

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MARK CANNISTRARO,
Appellant

D-19-230

v.

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Mark Cannistraro, *Pro Se*

Appearance for Respondent:

Joseph S. Santoro
Labor Relations Advisor
Department of Correction
Division of Human Resources
50 Maple Street, 1st Floor
Milford, MA 01757

Commissioner:

Cynthia A. Ittleman

DECISION

On October 18, 2019, the Appellant, Mark Cannistraro (Appellant), pursuant to G.L. c. 31, § 43 filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Department of Correction (Respondent or DOC) to suspend him for five (5) days based on violations of DOC Rules and Regulations involving employee conduct; the care, custody, and safety of inmates; and the maintenance of good order. The Appellant also appeals a suspension imposed for three (3) days based on violations of administrative procedures, institutional requirements, the care, custody and safety of inmates, and the maintenance of good order.

A prehearing conference was held at the offices of the Commission on November 26, 2019. A full hearing was held at the same location on February 28, 2020.¹ The hearing was digitally recorded and both parties were provided with recordings of the hearing.² Both parties submitted post-hearing decisions. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

The Respondent entered seventeen (17) exhibits into evidence (Resp. 1-17³) and the Appellant entered two (2) exhibits into evidence at hearing. Additionally, after I issued a Procedural Order on March 2, 2020, the DOC provided Post Hearing Exhibits 1-27 (PH 1-27). Based on these exhibits; the testimony of the following witnesses:

For the DOC:

- Deputy Superintendent Dean Gray, DOC
- Captain Glenn Doher, DOC
- Captain Joseph Prato, DOC

For the Appellant:

- Mr. Cannistraro (Appellant);

and taking administrative notice of all matters filed in the case, plus pertinent statutes, case law, regulations and policies; the evidence that I find credible and reasonable inferences drawn therefrom; a preponderance of the evidence establishes the following findings of fact:

¹ 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.

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

³ DOC produced two exhibits comprised of rules, regulations or policies applicable here. Given the sensitivity and related security concerns involved in the two exhibits, the two exhibits have been marked and shall be treated as confidential matters.

1. The Appellant began his career working with a sheriff's office, where he was employed for fourteen (14) years. He has worked as a Correction Officer I (CO I) for the DOC since September 5, 2005.
2. The Appellant works in the Souza-Baranowski Correctional Center (SBCC), which houses maximum security male inmates. (Gray Testimony).
3. Prior to the two disciplinary matters now being appealed, the Appellant had three instances of prior discipline at the DOC. The Appellant was issued a letter of reprimand in 2008 for not providing medical documentation for sick leave; received a one-day suspension in 2011 for not responding fully and completely about the conduct of another employee; and received a one-day suspension in 2013 for not covering inmate movements as directed. (Resp. Exs. 12, 13, 14).
4. Employees at SBCC review the post orders at each shift, which orders they normally read online at the institution. (Gray Testimony; Doherty Testimony).
5. A special unit of SBCC, the Health Services Unit, contains cells for inmates who have been deemed a mental health risk. Post orders for shifts at the Health Services Unit are available on a computer during the shift and through paper copies within the Health Services Unit. (Gray Testimony; Prato Testimony).
6. Post Order #48, Mental Health/Security Watch, states: "An officer will be assigned to maintain uninterrupted observation of the inmate in an approved watch cell. The staff person assigned to the watch shall be positioned in the following manner ... seated, facing the door/cell, and no more than three feet away from the cell." (Resp. Ex. 8).
7. Corrections Officers perform "constant observation duty," also called "constant watch", for inmates in the Health Services Unit when an inmate is at a mental-health risk.

Determinations for assigning constant watch are made in instances when an inmate has threatened to harm himself or has harmed himself. (Appellant Testimony; Prato Testimony).

8. When assigned to constant observation duty, Correction Officers must keep a direct, unobstructed view of the inmate *at all times*. Constant observation duty also requires that the Correction Officers log what the inmate has been doing every 15 minutes. This duty usually lasts for two hours, until the assigned officer is relieved. (Doherty Testimony; Gray Testimony; Prato Testimony).
9. The Rules and Regulations Governing All Employees of the Massachusetts Department of Corrections (DOC Rules) include the following provisions relevant to this appeal:

I. General Policy

These rules and regulations are general directions and do not attempt to cover each and every contingency which may arise during the performance of your duties or while employed by the Department of Correction. 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 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...

Rule 7, General Conduct – Employees, Section (c)

Any Department of Correction or Institution employee who is found sleeping at his/her post during the course of their official duties, or otherwise 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 12, Care, Custody, Safety, and Good Order, Section (a)

Employees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities through presumption and must familiarize yourself with assigned tasks and responsibilities including institution and Department of Correction policies and orders.

Rule 13, Institutional Requirements, Section (b)

You shall not leave the institution during your duty hours without the permission of your direct supervisor unless it is absolutely necessary in order to complete an assigned task. Employees having charge of inmates, or in a security tower, or assigned to any other security position, must not leave their post or terminate their tour of duty until relieved by proper authority. Acquaint your post relief with all special orders, pertinent occurrences and significant happenings within your shift before leaving your post.

Rule 19, Administrative Procedures, Section (d)

It 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....

(Resp. Ex. 15).

10. The Appellant acknowledged receiving the DOC Rules in 2005 with his signature on a receipt form. (Resp. Ex. 11).
11. DOC policies include a specific protocol regarding medical emergencies or other serious matters. This policy instructs Correction Officers to immediately report medical situations. (Prato Testimony).

Five-Day Suspension

12. As part of his duties as a shift commander in charge, Captain Doher, who has worked within the DOC for over two decades, reviews the video feed of all hallways at SBCC during evening shifts, particularly in the 3 AM shift. It is common practice for shift supervisors to watch these videos multiple times throughout the day to ensure rounds are being conducted. (Doher Testimony; Gray Testimony).
13. On August 9, 2018, the Appellant was assigned to constant watch of Inmate A on the Health Services Unit on the overnight shift. The Appellant is familiar with Inmate A and knows that Inmate A has a history of harming himself. (Appellant Testimony).

14. Video of Inmate A during the night of August 9, 2018 shows Inmate A picking at a wound on his skin and blood pooling on the floor of Inmate A's cell. Inmate A also placed his blood on the walls of the cell. (Resp. Ex. 16; Prato Testimony).
15. The Appellant was not observing Inmate A injuring himself either through the Graphic User Interface (GUI) camera feed available to him outside the inmate's cell or physically through a window. The video shows the Appellant sitting in an area away from Inmate A's door. (Resp. Ex. 16; Prato Testimony; Appellant Testimony).
16. A correction officer on his rounds saw Inmate A's condition and told the Appellant and others to "call it in" as a medical emergency, after which Inmate A received medical treatment. (Resp. Ex. 16; Prato Testimony; Appellant Testimony).
17. Captain Prato, who has been employed by the DOC for twenty-two years, held an Investigatory Interview about this incident on August 29, 2018. A union official was also present as a witness.⁴ As part of his investigation, Captain Prato spoke with the Appellant and reviewed the video tapes of that evening. During the interview, the Appellant stated that he had not read the Post Orders for Inmate A. The Appellant also stated that he could see Inmate A's shoulder from where he was sitting and could see Inmate A on the GUI video. However, he did not see Inmate A's self-injurious behavior. (Resp. Ex. 10).
18. The Appellant stated that he did not believe Inmate A's "picking an old scab" was reason to initiate the code for life-threatening situations. At this Commission's hearing, the Appellant acknowledged that he misjudged the situation and admitted to the infractions of not watching the inmate and not recording his observations every 15 minutes. (Resp. Ex. 5; Appellant Testimony).

⁴ The Appellant has not been part of a union since 2011. (Appellant Testimony).

19. The Appellant was suspended for five days for violations of the DOC's General Policy, Section 7(c), and 12 (a) of the DOC Rules, and violation of Post order No. 48. The DOC's letter to the Appellant stated, in relevant part,

You failed to read your post orders prior to your assignment. Your assignment required that you maintain a constant, in-person observation of the inmate. You failed to maintain uninterrupted direct visual observation of this inmate. While you were assigned to watch this inmate, he began to self-injure. You did not see him injure himself nor did you see him wipe what appears to be blood from his arm on the wall. Due to your egregious misconduct, the inmate's self-injurious behavior continued for approximately 22 minutes and only came to your attention when another officer did rounds."
(Resp. Ex. 8)

20. The Appellant appealed his five-day suspension and the DOC held a hearing on January 24, 2019. The DOC determined that there was just cause for the suspension and the Commissioner of DOC denied the Appellant's appeal of this finding on October 15, 2019. (Resp. Ex. 3, 5).

Three-Day Suspension

21. Approximately three days after he was issued the five-day suspension, the Appellant was assigned to constant observation duty of an inmate (Inmate B) on the overnight shift of August 12- August 13, 2018. (Gray Testimony; Appellant Testimony).

22. The captain on duty as shift commander on this overnight shift, Captain Doher, witnessed the Appellant sitting back in a chair, his mouth open, and wearing mirrored sunglasses at approximately 3 A.M. This was the first time Captain Doher had seen the Appellant wearing sunglasses. (Ex. 9. 17; Doher Testimony).

23. The Appellant gets migraine headaches because of a previous assault and the lights in the institution can trigger them unless he wears sunglasses.⁵ (Appellant Testimony).

⁵ The record does not include medical information or evidence of approved accommodation in this regard.

24. Believing the Appellant to be sleeping and knowing that the Appellant was assigned to constant observation duty, Captain Doher issued orders to Lieutenant Gogan that the Appellant remove his sunglasses and be relieved from his observation to take a break from his shift. Lieutenant Gogan communicated this order to Correction Officer Jenkins, who then communicated the information to the Appellant. (Ex. 9; Doher Testimony).
25. The Appellant removed his sunglasses and told Officer Jenkins that he was OK and was able to complete his shift, after which Captain Doher relayed that the Appellant should go home. The Appellant left the building at approximately 3:20 AM and returned for his next shift, which started at 7 AM. (Doher Testimony; Appellant Testimony).
26. Captain Doher conducted a fact-finding investigation of the incident on August 29, 2018. During this investigation, he spoke with the Appellant to give him the opportunity to “tell his side of the story.” Another officer, a union representative, attended the meeting as a witness. (Doher Testimony, Gray Testimony, Appellant Testimony).
27. The Appellant does not dispute his failure to constantly observe the assigned inmate and he stated, in essence, that he erred by not performing his duty on August 12-13, 2018. (App. Ex. 1,2; Appellant Testimony).
28. Another officer who was assigned to be on constant watch who was with the Appellant on the night of August 12- 13, 2018 was observed to be sleeping and no fact-finding interview was held for that infraction. Captain Doher testified that his not conducting a fact-finding hearing of the other Correction Officer was inadvertent and that he himself was under investigation for this oversight. (Appellant Testimony; Doher Testimony).
29. The Appellant received a three-day suspension for violations of General Policy I; Rule 12, Sec. (a); Rule 13, Sec. (b), and Rule 19, Sec. (d) for his conduct August 12 – 13, 2018. The

Appellant appealed this decision to this Commission in conjunction with the 5-Day suspension. (Resp. Exs. 4, 7; Appellant Testimony).

30. The DOC conducted a hearing on January 24, 2019 and issued a report dated September 16, 2019 to the DOC Commissioner regarding both the three-day and five-day suspensions. The DOC Commissioner upheld the suspensions on October 15, 2019. (Resp. Ex. 2, 3).
31. The Appellant believes that his three-day suspension should be removed from his record because he was treated differently than the other Correction Officer who was also observed to be sleeping during the same shift as the Appellant. (Appellant Testimony).
32. The DOC provided the redacted discipline records of 25 COs as comparators for the Appellant's two suspensions. (Resp. PH Ex. 1-25).
33. The DOC discipline records indicate that DOC has issued five-day suspensions for infractions after previous 1-day suspensions (Rep. PH 3; 4, 6, 18). The DOC has also issued three-day suspensions for infractions for a variety of reasons, including misuse of sick time, failure to follow policy or rules, and other misconduct. (Resp. PH 1, 2, 7, 8, 16, 18).

Legal Standard

Section 43 of G.L. c. 31 provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [a tenured civil service employee] ... 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 the 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." *Id.*

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). *See also* Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof to show misconduct 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.

Analysis

The DOC has shown by a preponderance of evidence that it had just cause to discipline the Appellant for five days and for three days for separate incidents involving the safety of inmates.

First, video footage from the Health Services Unit on August 9, 2018 clearly shows Inmate A engaging in self-injurious behavior and also clearly shows the Appellant sitting in a position where he could not keep constant watch over the Inmate. During his fact-finding interview, the Appellant told Captain Prato that he had not read the post-orders about his shift with this inmate. At hearing, the Appellant stated that he recognized his lapse in judgment by not watching the inmate and thus not recognizing a medical emergency. The Appellant does not deny that this event occurred. Rather, he takes issue with the imposition of a 5-day suspension

after nine years of discipline-free employment with DOC. The suspension was not warranted, he argues, given that his prior discipline occurred so long ago and because the last discipline was a one-day suspension.

The DOC issues 5-day suspensions for more serious infractions, as demonstrated by the sample redacted disciplinary reports submitted into evidence. Many of these infractions have to do with the security of inmates and employees in the institution, such as not monitoring inmates in accordance with policy.⁶ Here, the Appellant's lack of constant watch contributed to ongoing self-injurious behavior of an inmate whom the Appellant was assigned to monitor closely. This shows that the Appellant did not fulfil his primary duty to provide for the safe-keeping and custodial care of inmates and did not exercise constant vigilance and caution in the performance of his duties. Had he been performing his duties, the Appellant would have been monitoring Inmate A's behavior on the GUI camera and taken timely action to stop Inmate A's self-injurious behavior, which continued for more than twenty minutes. There can be no question that this dereliction of duty constitutes "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Therefore, there was just cause to issue the 5-day suspension.

There are problems with the DOC's fact-finding investigation report leading to the issuance of a three-day suspension on August 12-13, 2018. Of the violations of General Policy I; Rule 12, Sec. (a); Rule 13, Sec. (c); and Rule 19, Sec. (d) cited as cause for the three-day suspension, the Appellant did not violate Rule 13(c) which involved leaving the institution without a supervisor's knowledge. Capt. Doher, who wrote the report, issued the order for the Appellant to leave and the Appellant followed that order. The Appellant did not call out sick

⁶ The details of the DOC comparator information were provided to the Appellant but are not detailed in this decision in view of concerns about the possible ramifications for institutional safety.

with a migraine, as the report states. Those errors in facts aside, the record contains visual evidence of the Appellant leaning back in a chair with his mouth open, indicating to Capt. Doher that the Appellant was sleeping while he should have been vigilant and constantly observing Inmate B as he was required to do.

The Appellant believes the three-day suspension to be excessive, especially because Captain Doher inadvertently did not discipline another CO in similar circumstances on the same shift. I credit Captain Doher's testimony that he had put the other officer's file aside and had mistakenly overlooked disciplining the other officer. Further, the record shows that a three-day suspension is not unusual in circumstances when an inmate's safety or the security of the institution could be at risk because of a DOC employee's behavior. For instance, many three-day suspensions in the DOC employee discipline reports involve violations of procedures having to do with inmate security, with one three-day suspension issued for not constantly watching an inmate to whom a CO was assigned.⁷ In all, the DOC has also met its burden to establish just cause for the discipline imposed on August 12-13 for his violation of DOC's Rules and Regulations.

The preponderance of the evidence establishes that on the nights of Aug. 9, 2018 and Aug. 12-13, the Appellant violated DOC Rules and there was just cause to suspend him for the lengths of suspension imposed. I have considered whether the Commission should exercise its discretion to modify the discipline imposed. However, of considerable concern here is that as a result of the Appellant's failure to maintain a constant watch of Inmate A for more than twenty minutes, this inmate, who was being watched because he had previously injured himself, again

⁷ Approximately ten (10) three-day suspensions in the sample were issued for violations of sick leave policy.

injured himself, putting his blood on the cell walls. Of added concern is the fact that the Appellant's conduct on the two occasions occurred only a few days apart. Further, I find no evidence that the DOC acted here out of unlawful bias or disparate treatment of similarly situated employees. Finally, my findings do not vary substantially from the findings of the DOC. Accordingly, modification of the discipline is not warranted and both the five-day suspension and three-day suspension are upheld.

Conclusion

For the foregoing reasons, the Appellant's appeal, docketed D-19-230, is hereby ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Ittleman, Stein and Tivnan, Commissioners) on July 1, 2021 [Camuso – Not Participating].

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. 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:
Mark Cannistraro (Appellant)
Joseph S. Santoro (for Respondent)