Decision mailed: 9/18/09
Civil Service Commission CS

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

KEVIN DONOVAN,
Appellant,

v.

Docket No. D-09-182

DEPARTMENT OF CORRECTION,
Respondent

Appellant:

Robert A. Stewart,
Louison, Costello, Condon & Pfaff
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305

Respondent:

Amy Hughes, Administrative Prosecutor
Massachusetts Department of Correction
Division of Human Resources
One Industries Drive
P.O. Box 946
Norfolk, MA 02056
508-850-7849

Commissioner:

Daniel M. Henderson

**DECISION**

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Kevin Donovan (hereinafter "Donovan" or "Appellant") appealed the decision of the Department of Correction (hereinafter "DOC," "Department," or "Appointing Authority") claiming that the "Appointing Authority" did not have just cause to suspend him from the Department for one (1) day without pay on March 13, 2009. The appeal was timely filed. A hearing

was held on August 5, 2009, at the offices of the Civil Service Commission. The hearing was digitally recorded onto one CD, which was provided to the parties. Both parties submitted post-hearing proposed decisions.

**FINDINGS OF FACT:**

Ten (10) Exhibits and a stipulation of facts, (SF) were entered into evidence at the hearing. The parties also stipulated that all exhibits, if business records or copies of are authentic and were kept in the normal course of business. The Appellant was the only witness at the hearing[1]. Based on the documents and audio recording, (Exhibit 2) submitted and the testimony of Appellant, *I make the following findings of fact*:

*Facts:*

1. The Appellant, Kevin Donovan, was a tenured civil service employee of the Massachusetts Department of Correction serving in the position of Correction Officer I. He was appointed to this position in September 2007. (Stipulated Facts-"SF"- #4 and #11)
2. In October 2008, The Appellant applied for a position with the Somerville Fire Department. (Exhibit 1, p. 37). The Appellant did disclose his prior discipline from Beth Israel Deaconess Medical Center, (BIDMC) to the Somerville Fire Department. (Exhibit 1, p. 13) On November 19, 2008, the DOC received a call from a Somerville Police Department investigator who was conducting a background investigation on The Appellant. (SF 5) Somerville's investigator brought The Appellant's prior

[1] Stephanie Embree, Special Assistant to Acting Chief of the Department's Office of Investigative Services, was at the hearing available to testify. However, the parties stipulated to the authenticity of the Department's 43 page investigation report (Exhibit 1), as well as the CD recording of the Department's investigatory interview with Appellant (Exhibit 2). Accordingly, Ms. Embree's testimony was unnecessary.

discipline to the attention of the DOC. The fact that the Appellant did answer the question regarding prior discipline accurately on the subsequent Somerville Fire Department application should have reasonably prompted him to reflect back on his DOC application regarding accuracy. In effect the Appellant had a second opportunity to notify the DOC regarding the prior discipline inaccurate answer. (SF 5, exhibits, testimony, reasonable inferences)

3. On November 21, 2008, the Department initiated an "Investigation into Correction Officer Kevin Donovan's Failure to Disclose Prior Discipline( to DOC) From His Previous Employer."(BIDMC). (SF 6)
4. This investigation revealed that on July 1, 2005, while working as a security officer at Beth Israel Deaconess Medical Center (BIDMC), Appellant was verbally counseled for leaving his assigned detail one hour early. Specifically, he was advised that **"leaving any post without authorization was clearly unacceptable and would not be tolerated."** (Exhibit 1, p. 35)
5. Despite the prior verbal warning of July 1, 2005; The Appellant, on August 16, 2006, abandoned his post at the South Lot while working as a Security Officer at Beth Israel Deaconess Medical Center. (Exhibit 1, p. 34-35).
6. When interviewed by Captain Edward Hammond of the Department's Office of Investigative Services, The Appellant stated that "I didn't know I had to get authorization because you took lunch when you wanted to." Similarly, on direct examination at his appeal hearing, The Appellant testified, "I thought I could leave when construction [was] done....I thought I could leave, get something to eat before figuring out what to do next." (Exhibit 2, Testimony of Appellant)

7. Ultimately, at the end of his testimony at this hearing, The Appellant admitted that he should have called, but stated, "to tell you the truth, **I probably knew they would say you can't ...I wanted to get an extra 5 or 10 minutes for lunch**." (Testimony of Appellant)

8. Via letter dated August 28, 2006, The Appellant was issued a three (3) day suspension without pay along with a written warning, for his conduct on August 16, 2006. (Exhibit 1, p. 35). In the written warning, The Appellant was advised:

> It is important that you understand that any future instances of such inappropriate behavior, poor judgment and/or breaches off departmental and/or Medical Center policy will result in further disciplinary action, up to and including immediate termination of your employment....We want to be very clear that these incidents are not viewed as a minor and understandable misunderstanding or miscommunication issue. This conduct is unacceptable and must not re-occur. (Exhibit 1, p. 35)

9. On June 19, 2007, The Appellant submitted an employment application to the DOC, for the position of a Correction Officer with the DOC. (SF 2)

10. This employment application contained a form with the title, "Employment History Addendum." This form directs the employee as follows, "In the space below please list all discipline that you have received from your current and/or previous employers." (Exhibit 1, p. 23) Below this language, The Appellant checked off a box affirming that **"I have never been formally disciplined by an employer."** The form further inquires that if "**you HAVE BEEN formally disciplined or charged**" to provide very detailed information related to the discipline (Exhibit 1, p. 23). This detailed question of inquiry in the DOC employment application should have prompted the Appellant regarding the seriousness of the matter and the need for accuracy in his answer.(Exhibits and testimony, reasonable inference)

11. The Appellant also signed a statement within the application package affirming, "I am aware that willfully withholding information **or making false statements on this application or any supporting document will be the basis of dismissal from the Department of Correction."** (Exhibit 1, p. 25)

13. The Appellant testified that he "remembered checking off the box" stating that he had never been formally disciplined but that he could not explain his answer other than it was a mistake. He could not recall his "mindset" at that time. (Testimony of Appellant).

14. Questions on an employment application for a public safety employer such as the DOC, inquiring about prior formal discipline, are serious yet simple questions demanding due diligence or thoughtful, accurate responses. The Appellant knew or should have known the seriousness of answering that question accurately and the fact that he answered it inaccurately would reasonably lead another person to assume that it was done intentionally for the purpose of presenting himself in a better light. (Exhibits and testimony, reasonable inference)

15. When asked on cross examination whether he had forgotten about his prior discipline when filling out the DOC employment application, The Appellant responded, "pretty much, yeah." The Appellant went on to state, "I didn't remember to put it down...." The Appellant when asked why he left his assigned post at BIDMC without permission or reporting first to the security office, the Appellant responded: "...**I was hungry.**" (Testimony of Appellant)

16. Via a letter dated February 3, 2009, Appellant was notified by DOC Commissioner Harold Clarke that a hearing was scheduled for February 27, 2009, as a result of an investigation which revealed the following:

> [The Appellant was] disciplined in 2006 while employed at Beth Israel Deaconess Medical Center. Subsequently, [The Appellant] falsely indicated in [his] application for employment with the Department of Correction that [he] had never been disciplined formally by an employer. (Exhibit 3)

Further, the February 3, 2009 letter advised The Appellant that this conduct is in violation of the General Policy and Rule 2(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (Exhibit 3, ST 8).

17. The General Policy I of the Blue Book states, in part, "Nothing in any part of these rules and regulations shall be construed to relieve an employee…from his/her constant obligation to render good judgment, full and prompt obedience to all provisions of law….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." (Exhibit 8)

18. Rule 2(a), which states, in part, "Selection for appointment to correctional service is based in part upon statements contained on your application form. Discovery that any statement is false may lead to your discharge." (Exhibit 8)

19. On February 27, 2009, in accordance with G.L. c. 31, § 41, a hearing was held by the Commissioner of Correction's designee to determine whether Appellant violated the aforementioned DOC Rules. After the hearing, the hearing officer found The Appellant to be credible and noted:

> "The Appellant admitted the second portion of the charges as well. He was hard put to explain the falsehood, particularly since it had occurred some ten (1) months after

the discipline in question. The Appellant said he honestly could not recall his mindset at the time or what he had been thinking." (Exhibit 4, p. 3)

20. Despite finding The Appellant credible, however, the Commissioner's designee concluded:

"[B]y his own admission and by the unequivocal documentation provided, I find sufficient evidence that CO Kevin Donovan was disciplined in 2006 while employed at Beth Israel Deaconess Medical Center (BIDMC), and subsequently falsely indicated in his application for employment with the Department of Correction ("DOC") that he had never been disciplined formally by an employer.....Accordingly, I find that The Appellant violated the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction General Policy I and Rule 2(a)." (Exhibit 4)

21. Accordingly, Appellant was issued a one (1) day suspension via letter dated March 13, 2009 for violating the General Policy and Rule 2(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. (Exhibit 5)

22. A commonly understood definition of the word *False* 1. Not true or correct; erroneous: a false statement or accusation. 2. Uttering or declaring what is untrue. (The American College Dictionary, Random House Inc., New York, 1963 edition, Administrative notice)

23. With the exception of The Appellant, the Department's practice is to terminate officers found to have violated Rule 2(a). (DOC opening statement, Exhibit 10)

24. The Appellant readily admitted, both in his testimony and the DOC investigative interview that he made a false statement on his DOC application regarding his prior formal discipline while employed at BIDMC. However, the Appellant could not adequately explain how or why he had made this false statement in response to an important and relevant question on his application. (Exhibits and testimony, reasonable inferences)

25. Questions on an employment application to a public safety agency, such as the DOC, relating to prior employment formal discipline, is per se serious and important. This type of question is deserving of the utmost care and accuracy in response to it. The DOC is entitled to have accurate background information of this type available in its employment decisions. The public interest for the employment of persons of the highest character standards in such an agency as the DOC is obvious. (Exhibits and testimony, reasonable inferences, administrative notice)

26. The Appellant appeared in a suit and tie with short neat hair. Despite this affectation, his presentation and demeanor, including body and facial language is bland, non-demonstrative, non-expressive and incurious. He speaks in a monotone and flat voice. He testified with his elbow on the table and his hand splayed on the side of his face. His only reaction seemed to be genuine perplexity at the inquiry into his false statement on the DOC application. He couldn't understand why his claim that it had been a mistake wasn't accepted as satisfactory. He believed the fact that leaving his post at BIDMC early, without reporting or receiving permission because he was hungry, was a satisfactory explanation. He did not consider his employer's policy or potential needs. The Appellant's thinking is noticeably incomplete and immature. I find that the Appellant did not intentionally answer the DOC application question falsely. However, I find no explanation for his false answer other than immaturity or some other cognitive or attitudinal inadequacy. (Exhibits, Testimony and demeanor of Appellant)

**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." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). *See* Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal 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 Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, §43, if the

Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

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. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. at 797-799. When the Commission modifies an action taken by the appointing authority it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from partisan political control. Id. at 801. If the Commission decides to modify a penalty, it must provide an explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep., 14

Mass. App. Ct. 985, 987 (1982); Police commissioner of Boston v. Civil Service Commission, 39 Mass. App. Ct. 594, 602 (1996).

THE DEPARTMENT DISCOVERED THAT A STATEMENT ON THE APPELLANT'S EMPLOYMENT APPLICATION WAS FALSE.

Blue Book Rule 2(a) simply states, "Selection for appointment to correctional service is based in part upon statements contained on your employment application form. **Discovery that any statement is false** may lead to your discharge." There is no requirement in this rule that the employee intentionally seek to mislead the Department. If the Rule required a "knowingly false statement," meaning a "lie," it would say so. To the contrary, however, the rule merely applies to "**discovery that any statement is false.**" Similarly, The Appellant signed a statement in the employment application agreeing that "...**making false statements** on this employment application or any supporting documents will be the basis of dismissal from the Department of Correction. Again, there is no "knowing" or "willful" requirement in this agreement[2].

Moreover, the reason for the rule is self evident. Specifically, the rule states that "selection for appointment" is based in part upon statements contained in the employment application. In other words, the DOC relies on the statements contained in employment packages when making hiring decisions. Had the DOC known that the Appellant previously received a three (3) day suspension for abandoning his security guard post because "he was hungry," the DOC very well may have bypassed him for appointment to CO (and The Appellant was virtually assured to be bypassed had the DOC learned that he was previously reprimanded and warned not to abandon his post).

[2] The entire sentence reads, "I am aware that willfully withholding information or making false statements on this employment application or on any supporting documents will be the basis of dismissal from the

The fact that the Department's hearing officer found the Appellant to be honest at the DOC hearing is the likely reason why the Appellant received only a one (1) day suspension. The Appellant is very lucky that he was not terminated as a result of his false statement, as that is the usual practice of the DOC.

APPELLANT WAS UNJUSTIFIABLY INATTENTIVE AND INACCURATE IN PROVIDING AN ANSWER TO A SERIOUS QUESTION ON HIS EMPLOYMENT APPLICATION.

The Department has a right to expect that prospective employees are careful and accurately fill out their employment application. It is inexcusable for a prospective public safety employee to neglect to notify the DOC of prior discipline when specifically asked about this discipline on an employment application. Moreover, the application requires employees to agree that false information on the employment application may lead to their discipline. In light of this acknowledgement on his employment application, and the fact that The Appellant received his three (3) day suspension for abandoning his post while employed at BIDMC, a mere 10 months prior to filling out the DOC employment application. The DOC was justified in assuming that The Appellant was deceitful and not grossly negligent, when he falsely stated that he had never been formally disciplined. The DOC and the public interest for the hiring of personnel of the highest possible character dictate that the DOC has accurate background information regarding prior formal discipline. This factor should have been plainly obvious to the Appellant at the time that he completed his DOC employment application. The fact that he was mistaken in answering such a serious but simple question is inexplicable, as inattention or forgetfulness are not acceptable excuses.

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Department of Correction." Accordingly, there is a "willful" requirement with respect to withholding information, but there is no "willful" requirement with respect to making false statements.

Even if The Appellant did not intend to be deceitful, and merely "forgot" about the suspension when filling out the employment application, this failure to take a three (3) day suspension seriously and thoughtfully answer the questions posed to him in the DOC employment application is negligent and unacceptable. As such, in an effort to impress upon The Appellant the importance of attentiveness and of being conscientious when carrying out his duties, the DOC was justified in issuing him a one (1) day suspension as a means of corrective action. The next time The Appellant is faced with a situation requiring attentiveness, such as accurately completing an incident report or conducting a count, hopefully The Appellant will remember this prior suspension and ensure that the information he provides is accurate.

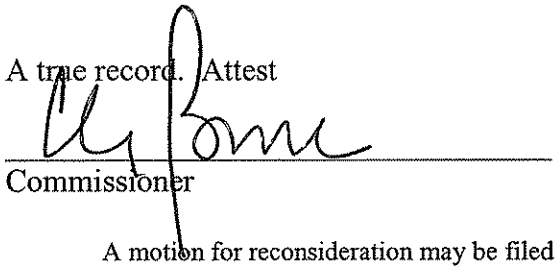
Finally, the DOC must be able to hold employees accountable when there are false statements regarding serious questions, for whatever reason, on their employment application. Hiring decisions are based, in part, on the information contained in employment applications. Accordingly, it would be unfair to honest applicants who thoughtfully and conscientiously answered the questions on the application for The Appellant to be rewarded for his carelessness without any negative repercussions. In short, it would be unjust for The Appellant to be rewarded for his inaccurate answers on the employment application with a job offer and no subsequent discipline. Therefore, I find that the DOC had just cause to impose a one (1) day suspension on the Appellant.

For all the reasons stated above, the Appellant's appeal under Docket No. D-09-182 is hereby ***dismissed***.

Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on September 17, 2009

A true record. Attest



Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Robert Stewart, Atty.
Amy Hughes, Atty. DOC