COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

PAUL CORDEIRO,
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

Case No.: D-12-130

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Department of Correction to suspend the Appellant for one (1) day is affirmed and the Appellant's appeal is ***denied***.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell- Absent]) on January 23, 2014.

A true record. Attest.

Christopher C. Bowman
Chairman

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 A. Padolsky, Esq. (for Appellant)
Kerry Rice (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

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Docket Nos.: D-12-130, CS-12-580

PAUL CORDEIRO,
Petitioner

v.

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Petitioner:

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Appearance for Respondent:

Kerry Rice
Division of Human Resources
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Administrative Magistrate:

Angela McConney Scheepers, Esq.

SUMMARY OF TENTATIVE DECISION

The Department of Correction had just cause to discipline the Appellant for one day for failing to comply with the Department sick leave policy, including the provisions of the medical certification granted under the Family and Medical Leave Act. I therefore recommend that the Appellant's discipline be upheld.

TENTATIVE DECISION

INTRODUCTION

The Appellant, Paul Cordeiro, pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission) on March 28, 2012, claiming that the Department of

Correction (Department or DOC) did not have just cause to suspend him for one day without pay for violating Department Rule 18(b) for unauthorized use of leave time.

The Appellant filed a timely appeal. A pre-hearing conference was held on May 29, 2012 at the offices of the Commission, One Ashburton Place, Room 503, Boston, MA 02108. On September 13, 2012, pursuant to 801 CMR 1.01(11)(c), a Magistrate from the Division of Administrative Law Appeals (DALA) conducted a full hearing at the offices of the Commission, in accordance with the Formal Rules of the Standard Rules of Practice and Procedure. 801 CMR 1.01.

The Appellant testified on his own behalf. The Respondent called Deputy Superintendent Sean Medeiros and Captain Henry Beckvold. The witnesses were sequestered.

Sixteen exhibits were admitted into evidence. I admitted the Stipulated Facts, signed by the parties at the May 29, 2012 pre-hearing conference, as Exhibit 17. The hearing was digitally recorded. As no notice was received from either party, the hearing was declared private.

The Respondent submitted its post-hearing briefs on October 15, 2012. The Appellant submitted his post-hearing brief on October 17, 2012, whereupon the administrative record closed.

FINDINGS OF FACT

Based on the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. Paul Cordeiro has worked for the Department of Correction as a tenured Correction Officer I since July 16, 1995. At all times relevant to this appeal, the Appellant was assigned to MCI-Norfolk. (Exhibit 17; Testimony of Appellant.)

2. On July 17, 1995, the Appellant received a copy of Rules and Regulations Governing all Employees of the Department of Correction (Rules and Regulations). (Exhibit 14.)

A. Previous Discipline

3. The Appellant was disciplined three times in 2011. On February 5, 2010, after a motor vehicle accident, the Somerset Police Department arrested the Appellant for operating under the influence of alcohol and negligent operation of a motor vehicle. On February 9, 2010, Chief Paul Oxford from the Department's Office of Investigative Services investigated the matter. Although the Appellant was found not guilty of these offenses, he admitted that he had spilled beer while driving and had struck the bumper of the car in front of him. On January 24, 2011, Superintendent Gary Roden found the Appellant in violation of General Policy I and the Rules and Regulations, Rule 1, and imposed a one-day suspension. (Exhibits 12, 15 and 17.)

4. On March 29, 2011, Norfolk police officers pursued the Appellant into the parking lot of MCI-Norfolk. The officers had received complaints about the Appellant driving erratically and at a high rate of speed. The Appellant's breath had the odor of alcohol. On May 21, 2011, Captain Fredericks conducted a fact-finding interview. On August 10, 2011, Superintendent Roden found the Appellant in violation of General Policy I and Rule 7, and imposed a three-day suspension. Two of the three days were held in abeyance for one year, subject to the Appellant not receiving further discipline for one year after the incident. (Exhibits 11, 15 and 17.)

5. On August 12, 2011, the Appellant was disciplined for Family and Medical Leave Act (FMLA) leave violations for the first time. The Department had authorized FMLA leave for the Appellant from August 12, 2010 until February 11, 2011. After his FMLA leave expired, the

Appellant was absent from work on July 3, 24 and 25, 2011. (Exhibits 10 and 15; Testimony of Beckvold, Testimony of the Appellant.)

6. Captain Harry Beckvold has worked for the Department fifteen years, and has served as the administrative captain of MCI-Norfolk for four years. On July 29, 2011, MCI-Norfolk Deputy Superintendent Sean Medeiros directed Sgt. Beckvold to conduct a fact-finding interview with the Appellant to determine if there was just cause to discipline the Appellant for his absences on July 3, 24 and 25, 2011. Cpt. Beckvold found that the Appellant had not submitted the requisite recertification paperwork to the Department before February 11, 2011 in order to extend his FMLA, and thus had used unauthorized FMLA leave on July 3, 24 and 25, 2011. The Appellant informed the captain that he did not know that the FMLA approval could expire. (Exhibits 7, 10 and 15; Testimony of Beckvold, Testimony of the Appellant.)

7. Belatedly, the Appellant submitted a "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)" to the Department on August 2, 2011. The medical certification, completed by Dr. Chris Joncas, the Appellant's health care provider on July 28, 2011, documented that the Appellant's diabetes had become a lifelong condition in 2009. The Appellant was able to fulfill all his job functions, and was prescribed Metformin, Crestor, Linspropil and Trazadone. The medication certification showed that on occasion the Appellant may need a part-time schedule, and that he could be absent from work due to episodic flare-ups. The flare-ups could occur two to three times per month with related incapacity of eight (8) hours per episode. (Exhibit 16; Testimony of Appellant.)

8. By letter dated August 2, 2011, Assistant Deputy Commissioner Karen Hetherson notified the Appellant that based on the information provided, she approved of his use of

intermittent medical leave granted under the FMLA, from July 28, 2011 until January 27, 2012. (Exhibit 6).

9. The August 2, 2011 letter further advised:

> ... You may elect to substitute available leave credits for unpaid FMLA leave.
>
> Under the FMLA, intermittent medical leave must be a cooperative effort between the employer and employee so as to not unduly disrupt the operations of the workplace and can only be used for the reasons stated on the medical certification. On the occasion you need to be absent as a result of incapacity from your condition, you must notify your facility appropriately and state specifically you are utilizing FMLA leave. As with all employees, your attendance will be monitored to ensure this leave is not abused. Please note, any absences in excess of those noted above, will be subject to the sick leave provisions of your collective bargaining agreement and if applicable, will require the submission of acceptable medical evidence to your facility.
>
> If additional leave is needed, you and your treating physician must complete and submit the enclosed application and medical certification to request an extension. ... prior to the expiration of your leave.

(Exhibit 6.)

10. After reviewing Cpt. Beckvold's investigation, Superintendent Roden found that without valid FMLA leave, the Appellant's absences for July 3, 24 and 25, 2011 were subject to the sick leave provisions of the collective bargaining agreement. By letter dated August 12, 2011, he informed the Appellant that he had found him in violation of the Rules and Regulations, Rule 18(b):

> 18. ATTENDANCE AND ABSENCES
> (b) Employees who abuse sick leave, fail to produce satisfactory medical evidence of illness (physician's slip) when requested, or use sick leave for personal matters not related to illness, will be denied said sick leave, and may be subject to disciplinary action up to and including discharge, in compliance with all valid collective bargaining agreements.

(Exhibits 10 and 15.) Superintendent Roden issued a letter of reprimand. He further advised that any future violations of the Rules and Regulations may result in more severe disciplinary action being taken, up to and including termination. (Exhibits 10 and 15; Testimony of the Appellant.)

11. On January 24, 2012, the Appellant was disciplined for FMLA leave violations for the second time. In October of 2011, the Appellant requested FMLA leave for seven absences: October 6, 7, 11, 12, 14, 17 and 20, 2011. (Exhibits 5, 9 and 17; Testimony of Beckvold, Testimony of the Appellant.)

12. On October 27, 2011, Cpt. Beckvold conducted a fact-finding interview into the Appellant's use of FMLA leave under the August 2, 2011 recertification, which was valid from July 28, 2011 until January 27, 2012. The Appellant attended with union representation. Cpt. Beckvold informed the Appellant that the August 2, 2011 FMLA certification letter only allowed him to be absent 2-3 times per month, 8 hours per episode. The Appellant said that the letter said that his condition *could occur* 2-3 times per month, and was a matter best interpreted by a medical professional. He said that he planned on seeing his medical provider in order to have the FMLA medical certification amended to more properly reflect his medical condition. (Exhibits 5, 9 and 17; Testimony of Beckvold, Testimony of the Appellant.)

13. Department employees are allowed forty-eight hours of unsubstantiated sick leave, before they are required to submit medical documentation. Whether the employee is utilizing FMLA leave or regular sick leave, a sick leave slip must be submitted after the forty-eight hour allotment. (Exhibit 3; Testimony of the Appellant.)

14. As of October 29, 2011, the Appellant had not submitted a new medical certification increasing the days of his FMLA leave-approved absences to the Department, thus the August 2, 2011 certification letter remained in effect. Cpt. Beckvold found that the

Appellant had used the 3 days of the time allotted by his FMLA medical certification letter for the month of October 2011; without authorization, the Appellant claimed an additional four days as FMLA; and the Appellant failed to submit medical evidence for the four days in excess of the FMLA allotment. Cpt. Beckvold found the Appellant in violation of Rule 18(b), and recommended that the Superintendent review the incident for further action, if necessary. (Exhibits 3 and 5; Testimony of Beckvold.)

15. By letter dated January 6, 2012, then in an amended letter dated January 24, 2012, Superintendent Roden reviewed and sustained the findings that the Appellant, in violation of Rule 18(b) for his absences in excess of the 2-3 days allowed under the provisions of the FMLA as approved by the Division of Human Resources. The superintendent then issued a one-day suspension. (Exhibits 4 and 4A; Testimony of the Appellant.)

16. Superintendent Roden had already issued the Appellant a three-day suspension in a previous discipline on August 10, 2011. Two of the three days were held in abeyance for one year, subject to the Appellant not receiving further discipline for one year after the incident. Because the instant discipline occurred less than a year after the August 10, 2011 discipline, the superintendent ordered that the Appellant serve the two days held in abeyance on February 14 and 17, 2012. Superintendent Roden further advised that any future violations of the Rules and Regulations may result in more severe disciplinary action being taken, up to and including termination. (*See supra* Findings of Fact 4 and 9; Exhibits 4, 4A, 11, 15 and 17; Testimony of the Appellant.)

17. Superintendent Roden wrote:

> Be advised that a correction officer's attendance is critical to the safe operation of the institution, for your safety, that of your fellow officers, and that of the public at large. This behavior cannot and will not be tolerated, and you are hereby notified that your attendance will be monitored to ensure your compliance with

> the submission of any required medical evidence, and for adherence to any additional FMLA leave approvals.

(Exhibit 4A.)

18. The appointing authority hearing was held on February 7, 2012, with Labor Relations Advisor Joseph S. Santoro presiding as hearing officer. The Appellant was represented. (Exhibit 3; Testimony of the Appellant.)

19. The Appellant argued that the 2-3 days in the medication certification was merely a guideline by the medical provider, and was not intended to be the maximum allotment due him under the FMLA. He argued that the Department staff are not medical professionals and are not privy to how many flare-ups may occur as a result of the Appellant's illnesses. (Exhibit 3; Testimony of the Appellant.)

20. The Department argued that the Appellant was familiar with the sick leave policy of the Department, including medical certification under FMLA, and that he was aware of what to do if he were sick more than 3 days per month. (Exhibit 3; Testimony of the Appellant, Testimony of Medeiros, Testimony of Beckvold.)

21. Mr. Santoro found that the Appellant's conduct was in violation of Rule 18(b), that Superintendent Roden had just cause to impose the one-day suspension on the Appellant, and that the Department had adhered to the policy of progressive discipline. (Exhibit 3; Testimony of Medeiros.)

22. On March 7, 2012, Commissioner Luis Spencer reviewed the hearing officer's report and documentation provided, and found that the Appellant violated Department Rule 18(b), and that there was just cause to impose the one-day suspension. (Exhibit 2; Testimony of the Appellant, Testimony of Medeiros.)

23. The Appellant filed an appeal with the Commission on March 28, 2012. (Exhibit 1.)

CONCLUSION AND ORDER

A. Applicable Legal Standards

A tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L. c. 31, § 41, may appeal to the Commission under G.L. c. 31, § 43, which 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). "The commission's task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact … the commission does not act without regard to the previous decision of the town, but rather decides whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983)." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823-24 (2006).

Under G.L. c. 31, § 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. The role of the 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 Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102, (1997). *See also Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003); *Police Dep't of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev. den.* (2000); *McIsaac v. Civil Service Comm'n*, 38 Mass App. Ct. 473, 477 (1995); *Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev. den.*, 390 Mass. 1102 (1983).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *Beverly v. Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 189, 190-91 (2010), *citing Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824-26 (2006). *See also Methuen v. Solomon*, Docket No. 10-01813-D, at *10

n.7 (Essex Sup. Ct. July 26, 2012). The Commission owes "substantial deference" to the appointing authority's exercise of judgment in determining whether just cause was shown.

Moreover, it is inappropriate for the Civil Service Commission to modify an employee's discipline where it finds the same core of consequential facts as the appointing authority regarding the misconduct of the employee, but makes different "subsidiary" findings of fact. *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 797-99 (2004).

B. Analysis

The Department has shown, by a preponderance of the evidence, that the Department had just cause to suspend the Appellant for one day without pay.

Department employees are allowed unsubstantiated sick leave for forty-eight hours. The employees must contact the facilities as soon as possible after deciding not to appear for work, in order for the Department to make arrangement for coverage After the forty-eight hours is exhausted, employees must submit a physician's note in order to be credited for sick leave. It is undisputed that the Appellant has a medical condition that may flare up during the month.

It is undisputed that the Appellant had been disciplined once before for violations of Family and Medical Leave Act (FMLA) leave. He had first sought a medical certification under the FMLA in 2010, which was authorized from August 12, 2010 until February 11, 2011.[1] After his FMLA leave expired, the Appellant was absent from work on July 3, 24 and 25, 2011. During the fact-finding interview with Cpt. Beckvold on July 29, 2011, the Appellant said that he was unaware that the FMLA medical certifications could expire. Four days later, he submitted a

[1] The 2010 "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)" was not submitted into evidence, but presumably it is similar to the one the Appellant submitted for his August 2, 2011 medical certification, Exhibit 16.

new medical certification to the Department. The Department issued the Appellant a letter of reprimand on August 12, 2011 after he belatedly submitted a new medical certification on August 2, 2011.

That new medical certification, as completed by Dr. Joncas, presumably happened after consultation with the Appellant. As his health care provider, it is likely that Dr. Joncas was familiar with the Appellant's ailments. Based on the Appellant's medical history and Dr. Joncas's knowledge of the medical condition, the doctor stated that the Appellant had an ongoing lifelong condition that could flare up 2-3 times per month, for a duration of eight hours per episode.

The Department's Human Resources Department approved the new medical certification on August 2, 2011 for six months, retroactive to July 29, 2011 and through January 27, 2012. The medical certification followed Dr. Joncas's recommendation, and specifically stated that the frequency of the Appellant's condition could be 2-3 times per month.

In October of 2011, the Appellant sought FMLA leave for seven absences, four days in excess of his FMLA leave. Although the Appellant testified that he tried to use other leave – sick time, comp time and vacation time – in excess of the three days, the 2011 Attendance Calendar reveals otherwise. (Exhibit 7.) The Appellant had already had a fact-finding interview on July 29, 2011 with Cpt. Beckvold for the same issue. There was another fact-finding interview on October 27, 2012 for the instant matter. During this interview, the Appellant said that his condition could occur 2-3 times per month, but was a decision best left to a medical provider. It is undisputed that a medical provider completed the Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), and the Department's allowance for FMLA leave was strictly based on that document. The Appellant

also said that he would contact his health care provider in order to have 2-3 days per month allowance for his intermittent condition increased. That was one of the options available to the Appellant. Alternatively, he could have sought a sick slip from his health care provider for the excess sick leave absences. Given the Appellant's tenure in the Department and his previous discipline on FMLA issues, it is likely that he knew what to do or at the very least whom to contact. By October 29, 2012, Cpt. Beckvold had heard nothing from the Appellant, so he found the Appellant in violation of Rule 18(b), and forwarded the matter to Superintendent Roden.

The Appellant was not a credible witness. The FMLA medical certification was in black and white, and the Department followed its guidelines. There was a simple solution to this problem, if there was in fact one: the Appellant could have seen his medical provider for a new certification if his medical condition had in fact deteriorated. This was the responsible thing to do, instead of compromising the safety of MCI-Norfolk by repeated and unexpected absences.

Based on testimony given and evidence presented, the Appellant was aware of the FMLA medical certification process, and had already been disciplined for failing to adhere to the Department sick leave policy. The Department had just cause to discipline the Appellant and has stated sound and sufficient grounds for doing so. This one-day suspension is in keeping with the principle of progressive discipline and does not warrant modification by the Commission. There is no evidence that the appointing authority's decision was based on political considerations, favoritism or bias. Thus the Department's decision to discipline the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the Department of Correction had just cause to discipline the Appellant Paul Cordeiro. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Angela McConney Scheepers
Administrative Magistrate

DATED: NOV 27 2013