inmate in violation of Rule 8(a) and that he had been less than truthful about his reasons for going to the HSU in violation of Rule 19(c). (Exhibit 3)

22. The Appellant was suspended for three (3) days for violating Rules 8(a) and 19(c). (Exhibit 3)

23. On June 2, 2006, the Appellant filed an appeal with the Commission. (Exhibit 2)

## 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. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997). See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civ. Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G. L. c. 31, § 43, if the Commission finds by a preponderance of the

evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue before the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria at 334. See Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton at 727-728.

The Appointing Authority was reasonably justified in disciplining the Appellant. The Appointing Authority's decision to discipline the Appellant was supported by adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law. See Leominster v. Stratton at 728.

After the inmate filed allegations of the correction officers' behavior in regard to his move to the HSU on March 15, 2005, DOC launched an investigation headed up by Gatewood. Gatewood interviewed most of the correction officers on the 3 pm to 11 pm shift that night, in addition to the medical staff. What emerged was that the inmate's statements in regard to physical abuse and racial slurs were not credible, but that the Appellant had left his post at some point to walk over to the HSU for no legitimate purpose. While engaged in that lack of purpose, he made inappropriate comments to the inmate. During the course of the investigation, he stated that he had left his post to retrieve a gurney. However, videotaped surveillance of the relevant locations at relevant times did not show the Appellant with a gurney at any time.

Evidence suggests that the inmate was not a model prisoner. During the DOC investigation, a witness stated that the inmate chronically complained about the staff on the 3 pm to 11 pm shift, but never identified staff members. Whatever the inmate's conduct may have been, there was no excuse for the Appellant's behavior. Correction officers' behavior must portray maturity and professionalism at all times, as governed by the Blue Book rules and the culture of the institution. Rule 8(a) states, "Your leadership ability may be enhanced by the professional image you project." Violations of the rules and regulations not only decrease the inmates' regard for the corrections officers and their ability to lead in the facility, but risk the safety and morale of the inmates. Taunting an incarcerated man with the mirage of a beer does not fall under the rubric of "utmost tact and diplomacy" in correction officer/inmate relations.

The Appellant compounded this error by lying more than once during the investigation. On at least two occasions, he had the opportunity to state what had actually taken place. In violation of Rule 19 (c), the Appellant failed to "respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself." The Appellant's lack of truthfulness is a serious matter, and could have hampered Gatewood's attempt to get at the bottom of the inmate's allegations. In the working environment of a correctional facility, correction officers' veracity is depended upon to protect the health and safety of everyone on the premises.

For all the above reasons, the Appointing Authority has demonstrated by a preponderance of the evidence that there was reasonable justification to discipline the Appellant.

However, the Commission finds that progressive discipline was not employed in this matter.



Although reasonable justification for discipline exists, this is the first instance of discipline in the Appellant's then six (6) history with the DOC. The Commission finds that the Appellant's behavior did not warrant a three (3) day suspension in the absence of previous violations of DOC rules and regulations.

The Commission hereby reduces the three (3) suspension to one (1) day.

The Appellant's appeal filed under Docket No. D-06-121 is hereby *allowed in part*.

Civil Service Commission

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Angela C. McConney, Esq.  
General Counsel

By a 3:1 vote of the Civil Service Commission (Bowman, Chairman [absent]; Henderson – yes, Marquis - no, McDowell – yes and Stein - yes, Commissioners) on May 20, 2010.

A true record. Attest:

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Commissioner

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

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

Notice sent to:

Bradford Louison, Esq. (for the Appellant)  
Jeffrey S. Bolger (for the Appointing Authority)