

**COMMONWEALTH OF MASSACHSETTS
CIVIL SERVICE COMMISSION**

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

Decision mailed: 3/14/08
Civil Service Commission

CB

THOMAS FISHER,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

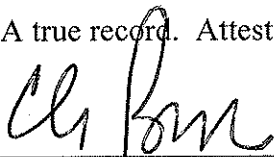
Case No.: D-05-85

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on March 13, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated February 6, 2008 and the comments of the Appointing Authority dated March 4, 2008. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *allowed*. The 20-day suspension is overturned and Appellant is to be returned to his position without any loss of pay or benefits.

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, Commissioners [Henderson –Absent]) on March 13, 2008.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), 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 to:

Stephen C. Pfaff, Esq. (for Appellant)
Jeffrey S. Bolger (for Appointing Authority)
Kimberly A. Fletcher, Esq. (DALA)

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

98 North Washington Street, 4th Floor

Boston, MA 02114

www.mass.gov/dala

Tel: 617-727-7060
Fax: 617-727-7248

February 6, 2008

Christopher Bowman, Chairman
Civil Service Commission
One Ashburton Place
Boston, MA 02108

Stephen C. Pfaff, Esq.
Louison, Costello, Condon & Pfaff
67 Batterymarch
Boston, MA 02110

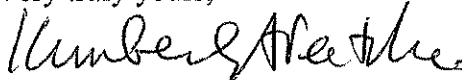
Jeffrey S. Bolger
Department of Correction
P.O. Box 946 Industries Drive
Norfolk, MA 02056

Re: *Thomas Fisher v. Department of Correction*, D-05-85, CS-07-1141

Dear Chairman Bowman, Attorney Pfaff and Mr. Bolger:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c), they have 30 days to file written objections to the decision with the Civil Service Commission, which may be accompanied by supporting briefs.

Very truly yours,



Kimberly A. Fletcher
First Administrative Magistrate

RECEIVED
2008 FEB -7 P 2:25
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

encl.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Thomas Fisher,
Petitioner

v.

Docket Nos. D-05-85, CS-07-1141

Department of Correction,
Respondent

Appearance for Petitioner:

Stephen C. Pfaff, Esq.
Louison, Costello, Condon & Pfaff
67 Batterymarch
Boston, MA 02110

Appearance for Respondent:

Jeffrey S. Bolger
Department of Correction
P.O. Box 946 Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Kimberly A. Fletcher, Esq.

RECOMMENDED DECISION

Thomas Fisher is appealing the February 11, 2005 decision of the Department of Correction ("DOC") suspending him for 20 days. "Specifically, it was alleged that you [Fisher] struck an inmate after he was placed in restraints...In addition, you were not truthful when questioned on this matter" (Ex. 1). He appealed timely under the provisions of G.L. c. 31, § 43 (Ex. 2). I heard the appeal on December 20, 2007 at the offices of the Civil Service Commission, One Ashburton Place, Boston. Since there was no written request, it was a private hearing.

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

2008 FEB - 7 P 2:25

RECEIVED

I admitted a total of 15 documentary exhibits at the hearing (Exs. 1 – 15¹) and I marked a video tape as Ex. 16². Testifying for DOC was Tina Goins. Mr. Fisher testified in his own behalf. At the request of DOC, I impounded inmate names and other identifying information. There is one tape of the hearing.

Findings of Fact

1. Thomas Fisher has been a Correction Officer (“CO”) for the DOC for 16 ½ years. There is no prior discipline aside from a letter of reprimand regarding sick leave (Fisher, testimony).

2. DOC regulations regarding the use of force provide as follows:

Excessive force – Force which exceeds reasonable force, or force which was reasonable at the time its use began but was used beyond the need for its application.

Reasonable force – The force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful order (Ex. 7).

3. Petitioner has attended training in the proper use of force on an annual basis (Fisher, testimony).
4. Petitioner has been taught that when confronted with a violent inmate, he is first to try to defuse the situation with his mere presence. Then he is to issue verbal commands. Next he is supposed to hold his open hands up. If those approaches do not work, then he must get physical with use of a closed fist (Fisher and Goins, testimony).

¹ Ex. 8 is missing the following pages: 5 – 10, 37 – 40, 43 – 44.

² Post-hearing, I marked the February 10, 2005 memo to Commissioner Dennehy as Ex. 17.

5. Senior correction officers who witness excessive use of force are required to file reports (Goins, testimony).
6. On January 22, 2004, Petitioner was on duty during his regular 3:00 to 11:00 p.m. shift on a locked unit for violent inmates at Souza-Baranowski Correctional Center when he saw inmate C.B. punch CO Mason in the face with a closed fist. Petitioner radioed for assistance and went to assist CO Mason (Ex. 11 and Fisher, testimony).
7. Petitioner ordered C.B. to go back to his cell. When C.B. did not leave, Petitioner held his flat hands up (Ex. 16 and Fisher, testimony).
8. Suddenly, C.B. grabbed CO Mason and flung him on the floor, with C.B. landing on top of CO Mason. Petitioner punched C.B. twice but C.B. did not let go of Mason (Ex. 16 and Fisher, testimony).
9. Petitioner attempted to pull C.B. off of CO Mason and C.B. punched Petitioner in the nose with a closed fist (Ex. 6 and Fisher, testimony).
10. About six or seven correction officers including three superior officers arrived on the scene and attempted to put C.B. in restraints. One officer got C.B.'s right hand in a restraint but C.B. had his left hand around CO Mason's neck. CO Mason was unconscious (Ex. 16 and Fisher, testimony).
11. Petitioner punched C.B. on his arm three times but still C.B. was not under control. Sgt. Preston said, "We can't get him off Mason" (Fisher, testimony).
12. Petitioner punched C.B. twice more while other officers attempted to put C.B. under restraints (Fisher and Goins, testimony).

13. Petitioner punched C.B. in order to get C.B.'s hands off the neck of CO Mason because Petitioner was afraid that CO Mason might die (Ex. 11).
14. Sgt. Cruz tapped Petitioner on the shoulder and told him that there were enough responders involved in trying to get C.B. in restraints (Exs. 8 and 15).
15. Petitioner stood up away from the pile of bodies. C.B. was finally placed in full restraints (Ex. 16 and Goins, testimony).
16. Correction officers other than Petitioner escorted C.B. out of the unit (Ex. 16).
17. Medical staff evaluated Petitioner and instructed him to go to Leominster Hospital for further evaluation. Petitioner then left and went to the hospital. He later returned to duty and finished his shift (Ex. 6).
18. Later that day, Sgt. Flowers wrote a report about the incident that does not mention any alleged use of excessive force, that Petitioner had hit C.B., or that C.B. had his hand around CO Mason's neck (Ex. 14).
19. Sgt. Flowers was not investigated nor disciplined for filing a false report (Goins, testimony).
20. Also on January 22, 2004, Sgt. Edmund Preston wrote a report that does not mention Petitioner hitting C.B., that there was excessive force, or that C.B. had his hand around CO Mason's neck:

...Upon entering the unit, I observed [C.B.] fighting with CO Tom Fisher and CO Ray Mason. Once inmate [C.B.] was placed on the floor and controlled by myself and the rest of the response team, I placed wrist restraints on him. I then helped inmate [C.B.] up from the floor and escorted him out of the unit. It should be noted that inmate [C.B.] resisted security staff throughout this incident (Ex. 10).

21. Sgt. Preston was not investigated nor disciplined for filing a false report (Goins, testimony).
22. Also on January 22, 2004, COIII Leo Coutu wrote a report that does not mention Petitioner hitting C.B. or that there was excessive force: "...Upon arriving I observed inmate [C.B.] assaulting Officer Raymond Mason on the floor of the unit. Inmate [C.B.] was choking Officer Mason when I arrived..." (Ex. 13).
23. COIII Coutu was not investigated nor disciplined for filing a false report (Goins, testimony).
24. Also on January 22, 2004, Petitioner wrote a report:
- ...I implemented emergency response via the two-way radio and responded to the fight to assist Officer Mason...I attempted to cut off inmate [C.B.]'s attacks by getting between him and Officer Mason. After giving inmate [C.B.] several orders to stop fighting he refused by running around a table, grabbing Officer Mason, and pulling him down hitting Officer Mason's head on the floor. Inmate [C.B.] got on top of Officer Mason and placed both of his hands around his throat. While this occurred I attempted to pull inmate [C.B.] off of Officer Mason with no result. I then punched inmate [C.B.] several times with my right fist while responding staff attempted to pull inmate [C.B.] off of Officer Mason...Only the necessary amount of force was used and area supervisor was notified (Ex. 11).
25. On January 23, 2004, the Superintendent of the Souza-Baranowski Correctional Center wrote a report to the Director of the Special Operations Division about the use of force on C.B.:
- ...Responding staff arrived and as they attempted to pull inmate [C.B.] off of C.O. Mason, he continued to resist by holding C.O. Mason by the throat. Staff gained control and then restrained a non-compliant inmate [C.B.] and escorted him out of the area...
- After careful review of this incident, I conclude that the use of

force was appropriate and that policy and procedural guidelines were followed as outlined in 103 CMR 505...(Ex. 6).

26. On January 27, 2004, CO Walker wrote a report about the January 22 incident in which he does not mention the fact that Petitioner hit C.B., that there was excessive force, or that C.B. had his hand on CO Mason's throat (Ex. 12).

27. CO Walker was not investigated nor disciplined for filing a false report (Goins, testimony).

28. The DOC charged C.B. with assaulting Petitioner and CO Mason. C.B. had six to eight years added on to his sentence for his conduct on January 22, 2004 (Goins, testimony).

29. On February 23, 2004, C.B. wrote a letter to DOC Commissioner Dennehy:

...On Jan.22, 2004, I was approached by C/O Mason...This officer had/has a problem with me because of my alledged [sic] involvement in the 1990 murder of Kimberly Rae Harbour...I was standing in a non-threatening position stance with my arms folded across my chest, and when I told this officer [CO Mason] that I wasn't gonna [sic] to do anything and turned to walk away...C/O Mason struck me with his fist/hand in my mouth, chin, and throat. I then proceeded to defend myself of this assault. The response team came, and once I was restrained with handcuffs (behind my back) and shackles on -- the other block officer C/O Fisher struck me in my face with his fist repeatedly until he was stopped by another officer. At this time, I was then kicked repeatedly in my face and head, and my head was stepped on...I must inform you, this entire incident was recorded on video surveillance (Ex. 9).

30. Tina Goins, a Lieutenant in the Internal Affairs office within the Office of Investigative Services, was assigned to investigate C.B.'s complaint. She watched the video and read the reports that had been filed (Goins, testimony).

31. Lt. Goins interviewed the Petitioner. The Petitioner denied that he had used excessive force on C.B. "Officer Fisher explained that he had observed

inmate [C.B.]’s hands still on his partner[‘]s (Officer Mason) throat, ‘I was defending my partner[‘s] life’ and when inmate [C.B.] was placed in restraints he stopped” (Ex. 8).

32. The Petitioner told Lt. Goins that C.B. was not restrained and had his hands around his partner’s throat trying to strangle him and that he therefore administered additional punches (Ex. 8).

33. The Petitioner told Lt. Goins that he stopped punching C.B. when he saw that C.B.’s hands were under control and away from CO Mason’s throat (Ex. 8).

34. Lt. Goins interviewed Sgt. Cruz who told her that C.B. was not in restraints when the Petitioner struck him (Ex. 8).

35. Lt. Goins interviewed Sgt. Preston who also told her that C.B. was not in restraints when the Petitioner struck him. Sgt. Preston added that when the Petitioner struck C.B., C.B. was still on top of CO Mason and refused to release his hold on CO Mason (Ex. 8).

36. Lt. Goins prepared an Investigation Report that concludes, “The video footage does not corroborate Officer Fisher’s claims and reveals that Officer Fisher struck inmate [C.B.] three times after Sergeant Edmund Preston had already gained control of and placed both of inmate [C.B.’s] wrists behind his back” (Ex. 8).

37. On November 16, 2004, Commissioner Dennehy advised the Petitioner that as a result of an investigation, “it has been determined that you struck an inmate after he was placed in restraints” and that a departmental hearing would occur (Ex. 3).

38. After a departmental hearing, on February 11, 2005, the Petitioner was suspended for 20 days for striking an inmate "after he was placed in restraints" and for not being truthful when questioned on this matter. The Petitioner appealed (Exs. 1 and 2).

Conclusion and Recommendation

I recommend that the 20-day suspension imposed on Petitioner by the DOC be reversed as the Department has not met its burden of showing just cause for imposing discipline.

Although DOC charged Petitioner with striking an inmate "after he was placed in restraints," in fact this is not true. Even DOC's witness, Lt. Goins, admitted that full restraints on C.B. did not happen until after the Petitioner struck him and that the Petitioner was "completely out of the picture when full restraints were made." The Investigation Report of Lt. Goins details the video footage:

As the Emergency Response Team attempts to place inmate [C.B.] in restraints, Correction Officer Thomas Fisher is observed on his knees wiping his nose and as the Emergency Response Team *attempts to apply restraints*, Officer Fisher leans forward striking inmate [C.B.] three times. IPS Sergeant Nesta Cruz is observed tapping Officer Fisher on his shoulder. Officer Fisher is observed leaning forward again striking inmate [C.B.] twice. Officer Fisher is then removed from the scene...The Emergency Response Team *finally was able to apply full restraints...*(emphasis added).

The Petitioner testified credibly that when he hit C.B., the inmate was not under control. The Petitioner punched C.B. in order to get C.B.'s hands off the neck of CO Mason because the Petitioner was afraid that his partner might die. Petitioner's testimony is corroborated by the contemporaneous report of the

incident submitted by COIII Coutu: "Inmate [C.B] was choking Officer Mason when I arrived..."


The investigation began with the February 23, 2004 letter to Commissioner Dennehy from C.B. That letter contains many blatant lies including, "I was then kicked repeatedly in my face and head, and my head was stepped on..." The video does not show any such conduct. C.B. also claimed that Petitioner struck him in his face with his fist "repeatedly until he was stopped by another officer." Again, a viewing of the video demonstrates the falsity of this claim.

DOC also charged Petitioner with not being truthful when questioned about the incident. Yet the report of Lt. Goins does not reveal that Petitioner lied to her. Her report details the April 28, 2004 interview of Petitioner at which he stated that when he punched C.B., C.B. was not restrained and had his hands around CO Mason's neck. Petitioner told her that "after I saw his hands under control and away from his (Mason's) throat I stopped."

Although Petitioner was punched in the nose by C.B., and was later evaluated at Leominster Hospital, he returned to duty and finished his shift. The evidence shows that Petitioner calmly radioed for assistance when he saw C.B. attack his partner and then defended his partner's life by using reasonable force.

Based on the foregoing, I recommend that the decision suspending Petitioner for 20 days be reversed and that he be restored to his position without loss of compensation or other benefits.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script, appearing to read "Kimberly A. Fletcher", is written over a horizontal line.

Kimberly A. Fletcher
First Administrative Magistrate

DATED: 2/6/08