# COMMONWEALTH OF MASSACHUSETTS
# CIVIL SERVICE COMMISSION

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

**JEAN FLOYD,**
*Appellant*

v.

**DEPARTMENT OF CORRECTION,**
*Respondent*

**Case No.:** D1-11-342

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.

The Commission received and reviewed: 1) the Tentative Decision of the Magistrate dated August 27, 2013; 2) the Appellant's Objections to the Recommended Decision; and 3) the Respondent's Response to the Appellant's Objections.

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 Appointing Authority to terminate the Appellant is affirmed and the Appellant's appeal is ***denied***.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on October 31, 2013.

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 Padolsky, Esq. (for Appellant)
Amy Hughes, Esq. (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Appeal of:

**Jean Floyd,**
Appellant

v. DALA Docket No. CS-12-204
Civil Service Docket No. D1-11-342

**Department of Correction,**
Appointing Authority

**Appearance for Appellant:** Joseph A. Padolsky, Esq.
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**Appearance for Appointing Authority:** Amy Hughes, Esq.
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P.O. Box 946, Industries Drive
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**Administrative Magistrate:** James P. Rooney, Esq.

## Summary of Recommended Decision

The Department of Correction had just cause to terminate a previously-disciplined correction officer who, after being warned that further discipline might lead to her termination, violated sick leave and attendance rules and failed to pay adequate attention while assigned to a security detail involving an inmate who was an escape risk.

## RECOMMENDED DECISION

Jean Floyd timely appeals, under G.L. c. 31, § 43, the Department of Correction's November 22, 2011 decision to terminate her employment as a Correction Officer I as a result of three separate incidents: abusing sick leave and failure to adhere to attendance policies, watching television while on security detail duty, and purposefully removing Department keys from a

facility. I held a hearing on May 7, 2012 and July 11, 2012 at the offices of the Division of Administrative Law Appeals, One Congress Street, Boston, Massachusetts. Twenty-five exhibits were submitted into evidence at the hearing. (Exs. 1-25). After the hearing, I added the Appellant's discipline appeal form into evidence. (Ex. 26). The Department of Correction called Lieutenant James McCormack, Correction Officer Keith Liberty, Lieutenant Douglas Adams, Lieutenant Investigator Chad Fiola, Lieutenant Michael Jeghers, Captain Donna Driscoll, and then-Deputy Superintendent Anne Manning as witnesses. Ms. Floyd called Correction Officer Robert Henderson as a witness and testified on her own behalf.

I marked Ms. Floyd's pre-hearing memorandum as Pleading A and the Department's pre-hearing memorandum as Pleading B. The Respondent submitted its post-hearing brief on September 21, 2012, and the Appellant submitted her post-hearing brief on September 25, 2012, whereupon the record closed.

## FINDINGS OF FACT

Based on the documents and testimony presented by the parties and reasonable inferences from them, I find the following facts:

1. The Appellant, Jean Floyd, was hired by the Department of Correction on August 19, 1990 as a Correction Officer I. She has worked at the Shattuck Hospital Correctional Unit since 1997. (Floyd testimony.)

2. The Shattuck Hospital Correctional Unit is a Department of Correction facility located within the Lemuel Shattuck Hospital in Jamaica Plain. The unit consists of two floors: Eight North, where inmates are housed if they are held overnight, and a holding area on a separate floor for inmates' routine appointments or clinic visits. (McCormack testimony.)

3. Ms. Floyd has been disciplined eighteen times previously in the course of her employment, starting in 1992 with a ten day suspension for allowing approximately twenty visitors to enter the facility without following procedures.[1] Thirteen of her violations were for failing to provide satisfactory medical evidence for use of sick leave, for which she was disciplined in varying degrees: in some instances receiving a letter of reprimand and other times serving one, three, or five day suspensions. She also received a three day suspension in 1998 for watching television and being away from her post, and a three day suspension in 2009 for refusing a direct order. A final warning was issued to her on March 31, 2009, at the conclusion of an appeal she filed of that three day suspension. The text of this warning is not in the record. (Ex. 12.)

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[1] The instances of discipline were:

10/29/92: 10 day suspension, allowed approximately 20 visitors to enter facility without passing through metal detector or being properly searched;
12/29/93: written warning, failure to provide medical evidence;
9/28/1998: 3 day suspension, watching television away from assigned post, unable to observe inmate and later viewed on phone, all while armed;
7/10/01: letter of reprimand, failure to provide medical evidence;
11/30/01: 1 day suspension, failure to provide medical evidence;
2/24/02: 3 day suspension, failure to provide medical evidence;
2/18/04, 8/20/04/, 2/1/06: letters of reprimand, all for failure to provide medical evidence;
2/24/06: 1 day suspension, failure to provide medical evidence;
3/9/06: 3 day suspension, failure to provide medical evidence;
5/2/06: 5 day suspension, failure to provide medical evidence;
9/19/07: letter of reprimand for habitual tardiness;
1/2/08: 3 day suspension, failure to provide medical evidence;
8/8/08: letter of reprimand, failure to provide medical evidence;
8/18/08: 1 day suspension, failure to provide medical evidence;
1/25/09: 3 day suspension, refusing a direct order, final warning issued;
6/08/09: terminated (arbitrator reduced to 60 day suspension).

(Ex. 12.)

4. On August 14, 2007, Ms. Floyd was charged by the Boston Police Department with trespassing, drinking in public, and possession of marijuana. According to an arbitrator's decision, these charges were dropped at her court appearance. (Ex. 13.)

5. On June 8, 2009, Ms. Floyd was terminated for failing to inform the Department of Correction of the charges and subsequent court appearance. In addition, the Department discovered that Ms. Floyd provided a false address to the Registry of Motor Vehicle in order to enroll her son at a school in a community in which she did not live, and included this as an additional ground for termination. (Floyd testimony; Ex. 13.)

6. In June 2010, while her appeal of the termination was pending before an arbitrator, Ms. Floyd planned a family vacation to Hawaii for the last week of January 2011. (Floyd testimony.)

7. On July 28, 2010, an arbitrator reduced Ms. Floyd's termination to a sixty day suspension without pay. In her ruling, the arbitrator declared that "a substantial suspension would emphasize the Grievant's need to fully heed Departmental Rules, Regulations and Policies in the future. . . . The Grievant is firmly on notice that future misconduct may end her career." (Ex. 13.)

8. Ms. Floyd returned to work in August 2010. (Floyd testimony.)

A. Use of Sick Time

9. Once per year, correction officers at the Shattuck Hospital Correction Unit, make a "vacation pick" of available weeks to take off, making selections in order of seniority. Each week of the year has four vacation slots available. The vacation pick usually takes place in February or March. Thus, to request a vacation week in January, an officer would normally have to make the request in February or March of the previous year. After the pick is over, officers

may use accrued vacation time by making verbal or written requests to supervisors for any remaining slots at any point in the year. Any verbal requests must eventually be put in writing. (Henderson, Driscoll, and Adams testimony.)

10. At some point after Ms. Floyd was reinstated in August 2010, she was called into Lieutenant Douglass Adams's office in order to pick her vacation time. Ms. Floyd recalled verbally requesting the last week of January 2011 and being denied, although only one of the four available vacation slots had been taken for the last week of January 2011. There is no evidence that she ever put this request in writing or that it was denied in writing. (Floyd, Henderson, and Adams testimony; Ex. 19.)

11. If an officer wants individual days off, that officer places a request in a time-off book, and the shift commander approves or denies the request five days prior to the requested date. (Driscoll and Henderson testimony.)

12. Ms. Floyd does not remember the exact date she left for her Hawaii vacation. The evidence shows that she was in Hawaii on January 26, 2011 and was scheduled to fly into Boston on February 2nd and resume work on February 3rd. Ms. Floyd was originally scheduled to work on Monday, January 24th, and then Thursday, January 27th through Monday, January 31st. Ms. Floyd's regular days off are Tuesdays and Wednesdays. (Floyd and Driscoll testimony; Exs. 3 and 15.)

13. The Shattuck Hospital Correctional Unit's time off book shows that on January 21, 2011, Ms. Floyd requested the 27th and 30th off (Thursday and Sunday). On January 22, she requested the 31st off (Monday). On January 23, she requested the 29th off (Saturday). Ms. Floyd mistakenly did not request Friday, January 28th off. All of her requests were approved by a shift commander. (Floyd, Driscoll, and Henderson testimony; Ex. 15.)

14. Ms. Floyd used sick leave on January 24, 2011. (Driscoll testimony; Ex. 3)

15. On January 26, 2011, Ms. Floyd called the facility from Hawaii and spoke to the on duty shift commander, Lieutenant James McCormack, to determine what days she had off. After reviewing the time off book, Lt. McCormack told her she had January 27, January 29, January 30, and January 31, 2011 off, but did not have January 28th off. Ms. Floyd said she wanted to use sick leave for the 28th. She did not tell the lieutenant that she was in Hawaii. Lt. McCormack told her she could not call in sick two days in advance. There is no evidence that Lt. McCormack told anyone Ms. Floyd was likely to be absent on January 28th.[2] (Floyd and McCormack testimony; Ex. 3.)

16. On January 28, 2011, Ms. Floyd did not show up for her 7:00 a.m.-3:00 p.m. shift and did not call the facility before 7:00 a.m. Capt. Driscoll left a message at her home. She also spoke to Sgt. Sondra Doyle, who thought Ms. Floyd might be away. Sgt. Doyle relayed to the captain that she had told Ms. Floyd before she left to make sure she had all the days she needed off, even if that meant swapping with another correction officer. Around 8:50 a.m., Ms. Floyd called and spoke with Lieutenant Michael Jeghers. She told Lt. Jeghers that she had spoken to Lt. McCormack before and had requested sick leave. She mistakenly said she had spoken to Lt. McCormack on the night of January 27th, when he was not on duty, rather than on January 26th. (Floyd, Jeghers, McCormack, and Driscoll testimony; Ex. 3.)

17. On February 2, 2011, Ms. Floyd called Deputy Superintendent Anne Manning to inform her that she was stranded during travel and could not fly into Boston due to a snow storm. The Department allowed her to take a personal day on February 3, 2011. (Floyd testimony; Ex. 3.)

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[2] Lt. McCormack was not asked whether he passed this information on; his report does not address this. (McCormack testimony; Ex. 3.)

18. On February 4, 2011, Ms. Floyd filed an incident report detailing her actions on January 28, 2011. She reported that she was in Hawaii on vacation and because of the time difference, confused Friday, January 28th with Thursday, January 27th, and thus did not call on January 28th. (Driscoll testimony; Ex. 3.)

19. Ms. Floyd was one hour late for her shift on February 5, 2011. She was to report for duty at 6:50 a.m., but contacted the facility at 6:53 a.m. to report that she would be one hour late. Correction Officers are expected to call one hour in advance if they are going to be late. Ms. Floyd wrote in her incident report that she had to wait for her sister to arrive to take care of her sick mother. At a fact-finding hearing on March 3, 2011, Ms. Floyd told Capt. Driscoll that she was late because she overslept. She did not mention her mother's health problems to Capt. Driscoll. (Driscoll testimony; Ex. 3.)

20. A correction officer must submit a sick leave slip every time she uses sick leave. The collective bargaining agreement for correction officers provides that an "employee shall not be required to provide medical evidence until the employee has used 48 hours of sick leave unless the appointing authority has probable cause to believe that sick leave is being abused." (Ex. 25, pp. 28-29.) If the Department believes probable cause exists that sick leave is being abused at any time, it may issue to a correction officer a form called an "Attachment D," which requires the officer to submit satisfactory medical evidence of illness. (Driscoll testimony; Exs. 10, 16, and 25.)

21. Correction officers have used sick leave in the past for purposes other than being sick, such as having car trouble, and have not been issued an Attachment D. (Henderson testimony.)

22. On February 7, 2011, Ms. Floyd was told that she needed to submit a report explaining her tardiness on February 5. Ms. Floyd filed the report, then left work five hours early using family sick leave. She did not submit a sick leave slip upon her return to work. She stated that she was unaware she had to submit a sick leave slip if she used partial sick leave. However, Capt. Driscoll had informed Ms. Floyd of the partial sick leave policy on several prior occasions. Ms. Floyd, who had over twenty years of experience, should have known of this aspect of the sick leave policy. (Driscoll and Floyd testimony; Ex. 3.)

23. Ms. Floyd was issued an "Attachment D" on February 10, 2011 for her use of sick time on January 24th, after Capt. Driscoll and Dep. Supt. Manning learned that she was in Hawaii during her approved days off and on January 28, 2011. The Department's cause was listed as "use of sick time in conjunction with planned travel." Ms. Floyd did not provide any medical evidence in response to the Attachment D. (Driscoll testimony; Exs. 3 and 10.)

24. Ms. Floyd acknowledges that her use of sick time on January 24th was probably related to her vacation in Hawaii, and not due to illness, but does not recall specifically what she was doing that day. (Floyd testimony.)

25. On March 3, 2011, Capt. Paul Craven and Capt. Driscoll conducted a fact-finding hearing and recommended a commissioner's hearing to determine the proper level of response regarding Ms. Floyd's unexcused absence and use of sick time. (Ex. 3.)

26. On June 16, 2011, a commissioner's hearing was held pertaining to Ms. Floyd's "no call, no show" on January 28, 2011, her failure to submit medical evidence for her use of sick time on January 24, 2011, her failure to notify the Department prior to the start of her shift on February 5, 2011 that she was going to be late, and her failure to submit a sick leave slip for leaving early on February 7, 2011. The decision was released on November 22, 2011 in

conjunction with the decisions in two other commissioner's hearings discussed below. (Exs. 2 and 11.)

B. Security Detail

27. The DOC's "Outside Hospital Security Procedures" and post orders require that one armed guard and one unarmed guard be assigned to an inmate on an outside hospital visit, which includes any visit to an area of a hospital not controlled by the Department. The unarmed guard must be in the room with the prisoner and maintain visual observation at all times. The armed guard should be positioned outside the room, and is only to enter in the event of an emergency. One limb of the inmate must be shackled to the hospital bed. (Manning testimony; Exs. 20, 21A, and 22.)

28. A Level A Escape Risk Inmate is an inmate who is known to be violent or has made a previous escape attempt, and has a discipline record. The procedures and post orders for a Level A Escape Risk Inmate require two unarmed officers and two armed officers to escort them on an outside hospital visit. The procedures and post orders are unclear as to where the additional officers are to be positioned, but in practice one unarmed officer is typically in the room, and the other is positioned either in the room or just inside the door, with both maintaining visual observation at all times. The two armed officers are not to be in the room, but must be just outside it. Two limbs of the inmate must be shackled to the hospital bed. (Exs. 20, 21, 21A, 22; Manning, Floyd testimony, and Henderson testimony.)

29. On April 4, 2011, CO Brian Moore and Ms. Floyd were the two unarmed officers assigned to a four-man coverage team of a Level A Escape Risk Inmate in the Lemuel Shattuck Hospital intensive care unit (ICU). CO Milton Paige and CO Lovette McKoy were the armed officers assigned to the detail. The ICU is not part of the Shattuck Hospital Correctional Unit; it

is the same ICU used for the general public. The assigned inmate had previously thrown a television at a correction officer, which Ms. Floyd knew. She did not know that he had previously made an escape attempt. She knew as well that the inmate was quite ill with cancer, and that he dozed off frequently. A glass wall separated the inmate's ICU room from the adjoining room, thus allowing a person in an adjoining room to see him. (Floyd, Manning, Henderson, and Driscoll testimony; Ex. 5.)

30. That day, Dep. Supt. Manning was conducting rounds in the ICU when she witnessed CO Moore in the room with the escape risk inmate and a member of the hospital staff, in compliance with Department of Correction policy. The inmate had an IV in one of his arms and was properly shackled. Dep. Supt. Manning then walked to the adjacent room and observed Ms. Floyd, CO Paige, and CO McKoy watching a television. Televisions are turned on routinely in the ICU; other supervisors had observed correction officers in rooms with a television on without relieving them of duty. Ms. Floyd was seated closest to the entrance of the room. She did not see Dep. Supt. Manning approach until she was next to her in the room. Dep. Supt. Manning asked twice what the officers were doing and received no response. She turned the television off and left the room. She then ordered the shift commander to relieve the three officers of ICU duty and had them write incident reports. (Manning, Driscoll, and Floyd testimony; Ex. 5.)

31. Ms. Floyd has performed over one hundred outside hospital escorts in her career. She admits to watching a television in the room on April 4, 2011. From her position, she could observe the inmate through the glass wall separating the two rooms. The head nurse had complained about correctional staff in the hallways, something both Ms. Floyd and one of her fellow officers noted in their written reports. Officers have responded by making it a common

practice to sit in empty adjoining rooms. Ms. Floyd was about six feet away from the doorway of the room adjacent to the prisoner's ICU room, and was rotating positions with CO Moore, who was only inside the prisoner's room at the time of Dep. Supt. Manning's observation because he was escorting medical staff; otherwise he would have been sitting outside the prisoner's room. (Floyd and Henderson testimony; Ex. 5.)

32. On April 8, 2011, Capt. Driscoll conducted a fact-finding hearing about Ms. Floyd's conduct on the April 4, 2011 security detail and requested a commissioner's hearing to address her conduct. (Driscoll testimony; Ex. 5.)

33. In response to this incident, one of the armed officers received a one day suspension and the other received a three day suspension. Officer Moore was not disciplined. (Henderson testimony.)

34. On September 7, 2011, a commissioner's hearing was held pertaining to Ms. Floyd's failure to be in the same room as the inmate and to maintain constant visual observation of him. The decision was released on November 22, 2011, in conjunction with the decisions arising out of Ms. Floyd's June 16, 2011 hearing and another commissioner's hearing discussed below. (Exs. 4 and 11.)

C. Lost Keys

35. On May 30, 2011, Ms. Floyd was operating the security gate that separates the "Eight North" locked hospital ward from the rest of Lemuel Shattuck Hospital. (Exs. 7, 8, and 9.)

36. That day, CO Keith Liberty was assigned to monitor the inside corridor of Eight North, and was rotating this position every hour with CO Rikki Raymond. CO Liberty obtained the inside corridor keys (C-5 keys) in the morning after providing a chit, and exchanged the keys

with CO Raymond at every rotation. Every hour, the officer with the keys was supposed to return them, and the next officer was supposed to exchange a chit for the keys, in order that the unit supervisors would know who had the keys. On this day, the keys were "chitted" to CO Liberty for the entire shift, even though he was exchanging the keys with CO Raymond. This was not in accord with policy, but was an established practice. Around 11:00 a.m., CO Liberty received the C-5 keys from CO Raymond. (Liberty and McCormack testimony; Ex. 7.)

37. The C-5 keys, of which there is only one set, are comprised of one oversized key and two normal sized keys that are attached to a three-foot-long chain-link retention chain. They operate the security cells and a handicapped bathroom in the inside corridor. The keys are important to the safety and security of the facility; if staff were to need emergency access to the security cells or the handicapped bathroom, they could not access them without the keys. (Liberty and McCormack testimony; Ex. 7.)

38. According to Department policy, facility keys should be attached to a correction officer's duty belt. CO Liberty was not wearing his required duty belt on May 30, 2011. The only items he remembers having on him were the keys, his radio, and his handcuffs. (Liberty testimony; Ex. 7.)

39. The hallways in Eight North are monitored by security cameras. At 11:15:11 on May 30, 2011, a video shows CO Liberty in the inside corridor with what appears to be the key ring retention chain hanging out of his right front pants pocket. (Ex. 9.)

40. At 11:20:11, a video shows Ms. Floyd seated at a desk next to the security gate. At 11:22:19, she walks towards the gate and opens it for medical staff. CO Liberty can be seen walking toward the desk area at 11:22:25. While he is doing so, an unidentified object falls from his right side pants pocket, lands on the floor, and is visible as a brownish blob. Ms. Floyd sits

down again at 11:22:42, but gets up at 11:22:57 and walks past the blob on the floor to conduct a bathroom check. On her way back at 11:23:09, she picks up the unidentified item in one motion and easily places it in her pocket. (Ex. 9.)

41. At 11:24:00, CO Liberty is seen on video searching his pockets and patting himself. After doing a check of his area, CO Liberty questioned his co-workers about the missing C-5 keys. A few of his co-workers and CO Liberty conducted an impromptu search. CO Jeremy Dion asked Ms. Floyd if she had seen CO Liberty's C-5 keys. Thinking it was a joke, she told him they needed to quit messing around and give the keys back to CO Liberty. (Liberty and Floyd testimony; Exs. 7 and 9.)

42. Since it was Memorial Day, Ms. Floyd had requested to leave early, as she always did on Sundays and holidays. Her request to leave at 11:00 a.m. was originally denied, but around 12:00 p.m., Lt. McCormack relieved her of her shift and CO Dion took over the gate. Ms. Floyd left by the main elevators. (McCormack and Floyd testimony; Exs. 7, 9.)

43. Around 12:20 p.m., CO Liberty informed Sergeant Michael Boyd about the missing keys. Sgt. Boyd immediately notified Lt. McCormack, the shift commander. (Liberty and McCormack testimony; Ex. 7.)

44. Lt. McCormack locked down the facility and made all staff empty their pockets and search themselves. Some staff members were searched with a hand-held metal detector. All inmates were strip searched and searched with a hand held metal detector; the unit was searched twice to no avail. (McCormack testimony; Ex. 7.)

45. At approximately 1:10 p.m., Lt. McCormack directed Correction Officer Wesley Alleyne to contact Ms. Floyd to ask if she had any institutional keys. Ms. Floyd returned the call and said she had no keys with her. (McCormack testimony; Ex. 7.)

46. There is no record of how many doctors, nurses, or other non-Department of Correction staff entered and exited the Eight North facility between 11:00 a.m. and the lockdown at 12:20 p.m. on May 30, 2011. (McCormack testimony.)

47. Ms. Floyd acknowledges that she picked something up from the floor on May 30th. She does not remember what the item was or what she did with it after placing it in her pocket. She never returned an item to anyone or reported finding anything. (Floyd testimony; Ex. 7.)

48. Ms. Floyd picked up items from the floor in Eight North on a regular basis, such as dropped medical supplies or trash, and usually threw these items away or gave them to medical staff. (Floyd testimony.)

49. On June 1, 2011, Deputy Superintendent Raymond Marchilli initiated an internal affairs investigation. Lieutenant Chad Fiola of the Internal Affairs Unit conducted the investigation. Lt. Fiola reviewed the video system, reviewed all the incident reports, and interviewed all staff members on duty on May 30, 2011. (Fiola testimony; Exs. 7, 8.)

50. One month later, on June 28, 2011, an elevator maintenance worker found the C-5 keys at the bottom of the main elevator. The keys were returned to Lt. McCormack by Chief of Campus Police Shawn McMullen. (McCormack testimony; Ex. 7.)

51. On September 21, 2011, a staged reenactment. Lieutenant Douglas Adams dropped and picked up replica C-5 keys in approximately the same place as the object seen on the May 30, 2011 video. The dropped duplicate keys appear as a brown blob on the video. (Adams testimony; Exs. 7, 9.)

52. In a report dated September 26, 2011, Lt. Fiola closed his investigation and concluded that Ms. Floyd picked up the dropped keys and disposed of them in the elevator on May 30, 2011. (Fiola testimony; Ex. 7.)

53. On October 24, 2011, a commissioner's hearing was held pertaining to the lost C-5 keys and Ms. Floyd's possible involvement. (Ex. 6.)

D. Termination

54. On November 22, 2011, Acting Commissioner Paul DiPaolo issued the findings of Ms. Floyd's three commissioner's hearings. He determined that misconduct by Floyd had been established in all three hearings and that the misconduct:

> constitutes behavior incompatible with the safety and security responsibilities of the Department of Correction. I also note that a prior sanction issued by the Department regarding a 2009 hearing was reviewed through arbitration, and the arbitrator's award on July 28, 2010 clearly stated that you were "firmly on notice that future misconduct may end [your] career." Additionally, the Department had earlier issued you a Last Chance Warning on March 31, 2009. Considering your lengthy discipline history, and the ample notice you have received concerning further violations, I find that the sustained charges in any one (1) of your three (3) recent hearings warrants termination from your employment with the Department of Correction. Most particularly I note the sustained charges in your last hearing of October 24, 2011, and your explicit compromise of safety and security, as indefensible conduct that specifically warrants your termination.

(Ex. 11.)

55. Ms. Floyd appealed her termination to the Civil Service Commission on December 1, 2011. (Ex. 26.)

## DISCUSSION

The Department of Correction has just cause to discharge Jean Floyd from her employment as a Correction Officer I.

A tenured civil service employee may not be discharged except for "just cause." *See* G.L. c. 31, § 41; *School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct.

486, 488, 684 N.E.2d 620, 622 (1997). The appointing authority has the burden of proving just cause by a fair preponderance of the evidence. *See* M.G.L. c. 31, § 43; *School Committee of Brockton*, 43 Mass. App. Ct. at 488. A disciplinary action is justified if the employee has "been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *Murray v. Justices of Second Dist. Court of E. Middlesex*, 389 Mass. 508, 514, 451 N.E.2d 408, 412 (1983).

The *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction* (The "*Blue Book*") contain the basic rules, policies, and principles Department of Correction employees must abide by in the performance of their duties. The evidence establishes that Ms. Floyd violated a number of Department of Correction policies and procedures in a manner that impaired the efficiency of the public service the Department provides, and thus adversely affected the public interest.

A. Use of Sick Time

Ms. Floyd's use of sick time and her unreported or delayed reporting of absences in January and February 2011 did not conform to Department Rules.

Rule 18(a) states:

> Punctual attendance for your regular hours of duty must be strictly observed. . . . Notification of anticipated delay or absence due to unavoidable detention must be telephoned or sent promptly to the person designated . . . to receive and record such calls, in order that provisions may be made to cover your assignment. Absence from duty without permission or notice shall not be allowed.

Ms. Floyd failed to report for duty without notifying the Department on January 28, 2011. Instead, she was on vacation in Hawaii without having obtained advanced approval for time off on this day. She was also late for work on February 5, 2011, and did not notify the institution that she would be late prior to the start of her shift.

Ms. Floyd offered two different explanations for her one hour late arrival on February 5, 2011. In her written report, she stated that she had to address her aging mother's health crisis; she later told Capt. Driscoll that she overslept. It is conceivable that both are true – she overslept, and then woke to find she had to assist her mother – but I can understand why the Department would be suspicious that she offered two seemingly disconnected reasons for her delay in reporting. Nonetheless, what is significant here is that she failed to report before the shift started that she would be late.

Rule 18(b) states:

> 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.

(Emphasis added). Additionally, Rule 19(c) states, in relevant part:

> Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative of the conduct of an inmate, a visitor, another employee, or yourself.

Ms. Floyd used sick leave on January 24, 2011, in conjunction with a planned trip to Hawaii, and, as previously mentioned, she also attempted to use sick leave to cover her January 28, 2011 absence. The Department of Correction's Sick Leave Policy, 103 DOC 209.03, allows for sick leave only when an employee cannot perform duties because of personal illness or injury, is caring for an immediate family member who is seriously ill, or in a small number of other instances along these same lines. However, going on a planned vacation is not one of these approved allowances. (Ex. 16.)

Per the collective bargaining agreement, an employee does not typically have to demonstrate that the first 48 hours of sick leave used are for health reasons. All the sick leave

Ms. Floyd used here were within that 48 hour window. However, if the Department has reason to suspect sick leave is being abused, it may ask the employee for satisfactory medical evidence.

Ms. Floyd was issued an "Attachment D" on February 10, 2011, as allowed under her collective bargaining agreement, asking her to provide medical support for the two sick days (January 24 and 28) that the Department had reason to believe she used in conjunction with her vacation. Ms. Floyd failed to provide the required medical evidence.

Ms. Floyd also failed to submit a sick leave slip for her partial sick day on February 7, 2011. As an experienced officer, she should have known that sick leave slips must be submitted for all sick leave taken, including instances in which sick leave is taken in the middle of a shift.

The most serious of Ms. Floyd's failures to follow sick time rules was her effort to call in sick in the middle of her Hawaii vacation. I am troubled, however, that the problem Ms. Floyd created with her misguided effort to use sick time as vacation time could easily have been avoided had she been granted the vacation time to which she was entitled when she was reinstated in August 2010. Ms. Floyd was one of the most senior correction officers at the unit, and there were three remaining available time slots for the last week of January 2011. It is not clear why a vacation was not granted to Ms. Floyd when she asked for this week upon her return from her suspension. Nevertheless, she did not take action through the appropriate channels to rectify the situation. Instead, she waited for her time to be scheduled, and then requested the individual days off in a haphazard fashion, which resulted in an oversight and an unexcused absence. She did belatedly attempt to rectify the situation when she called on January 26, 2011 and while the supervisor with whom she spoke could have conveyed a message that Ms. Floyd would likely be absent on January 28, it is not clear that she ever told him the most obvious

reason why she would not report that day, namely that she was thousands of miles away on vacation.

B. Security Detail

Ms. Floyd's handling of her role on the security detail of the inmate who was an escape risk also did not conform to Department rules.

Rule 6(c) of *The Blue Book* states, in part: "The duties assigned to you should demand your entire attention." Rule 7 states, in part:

> (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*.
>
> (d) Employees should not read, write or engage in any distracting amusement or occupation during their required work hours . . .

(Emphasis added). Rule 10(c) adds:

> Employees assigned to or having duties related to inmates confined in isolation, segregation, hospital or special housing sections must comply with institution and Department of Correction policy and orders relative to the daily medical attention, hourly care . . . and custody of such inmates.

Rule 12(a) states:

> 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.

On April 4, 2011, Ms. Floyd was watching television while assigned to a coverage team of a Level A Escape Risk Inmate. By not providing her complete attention to her assignment, and by engaging, instead, in "distractive amusement," Ms. Floyd not only violated the above policies, but potentially placed her fellow officers, the inmate, and the general public at risk.

I give Ms. Floyd the benefit of some doubt on the question of her adherence to the post orders. These orders are clear that when a security detail includes one unarmed officer, that officer must be positioned in the inmate's hospital room. The orders are not clear as to where the second unarmed officer should be positioned when on a detail guarding a prisoner who is an escape risk. Furthermore, ICU nursing staff had requested that DOC employees keep the hallways clear. Thus, it is conceivable that Ms. Floyd and other correction officers who were assigned to security details in the Lemuel Shattuck ICU might have concluded that they could adequately perform their duties by positioning themselves in an adjoining room with only a pane of glass separating them from a prisoner who they could see at all times. There is some doubt as to whether Ms. Floyd could see the prisoner in this instance – she said she could, because nursing staff always keep the blinds open between the rooms, while Dep. Supt. Manning recalled seeing the blinds closed. Again, I will give the benefit of the doubt to Ms. Floyd, who had been at her post for some time, while Dep. Supt. Manning was in the room only for a matter of seconds (it could be, although no one mentioned this possibility, that she saw the privacy curtain in the inmate's room being temporarily drawn as a member of the ICU staff was in the room with the prisoner at the time). I also acknowledge Ms. Floyd's testimony that other correction officer supervisors were aware that correction officers on ICU detail were frequently stationed in rooms where a television was on. Nonetheless, even if it might have been acceptable under the post orders for the second unarmed officer to be in a room adjoining the prisoner's room with a television on, but with the inmate visible though a glass wall, under any circumstances those order required the officer to be alert to the inmate and her surroundings.

The real problem here was that Ms. Floyd was not alert. She did not notice Dep. Supt. Manning enter the room, or respond to her questions. Even if Ms. Floyd's eyes could have been

on the prisoner in the adjacent room, her attention was clearly on the television. Relative to her duty to monitor a high risk inmate, Ms. Floyd's conduct was not the exercise of constant vigilance and caution required by *Blue Book* Rule 12(a) and was a neglect of her duty and responsibilities in violation of Rule 7.

C. Lost Keys

I find that the Department has not established by a fair preponderance of the evidence that on May 30, 2011, Ms. Floyd removed the lost set of C-5 keys from the locked hospital ward and disposed them in an elevator shaft. The Department performed a thorough investigation that established a number of key facts. CO Liberty had possession of the C-5 keys at 11:00 a.m. on May 30, 2001 and, during a ten minute period after 11:15 a.m., he lost the keys. During that time, he can be seen on video passing Ms. Floyd's station at the desk next to the gate. Something falls out of the same pocket where he had been keeping the keys. Later, Ms. Floyd can be seen picking up the dropped object. Finally, the keys were found one month later at the bottom of a bank of elevators that Ms. Floyd had used to leave the building that day.

Based on this evidence, the Department had reason to strongly suspect Ms. Floyd of taking the keys, but that is not the same thing as proof that she did by a preponderance of the evidence. CO Liberty did not know precisely at what time he lost the keys, and almost an hour went by between the time he realized his keys were gone and Lt. McCormack's lockdown of the facility. Medical staff, correction officers, and maintenance workers entered and left Eight North during this time, and any one of them could have found the C-5 key chain. Similarly, no evidence establishes who dropped the C-5 keys down the main elevator shaft, let alone that Ms. Floyd did. She used the main elevator, but so did all Department staff and countless other individuals who accessed Eight North.

The central pieces of evidence against Ms. Floyd are the videotapes of CO Liberty dropping something, her picking it up, and the reenactment to see what a set of dropped C-5 keys might look like on video. The videotape reenactment demonstrated that dropped C-5 keys could have looked like the brown blob on the floor seen in the videotape of CO Liberty dropping something from his pocket. But in the end, it is still an indistinct brown blob. The easy manner in which Ms. Floyd picked up this object in one motion raises considerable doubt about whether it was a set of keys with an oversized key and a lengthy metal key chain. Accordingly, I conclude that because it is too uncertain from the videotape what fell to the floor from CO Liberty's pocket, the Department's proof is not adequate to sustain the charge against Ms. Floyd of removing and disposing of the C-5 keys.

D. Termination

The question then becomes whether this finding would warrant a modification of Ms. Floyd's termination, in light of her other violations. I conclude that no modification is warranted.

After determining the facts, the Civil Service Commission "may . . . modify any penalty imposed by the appointing authority" M.G.L. c. 31, § 42, but must provide an explanation of its reasons for doing so. *Robare v. City of North Adams*, 18 MCSR 7, 10 (Jan. 3, 2005). The Civil Service Commission's decision whether to affirm or modify a discipline imposed must be guided by M.G.L. c. 31, § 2(b), which requires the Commission "to find whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken . . . ." *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 303, 682 N.E.2d 923, 925 (1997). "Justified" means "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. If the Commission finds by a preponderance of the evidence that there was just cause for an action against an employee, the Commission must affirm the action of the appointing authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735, 738 (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, 451 N.E.2d 443, 445 (1983).

When evaluating whether a reasonable justification exists for an action, the Commission may not "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *City of Cambridge*, 43 Mass. App. Ct. at 304, 682 N.E.2d at 926. Instead, the Commission considers whether the decision was made with "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy." *Id.* The Commission's decision "must focus on the fundamental purpose of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions." *Id.* When an appointing authority takes an action that penalizes an employee, the Commission's "authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.'" *Town of Falmouth v. Civil Service Comm.*, 447 Mass. 814, 824, 857 N.E.2d 1052, 1059 (2006), quoting *Police Commissioner of Boston v. Civil Service Commission*, 39 Mass. App. Ct. 594, 600, 659 N.E.2d 1190 (1996).

Applying these principles, the Civil Service Commission has declined to terminate an employee in circumstances in which termination would be an overly harsh punishment in light of the charges that were proven. *See LeComte v. Dept. of Correction*, 24 MCSR 534 (Nov. 4, 2011) (correction officer terminated after he had to be subdued by police responding to domestic dispute call at his house; Commission reduced this to a four month suspension when most serious charge of domestic violence was not sustained) and *Stuckey v. City of Springfield*, 11 MCSR 270 (Aug. 20, 1998) (trash collector terminated over confrontation with day care employee over trash placed on the wrong street; Commission reduced this to a one year suspension when charge that would have warranted termination – abusive behavior toward the public – was not proven).

There is no evidence suggesting that Ms. Floyd's termination was based on any improper political consideration, bias, or favoritism. The only issue is whether terminating her would be overly harsh given the offenses the Department established.

Had the Department established that Ms. Floyd had recovered the lost C-5 keys, failed to report that she had the keys, and then disposed of the keys down an elevator shaft, this would have been serious misconduct that alone would have warranted a termination of any Department employee, regardless of disciplinary history. Acting Commissioner Paul DiPaolo commented on this charge specifically in his termination decision, focusing on the compromise of safety and security it involved.

Absent a significant disciplinary history, Ms. Floyd's termination would have been overly harsh if it relied solely upon the two charges the Department sustained. She failed to adhere to sick leave and attendance rules by neglecting to call in one hour before her shift began on February 5, 2011 to report that she would be late, and by failing to fill out a sick leave slip

when she left work early on February 7, 2011, which are the more minor of her sick leave violations. Her use of sick time for vacation-related purposes on January 24 and 28, 2011 and her failure to arrange for a day off on January 28 when she was in Hawaii amount to sick leave abuse.[3] But as poor as her judgment was in these instances, the decision to impose discipline had to take into account that discipline for the most serious violations would not have been necessary if Ms. Floyd had been granted the vacation week she requested and that was unquestionably available. *Compare Robare*, 18 MCSR at 10-11 (firefighter was terminated for insubordination toward a lieutenant while at the scene of a fire; Commission reduced to 30 day suspension in part because of evidence that the lieutenant instigated a confrontation).

Ms. Floyd's handling of the security detail in the ICU on April 4, 2011 is also subject to discipline. She failed to give an assignment guarding an inmate who was an escape risk her full attention, one time. As serious as this offense was, the other officers on her security detail received far less severe penalties for watching television while on the security detail – a one and a three day suspension, respectively. *Compare Robare,* 11 MCSR at 10-11 (similar insubordination by another firefighter at a fire scene had resulted in three day suspension, not termination).

The difference here is Ms. Floyd's extensive disciplinary record and the warnings she received that further misconduct might lead to her termination. Ms. Floyd was disciplined thirteen times for failing to provide medical evidence after using sick leave. She was also

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[3] I do not regard it as significant for purpose of determining whether to affirm or modify the discipline that the collective bargaining agreement allowed correction officers to use 48 hours of sick time without providing medical documentation or that other officers have not been disciplined for use of sick time for matters unrelated to illness, such as car trouble. The collective bargaining agreement allowed the Department to question the use of sick leave if it had reason to believe such leave was being abused. It had sufficient reason here to question Ms. Floyd's use of sick time.

disciplined on another occasion for watching television on duty. Ms. Floyd had already nearly been issued a "final warning" in January 2009 after refusing to follow a direct order and was terminated in June 2009, a decision an arbitrator reduced to a 60 day suspension, but with a warning that she was "firmly on notice that future misconduct may end her career." (Finding 7.)

Ms. Floyd knew or should have known Department rules and policies on sick leave, attendance, security details, and attention to assigned duties. She also should have known the consequences of failure to follow these rules and policies. The Department's *Blue Book* states that failure to provide required medical evidence, use of sick leave for personal matters other than sickness, and willful negligence of one's job duties are all violations for which an employee may be disciplined, up to and including discharge. She should have been particularly conscious that failure to adhere strictly to Department rules might cause her to be terminated in light of the two warnings she had received to this effect in 2009. Yet she still failed to comply with some of the same policies she had violated in the past, less than a year after being reinstated.

The situation is akin to that of an employee with a last chance agreement. The two warnings Ms. Floyd received are not literally last chance agreements – they were not voluntary agreements between her and her employer. Instead, they each arose out of resolutions of appeal processes, and were issued to her at the close of those processes. I do not give as much weight to the January 2009 "final warning" because it is not in the record, and hence its import can be determined only broadly. The later warning by the arbitrator is in the record, however, and it clearly informed her that any future misconduct might lead to her termination. It is the clarity of this warning that makes the situation similar to one in which a last chance agreement is in place. The employee is put on notice that the discipline process is at an end, and that further violations may lead to termination. In those circumstances, further violations have been held to be a

sufficient justification for terminating an employee. *See Gilligan v. City of Quincy*, 25 MCSR 516 (Dec. 13, 2012) (continued absenteeism violated last chance agreement), *Alves v. Fall River School Committee*, 23 MCSR 611 (Oct. 22, 2010) (custodian terminated for repeated absenteeism and violation of last chance agreement), and *Cruz v. Holyoke Dept. of Public Works*, 12 MCSR 195 (Aug. 23, 1999) (employee who signed last chance agreement after using abusive language toward another employee, was terminated when he again engaged in this conduct). Even without a last chance agreement, termination may be warranted when there exists "a situation where progressive discipline failed to correct the employee's deleterious work habits." *MaCinnes v. City of Somerville*, 20 MCSR 513, 515 (Aug. 20, 2007) (custodian with a lengthy discipline history was denied vacation time in late August because the school he was responsible for was not ready for the school term to begin; when he nonetheless took sick time that week to attend his son's bachelor party in Las Vegas, he was terminated).

Taking into account Ms. Floyd's disciplinary history and last chance agreement, the Department of Correction had just cause to terminate her for these infractions, even if such punishment would otherwise be overly harsh for her individual infarction standing alone. It is a tenet of the basic merit principle, which governs Civil Service Law, to retain employees "on the basis of [the] adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected." M.G.L. c. 31, § 1. The Department of Correction has attempted many times to correct Ms. Floyd's performance, but despite ample warning that further violations would lead to her termination, she did not correct her work habits and repeatedly violated Department rules and policies – four separate sick leave and attendance violations in late January and early February 2011, and poor performance on a security detail in April 2011 for which she was relieved of duty. Although in her testimony, she

came across as a person who is dedicated and values her career as a correction officer, that is not a sufficient basis to justify modifying the Department's decision. It established that she is an employee whose performance did not live up to Department standards, and thus showed just cause for her termination.

Accordingly, I recommend that the Civil Service Commission affirm the action of the Department of Correction discharging Jean Floyd from her position as a Correction Officer I.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney, Esq.
First Administrative Magistrate

Dated: AUG 27 2013