Decision mailed: 12/7/09
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

One Ashburton Place - Room 503
Boston, MA 02108
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JOAO FORTES,
Appellant

v.

CASE NO: D1-09-13

DEPARTMENT OF CORRECTION,
Respondent

DECISION

The Appellant, Joao Fortes filed this appeal to the Civil Service Commission (Commission) from the decision of the Department of Correction (DOC0 as the Appointing Authority, to terminate him from his position as a Correction Officer I (CO I) at the Bridgewater State Hospital (BHS). By Notice of Hearing dated February 11, 2009 the Commission referred the appeal to the Division of Administrative Law Appeals (DALA) for evidentiary hearing and preparation of a tentative decision pursuant to the Commission rules , 801 C.M.R. 1.00(11). On August 31, 2009, the Commission received the recommended tentative decision of the DALA Administrative Magistrate Maria A. Imparato (dated August 28, 2009), copy attached. The Commission received CO I Fortes Objections to the tentative decision on September 17, 2009 and the DOC's Response on October 9, 2009. On November 12, 2009, acting pursuant to 801 CMR 1.00(11)(c)(2), the Commission voted at an executive session to acknowledge receipt of the DALA

tentative decision. By a 3-2 vote[1], the Commission voted to affirm and adopt the tentative decision only in part, for the reasons set forth herein.

APPLICABLE LEGAL STANDARDS

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which provides:

> "*If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action* and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, *if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained*, and the person shall be returned to his position without loss of compensation or other rights. *The commission may also modify any penalty imposed by the appointing authority*." (*emphasis added*)

Section 43 requires "a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

[1] Chairman Bowman and Commissioner Marquis were in favor of adopting the magistrate's findings and conclusions.

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist.Ct., 262 Mass. 477, 482 (1928).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist.Ct., 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The Commission must take account of all credible evidence in the administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)[2]

[2] The Commission is authorized to affirm and adopt the tentative decision of a hearing officer in whole or in part, except that the Commission is obliged to accept duly made express determinations of credibility of witnesses personally appearing before the Administrative Magistrate. 801 C.M.R. 1.00(1)(c)(2). See also Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988)

"The commission's task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'". Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334 rev.den., 390 Mass. 1102 (1983) and cases cited.

"Likewise, the 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.' " Town of Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594 (1996) Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation". E.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

REASONS FOR REJECTING, IN PART, PORTIONS OF THE TENTATIVE DECISION

After a careful review and consideration, the majority of the Commission finds the conclusions of the Administrative Magistrate that DOC met its burden of proof to establish that it was justified to discipline the Appellant for only one of the charges

asserted against him in accordance with foregoing applicable Civil Service Law and rules, but not to discharge him..

The Commission majority rejects the Administrative Magistrate's recommendations and conclusions that the DOC was justified to impose discipline on CO I Fortes for a private financial dispute involving his personal credit union that was in no way tied to his employment at DOC, as the imposition of discipline in such a case would be inconsistent with established Commission decisions and applicable appellate case law. See City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, rev.den., 432 Mass 1110 (2000) (affirming Commission's reversal of discipline of DPW employee for inappropriate off-duty behavior, holding that employee had sustained his burden of showing that there was no significant correlation between his conduct and his continuing fitness to perform his job); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997) (off duty sexual misconduct by school employee in public park lacked "significant correlation between ... [his] ... conduct ... and his employment ..., nor that this conduct impairs the efficiency of the public service.")

As to the charges of CO I Fortes mendacity involving the December 2007 medical note, the Commission accepts the Administrative Magistrate's credibility determination that CO I Fortes gave a false account of his actions in one respect when interrogated about it. After consideration of all of the facts and circumstances, however, including CO I Fortes prior disciplinary history and the preponderance of the evidence which established that, the misrepresentations was not material to the validity of the underlying request for medical absence, the Commission majority concludes that, the misconduct actually proved warrants no more than a 10-day suspension.

As to the credit union matter, the Commission majority takes note that CO I Fortes troubles with the RAH Credit Union, of which he had been a member since 2001, began in December 2006, when he (i.e. CO I Fortes) voluntarily brought the credit union's mistaken deposits to the institution's attention, which resulted in the credit union immediately drawing down the balance in his account (some $1,459) and he began making payments of $175.00 monthly. (*Tentative Decision, Findings 13-16: Exh. 5*) CO I Fortes stopped payments for reasons that are not clearly described in the findings (his explanation was that had run into financial difficulties due to legal obligations to pay child support), criminal charges were brought against him by the credit union, criminal charges were brought against him by the credit union and he agreed to make full restitution and, by September 2008 had done so. (*Tentative Decision, Findings 19 & 20: Appellant's Objections to Recommended Decision, p.3*) CO I Fortes was placed on "pre-trial probation" until September 2009; he never entered a plea, or admission to sufficient facts. (*Exh. 5*)[3] Neither the DOC interview of this incident, which lasted approximately 5 minutes, nor any other of the underling evidence, established that CO I Fortes committed any crime or was evading responsibility. (*Exh. 5 & 6*) Unlike the medical note incident described below, there is no finding of mendacity on the part of CO I Fortes as to his part in the credit union mistake or that he disputed or ceased repayment for any reason other

[3] Under these circumstances, a criminal charge is not substantial evidence that a crime was committed or admitted, and would not, alone, justify discipline based on such charge. See, e.g., Burns v. Commonwealth, 430 Mass. 444, 449-451, 720 N.E.2d 798, 803-805 (1999) (state police officer discipline based on CWOF reversed as legal error); Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37, 491 N.E.2d 1057, 1059-60 (1986) ("*Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed*. To the extent that the 'deliberate misconduct' relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification [from receiving unemployment benefits]." (*emphasis added*)

than a financial bind that he had gotten into. (*Tentative Decision, Findings 16 & 17; Exh. 5 & 6*)

The Commission majority is satisfied that the preponderance of the substantial evidence shows no significant correlation between CO I Fortes conduct with the RAH Credit Union (spending money erroneously deposited to his account and the problems he encountered in repaying the money) and his continuing fitness to perform his job as a DOC Correction Officer. To terminate an employee for this conduct solely because it purportedly failed to "give dignity" to the position of a Correction Officer (*Exh. 4 [DOC "General Policy & Rule 1]; Tentative Decision, Conclusion & Recommendation, p. 8*), would seem to leave virtually no objectively discernable limit to what private behavior might be deemed appropriate for discharge and does not comport with the "just cause" standard which requires a work-related nexus to discipline an employee under Civil Service Law and rules. See City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, rev.den., 432 Mass 1110 (2000); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997)

The Commission majority also rejects the tentative decision's conclusion that DOC was warranted to discipline CO I Fortes for a violation of the "spirit" of DOC Rule 2(b), requiring a DOC employee to report promptly in writing "any involvement with law-enforcement officials pertaining to any . . . court appearance", even though CO I Fortes fully complied with the letter of the rule. The Administrative Magistrate concluded that CO I Fortes "did promptly report in writing that he was going to be making two court appearances, but he did not disclose the fact that he had been criminally charged. . . *His behavior does not violate the letter of the regulation*, although it may violate the spirit of

the regulation." (*Tentative Decision, Findings 21 & 22, Conclusion, & Recommendation, p. 9*) (*emphasis added*)

The Commission majority finds no support in any prior Commission Decision or appellate case law for the Administrative Magistrate's conclusion that an employee can be disciplined, much less terminated, even though the appointing authority failed to establish that the conduct violated the rule upon which the appointing authority relied in imposing that discipline or which the employee knew or should have known would be considered a grounds for termination. An interpretation that would allow a "spirit of the rule" violation to trigger discipline invites an unacceptable level of ambiguity and subjectivity into the disciplinary processes, which offends the requirements of merit principles of civil service law to assure that "all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1.

The court appearances in this case all were disclosed in advance, DOC had full access to the details of the criminal charges within days after the first court appearance, and both absences to attend court were duly and fully approved. (*Exh. 5; Tentative Decision, Findings 21 & 22*) Thus, this appeal differs from the situation in School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486 (1997) in which the employee's criminal arrest caused him to be absent without leave and that, in turn, justified discipline.

Apparently even the DOC's own witnesses could not identify the rule that CO I Forte violated in this regard. (*See Appellant's Objections to Recommended Decision, p.5*) The Commission majority discerns no other legitimate reason stated on this record that

DOC needed to know more about the court matters than it knew or DOC's own rules required. Should there be such a justification, DOC is fully capable of revising their own rules to be sure all employees have equal and fair notice of what behavior is expected of them and why.

The third charge against CO I Forte involves his submission of a false medical leave note by writing a statement (albeit a true statement) on the back of the doctor's note and then stating to the DOC investigators that the statement was written by the doctor). The Commission majority adopts the Administrative Magistrate's findings and reluctantly accepts her credibility determinations on this point. (*Tentative Decision, Findings 2 – 12; Conclusions & Recommendations, pp 9, 10*)[4] For the wholly independent reasons set forth below, the Commission majority rejects, in part, the Administrative Magistrate's finding concerning prior "related" discipline (*Tentative Decision, Finding 25*) as not supported by the substantial evidence in the record. The Commission majority also

[4] Solely in he interest of closing the matter, the Commission majority declines to remand the appeal for further clarification of the credibility determinations by the DALA hearing officer. The Commission majority is troubled, however, by the credibility determination of the Administrative Magistrate that CO I Fortes explanation for why he falsely reported that his doctor had written the entirely of the medical note, when, in fact, he had written part of it himself. The Commission majority is skeptical that CO I Fortes would have any motive to lie about such a apparently trivial and immaterial matter, given that the underlying facts stated in the note were entirely accurate as the Commission majority decision explains. CO I Fortes explanation that, when he was asked about the note several weeks after the fact, he was confused and believed he was being asked only about the doctor's statement on the front side, which seems plausible on its face. There is no contemporaneous recroding of the interview on the medical note incident, as there is for the credit union matter (*Ex. 6*), and the Administrative Magistrate makes no express findings as to why she disbelieved this explanation.

In the future, it would be helpful if the DALA hearing officer provided the Commission with some "thorough and reasoned" explanation for why a witness's statements were not found credible, rather than the bald credibility determination provided here, especially when credibility is key to the conclusion and recommended discipline, as in this case. See, e.g., Town of Brookfield v. Labor Rel. Comm'n, 443 Mass. 315, 322 (2005) (affirming agency credibility determinations so long as they are supported by a "thorough and reasoned explanation" in the record); Herridge v. Board of Reg. in Med., 420 Mass. 154, 163-66 (1995) [*Herridge I*], appeal after remand, 424 Mass. 201, 206 (1997) [*Herridge II*] (vacating decision after board failed to explain its credibility determinations as previously instructed in *Herridge I*); Jacobs v. Department of Social Svs., 21 Mass.L.Rptr. 569, 2006 WL 3292633 (Sup.Ct.) (Henry, J.) (vacating hearing officer's decision that gave "no reason for crediting the investigator's disbelief and not the plaintiff's testimony" and, thus, failed to provide the required "explicit analysis of credibility and the evidence bearing on it")

departs from the Administrative Magistrate's Conclusions & Recommendations that CO I Fortes very limited misconduct justifies his termination. (*Tentative Decision, Conclusions & Recommendations, pp 9-10*)

First, the tentative decision's findings leave no doubt that CO I Fortes sick leave request was completely genuine. He called in sick well in advance of his 11PM to 7AM shift on December 11-12, 2007 because, in fact, he had to care for his son, who had conjunctivitis that night. CO I Fortes, in fact, took the boy to the doctor the next morning, where the doctor wrote a note confirming that, in fact, the boy was contagious and could not be taken to day care that day. (*Exh. 11; Tentative Decision, Findings 2 & 3)* Prior to submitting this note with his "Sick Leave Slip" dated 12/18/2007, CO I Fortes added a sentence on the back of the doctor's note in his own handwriting: "To whom it may concern Joao Fortes was out of work on 12/11/07 because Alexander Fortes, son of Joao Fortes was seriously ill and in need of care", which statement was entirely true and consistent with the statement on the "Sick Leave Slip" itself, also completed by CO I Fortes in his own handwriting, that checked "Serious illness of a family member" as the reason for the request for sick leave, all of which was true and accurate. (*Exh. 10 & 11; Tentative Decision, Findings 5*) The sick leave request was approved in the usual course and there was no evidence it was ever rescinded (*Exh. 11*)

Thus, the Commission rejects the Administrative Magistrate's recommendation and conclusion insofar as it infers that CO I Fortes violated DOC Rule 18(b) or G.L.c.268, §6A, in respect to the medical leave issue. There is no substantial evidence that he "abused sick leave", failed to produce the necessary doctor's note, used sick time for "personal matters not related to illness" prescribed by the DOC Rule, that he made any

"false written report . . . knowing the same to be false in a material matter" within the meaning of G.L.c.268.

Second, the tentative decision misperceives CO I Fortes record of prior discipline and fails to fully account for the unusual institutional interest in the medical note investigation and the persistence in pressing the matter, even after the investigation confirmed that the medical note was genuine and the underlying basis for the request for medical leave was true. The Commission majority concludes that the medical note investigation became blown out of proportion to the nature or severity of the offense, most likely because CO I Forte had become a target for heightened scrutiny, and eventually arbitrary and retaliatory treatment, as a result of the other on-going (and some cases, unfounded) charges against him. (*Exhs. 5 & 7*)

According to the disciplinary history in the record, until July 2007, CO I Fortes had an unblemished record in 17 years of service with the DOC, save for one written warning for tardiness in 1994. (*Tentative Decision, Finding 1; Exh 7*) He is a member of the Army National Guard and has served in Iraq. (*See Appellant's Objections to Recommended Decision, pp. 4, 8*)

CO I Forte received his first (3-day) suspension on July 18, 2007 for being "insubordinate toward Captain and DOS" followed by a 10-day suspension and final warning on August 1, 2007 because of an "altered doctor's note". (*Exh. 7*) The details of theses underlying offenses are not fully described, but the second one, concerning the doctor's note was appealed to the Commission and the undisputed record indicates that the parties agreed to a settlement (dated 11/28/2007), reducing the discipline to 5-days and, specifically, negotiating out the "final warning" provision. (*Administrative Notice,*

CSC Case No. D-07-295[Comm'n Ex.13]; See Appellant's Objections to Recommended Decision, pp. 7-8)

In this regard, the Administrative Magistrate's conclusion that the Appellant's conduct was "especially egregious" because "the Appellant had been previously disciplined and received a final warning in August 2007 for altering a doctor's note" (*Tentative Decision, Conclusions and Recommendations, pp.* 10) is rejected as relying solely on the original discipline (not actually in the record) of a disputed matter that was settled by agreement, and, therefore not supported by the record of all of the relevant evidence.[5]

While the foregoing civil service appeal was pending, on November 10, 2007, having received CO I Fortes second notice of a court appearance in Quincy District Court, Captain Vincent Martin ran a "BOP" [presumably a Board of Probation or "CORI"] check that found the record of CO I Martin's arraignment on November 8, 2008 for larceny. (*Exh. 5*) This information prompted BHS Superintendent Bergeron to open an investigation, which remained open at the time of the December 11, 2007 medical leave request, but which did not result in charges until June 19, 2008 and as to which CO I Martin did not receive a DOC hearing until August 19, 2008. (*Exh.2, 3 & 5*)

[5] The evidentiary record as transmitted by DALA to the Commission presents some confusion about what actual evidence had been proffered about the first medical note incident. The Appellant's objections clearly refer to the settlement agreement disposing of the prior appeal *(Appellant's Objections to Recommended Decision, pp. 7-8*and the summary disciplinary record exhibit (*Ex.7*) refers to the agreed reduction of the prior suspension from 10 days to 5 days. Rather than recommit the matter back to DALA for clarification or further findings, the Commission takes administrative notice of the settlement agreement that was filed with the Commission in the prior appeal of the first medical note incident, and has included a copy of that document in this record as Commission Exhibit 13. In addition, the Commission takes administrative notice of the DOC's August 1, 2007 discipline letter (included in this record as Commission Exhibit 13A for identification) and the DOC's appointing authority level hearing officer's report of the incident (included as Exhibit 13B for identification). As to the latter two documents, they are received solely for the purpose of establishing the nature of the charges involving the first medical note incident, as there was no adjudication about those charges in either the first or second appeal, the Commission majority does not accept the hearsay assertions of the DOC in those document for the truth thereof.

With this context in mind, on December 20, 2007, one day after submission and approval of CO I Fortes's "Sick Leave Slip" request, BHS Superintendent Bergeron personally dispatched DOC Captain Martin to the doctor's office in Quincy to authenticate the medical note. He was able to verify that the note was, in fact, genuine, but that the doctor had not authored the statement on the back of the note. Six weeks later, on January 31, 2008, Captain Martin first interviewed CO I Fortes about the note, during which interview CO I Fortes was reported to have made the false statement that the doctor had written on both sides of the note, a statement CO I Fortes later retracted, but which the Administrative Magistrate disbelieved for reasons she did not explain. (*Exh. 9; Tentative Decision, Conclusions and Recommendations, pp. 9, 10)* One day later, on February 1, 2008, CO I Fortes was formally charged with having "submitted a fraudulent medical note" by DOC Commissioner Clarke (*Exh. 1*)

Meanwhile, on January 30, 2008, CO I Fortes also was charged with failure to disclose an arrest for assault & battery and was issued a 3-day suspension. (*Exh. 7*) This charge apparently stemmed from an unreported 2006 incident, as to which no details are disclosed in the record, which seems to have come to light only as a result of the above-mentioned DOC CORI check in November 2007 (prompted by the investigation of the credit union matter). This charge was dismissed in December 2007 without any plea or admission. (*Exh. 5*)

The Commission majority concludes that: (a) the close proximity of the flurry of charges against CO I Fortes to each other, (b) the settlement of the 10-day suspension after appeal to the Commission, (c) the determination on this appeal that most of the DOC's charges against him were <u>not</u> substantiated (i.e., allegedly filing a "fraudulent

medical note" and supposedly detracting from the "dignity" of his position because of the credit union matter), and (d) the fact that his mendacity about the medical note did not misrepresent any material fact that would, or did, justify DOC into rejecting CO I Fortes' entitlement to medical leave on Dec 11-12, all are material factors that must be taken into account in assessing the appropriate discipline for the one violation that was established by the evidence here (i.e. making false statements to the investigator about who wrote the information on the back of the December 12, 2007 medical note).

Finally, the Commission majority has taken into account the evidence of a 2005 termination of a correction officer for violation of the sick leave policy by submitting a "falsified doctor's note" (*Exh. 13*), and concludes it is entitled to little if any weight. There is insufficient information about this one prior discharge to know whether the circumstances are comparable or disparate to those in the present appeal, such as whether the employee involved was guilty of claiming sick leave to which he actually was not entitled, which was not the case here.

In sum, the majority of the Commission concludes that findings, conclusions and recommendations of the DALA Administrative Magistrate be adopted, in part, and rejected, in part, as described above. The Commission majority concludes that the discipline imposed by DOC should be modified and reduced from a termination to a 10-day suspension. Some of the Commission majority believes even a 10-day suspension could be considered excessively punitive given the nature of the infraction actually charged and proved here. However, the Commission majority concluded that a 10-day suspension is appropriate and rational discipline that conforms to the standards of progressive and remedial discipline required by the merit principle of the Civil Service

Law to reflect the level of discipline that seems most consistent with what the parties contemplated would be the appropriate progressive next step for the type of infraction involved. See G.L.c.31, §1 ("Basic merit principles", shall mean . . . (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected")

This conclusion takes into account the settlement of the prior medical note incident for which DOC had originally imposed a 10-day suspension and "final warning" and later modified to specifically refer to "progressive discipline" for future violations. (*Comm'n Exhibits 13 & 13A*) The charges in the first incident included (a) the admitted failure to submit any medical documentation for an absence while the Appellant was on "Attachment A" (which he though had expired but, in fact, ran until February 25, 2007), meaning his recent attendance required a note for every such absence and (b) a second charge that involved an addition to a medical note in response to the initial rejection of the note as insufficient. The author of the addition was not firmly established and may have been the Appellant's girlfriend. In addition, the doctor in that case submitted a letter that ratified the addition after the fact. By the time of the present incident it appears that the Appellant had completed his "Attachment A" obligations; the negotiated settlement agreement of the first incident was silent as to any "Attachment A" obligations or any "final warning". (*Comm'n Exhibits 13,13A, 13B; Appellant's Objection to Recommended Decision, pp. 7-8*) The Commission majority construes these factors to support the conclusion that both DOC and CO I Fortes contemplated at least one round of <u>further</u> remedial progressive suspension, but not termination, would be consistent with, and

would be the likely consequence of, any subsequent misconduct of the nature established by the evidence here. (*Comm'n Exhibit 13*)

Accordingly, for the reasons stated above, the appeal of the Appellant, CO I Joao Fortes, is ***allowed, in part.*** The Commission majority exercises its discretion to modify the discipline imposed on CO I Fortes for his misconduct to a 10-day suspension. The DOC will return to CO I Fortes all compensation and other rights to which CO Fortes is entitled consistent with this Decision.

Civil Service Commission

Paul M. Stein
Commissioner (For the Majority)

By 3-2 vote of the Civil Service Commission (Bowman [NO], Chairman; Henderson [AYE], Marquis [NO], Stein [AYE] and Taylor[AYE], Commissioners) on November 19, 2009.

A True Record. Attest:

Commissioner

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)(l), 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:
Bradford Louison, Esq. (for Appellant)
Amy Hughes, Esq. (for Appointing Authority)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOAO FORTES,
Appellant

v.

D1-09-13

DEPARTMENT OF CORRECTION,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves the termination of the Appellant from his position as a correction officer at the Massachusetts Department of Correction (DOC).

The Appellant has a lengthy disciplinary history including: 1) a written warning for being late to roll call; 2) a 3-day suspension for insubordination; 3) a 5-day suspension and a final warning for altering a doctor's note; and 4) a 3-day suspension for failure to disclose an arrest for assault and battery with a weapon.

Here, the Appellant, as found by the magistrate, has engaged in the same type of misconduct for which he has been disciplined in the past. Remarkably, less than two years after being suspended for altering a doctor's note, the Appellant has committed the same offense again. This time, however, he compounded his misconduct by lying to DOC investigators when questioned about his actions. The Commission should not be a safe haven for those who engage in such egregious and repeated misconduct. The majority has erred by substituting its judgment for the Appointing Authority and overturning their decision to terminate the Appellant.

For these reasons, I respectfully dissent.

Christopher C. Bowman
Chairman
November 19, 2009

COMMONWEALTH OF MASSACHUSETTS

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

Joao Fortes,
Appellant

v. Docket No. D1-09-13
DALA Docket No. CS-09-89

Department of Correction,
Appointing Authority

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Administrative Magistrate:

Maria A. Imparato, Esq.

CASE SUMMARY

The Department of Correction has proven by a preponderance of evidence just cause for the discharge of the Appellant for submitting a fraudulent doctor's note to excuse an absence, for lying to a Captain during an investigation into the fraudulent note, and for spending $6,000.00 that was mistakenly deposited into his bank account.

RECOMMENDED DECISION

Joao Fortes filed a timely appeal under G. L. c. 31, s. 43 of the January 5, 2009 decision of the Department of Correction (DOC) to terminate him from his position as a Correction Officer I at Bridgewater State Hospital (BSH). I declared the hearing private because neither party submitted a written request to make the hearing public.

I admitted documents into evidence. (Exs. 1 – 12)[1]

The Appointing Authority offered the testimony of: Janice Ann O'Gara of the RAH Federal Credit Union (Credit Union); Sergeant Harold Wilkes of the DOC Office of Investigative Services; and Captain Vincent Martin, Director of Investigative Services at BSH.

The Appellant, Joao Fortes, testified on his own behalf.

The Appellant was discharged for violation of the DOC Rules and Regulations as follows:

General Policy: Nothing in any part of these rules and regulations shall be construed to relieve an employee of his … constant obligation to render good judgment, full and prompt obedience to all provisions of law …;

Rule 1: You must remember that you are employed in a disciplined service which requires an oath of office … Employees should give dignity to their position …;

Rule 2(b): Report promptly in writing to your Superintendent, DOC Department Head or their designee … any involvement with law-enforcement officials pertaining to any investigation, arrest or court appearance;

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

[1] The parties submitted exhibits 1-11 and 13. Post hearing I marked Ex. 13 as Ex. 12.

Rule 19(c): [Y]ou must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself; and

A possible violation of *G. L. c. 268, s. 6A* regarding false written reports by public officers or employees.

The record closed on June 19, 2009 with the filing of briefs.

FINDINGS OF FACT

1. Joao Fortes worked for the DOC from January 1990 to January 5, 2009 when he was discharged from his position as a CO I at BSH.

Sick note

2. Mr. Fortes worked the 11p.m. to 7a.m. shift. During the evening of December 11, 2007, Mr. Fortes's three-year old son had conjunctivitis and was unable to sleep. Mr. Fortes called in sick that night because he had to care for his son. Mr. Fortes's wife was unable to care for the child because she had to go to work the next morning and needed a full night's sleep. (Testimony, Fortes.)
3. On the morning of December 12, 2007, Mr. Fortes brought his son to the pediatrician, Mary A. McGaugh, M.D. Dr. McGaugh wrote a note dated December 12, 2007 indicating that Mr. Fortes was in the office that day with his son who had conjunctivitis, was contagious, and could not be in day care that day. (Ex. 10)
4. Mr. Fortes realized that because the note was dated December 12, 2007, it would not serve to excuse him from work for the night of December 11, 2007. (Testimony, Fortes.)

5. Mr. Fortes wrote on the back of the note, "To whom it may concern Joao Fortes was out of work on 12/11/07 because Alexander Fortes son of Joao Fortes was seriously ill and in need of care." (Ex. 10, Testimony, Fortes.)

6. On December 18, 2007, Mr. Fortes turned in his DOC Sick Leave Slip together with the note from Dr. McGaugh with Mr. Fortes's note written on the back. (Exs. 10, 11; Testimony, Fortes, Martin.)

7. The sick leave slip and doctor's note went to the Superintendent's office. Captain Vincent Martin, Director of Investigative Services at BSH, was asked to confirm that Dr. McGaugh had written the information on the back of the note which would excuse Mr. Fortes from work on the night of December 11, 2007. (Testimony, Martin.)

8. Captain Martin went to Dr. McGaugh's office. Dr. McGaugh said that she had written the front side of the note, but she had no knowledge of the information written on the back of the note. (Testimony, Martin; Ex. 9.)

9. The Superintendent asked Captain Martin to interview Mr. Fortes which he did on January 31, 2008. Mr. Fortes said that both the front and back side of the note were written by Dr. McGaugh. (Testimony, Martin; Ex. 8.)

10. By letter of February 1, 2008, Mr. Fortes received a Notice of Charges and Hearing from Commissioner Harold Clarke, scheduling a hearing to determine whether he submitted a fraudulent medical note on December 18, 2007 in an effort to substantiate his absence on December 11, 2007, and to determine whether he lied to the DOC investigator when questioned about the note. (Ex. 1)

11. At the Commissioner's hearing on March 25, 2008, Mr. Fortes said he was tired, that he made a mistake if he said that Dr. McGaugh wrote both sides of the note, that he wrote the information on the back of the note himself to remind himself to get a note with the proper information from the doctor. (Testimony, Martin.)

12. Mr. Fortes did not contact Captain Martin between the date of his interview on January 31, 2008 and the date of the Commissioner's hearing on March 25, 2008 to correct his assertion to Captain Martin. (Testimony, Martin.)

Criminal Charges

13. Mr. Fortes became a member of the RAH Federal Credit Union (Credit Union) in 2001. (Testimony, O'Gara.)

14. On December 29, 2006, Mr. Fortes informed a teller at the Credit Union that he had been receiving money into his account from the Norfolk County Retirement System that was not rightfully his. When Ms. O'Gara checked, she found that Mr. Fortes had received almost $700.00 a month since April 2006 for a total of about $6,000.00. The error was the Credit Union's. (Testimony, O'Gara.)

15. The Credit Union wrote to Mr. Fortes in January 2007 and acknowledged its mistake, but insisted that Mr. Fortes had to pay back the money. Mr. Fortes had already spent the money, but he agreed to pay $175.00 every other week from his direct deposit payroll funds beginning in March 2007. (Testimony, O'Gara.)

16. Mr. Fortes paid $880.00 and then stopped making payments. He moved his payroll direct deposit to another bank. Mr. Fortes did not return Ms. O'Gara's telephone calls. (Testimony, O'Gara.)

17. Ms. O'Gara's manager wrote a letter to Mr. Fortes. Mr. Fortes called the Credit Union in June 2007 and said he was not going to pay any more, that the mistake was the Credit Union's, and they would have to take him to court. (Testimony, O'Gara.)

18. The Credit Union reported the incident to Detective Clark of the Randolph Police Department. Detective Clark left several phone messages for Mr. Fortes, but Mr. Fortes did not call him back. Detective Clark decided to seek a complaint against Mr. Fortes for larceny over $250.00. (Ex. 5, pp. 25-26.)

19. On October 17, 2007, a criminal complaint was issued out of the Quincy District court by the Randolph Police against Mr. Fortes for the charge of Larceny Over $250.00. On November 8, 2007, Mr. Fortes was arraigned on the charge and was released on personal recognizance and the case was continued to January 8, 2008. On January 8, 2008, Mr. Fortes received the disposition of Pretrial Probation until September 25, 2009 with restitution of $3703.34. (Testimony, Wilkes; Ex. 5, pp.22-26)

20. Mr. Fortes paid all restitution by September 2008. (Testimony, Wilkes; O'Gara.)

21. On October 20, 2007, Mr. Fortes filed a confidential incident report with DOC stating, "On October 20, 2007 I CO Joao G. Fortes received a letter in the mail

to report to Quincy District Court on November 8, 2007 on a previous matter." (Ex. 5, p. 18.)

22. On November 10, 2007, Mr. Fortes filed a confidential incident report with DOC stating, "I CO Joao G. Fortes is (sic) scheduled for a court appearance on 8 January 2008." (Ex. 5, p. 19.)

23. By letter of June 19, 2008, Mr. Fortes received a Notice of Charges and Hearing from Commissioner Harold W. Clarke to determine whether he violated the Department's regulations because an investigation revealed that Mr. Fortes was arraigned on November 8, 2007 on a charge of larceny over $250.00, on January 8, 2008 he was placed on pre-trial probation in connection with that charge, and he "failed to notify your Superintendent, DOC Department Head or their designee of your involvement with the foregoing criminal court appearance." (Ex. 2.)

24. As a result of the Commissioner's hearings with respect to the sick leave note and the criminal charges, Mr. Fortes was notified by letter of January 5, 2009 that his employment was terminated for violations of the General Policy, Rule 1, Rule 2(b), Rule 18(b), Rule 19(c) and a possible violation of G. L. c. 268, s. 6A. (Ex. 1.)

Previous Discipline

25. Mr. Fortes had previously been disciplined with a written warning in December 1994 for being late to roll call; a three-day suspension in July 2007 for insubordination toward a Captain and DOS; a ten-day suspension (reduced to a five-day suspension) and a final warning in August 2007 for altering a

doctor's note; and a three-day suspension in January 2008 for failure to disclose an arrest for assault and battery with a weapon. (Exs. 7, 5 p. 29)

CONCLUSION AND RECOMMENDATION

The Department of Correction has demonstrated by a preponderance of evidence just cause for the discharge of Joao Fortes. I recommend that the Civil Service Commission affirm the action of the Appointing Authority.

The DOC has proved that the Appellant violated the General Policy, Rule 1, Rule 18(b), and Rule 19(c) of the DOC Rules and Regulations. The Appointing Authority did not prove that the Appellant violated Rule 2(b). The Appellant may have violated G. L. c. 268, s. 6A.

The **General Policy** set forth in the Rules and Regulations Governing all Employees of the DOC states, in pertinent 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 of 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 an described in these rules and regulations." **Rule 1** instructs DOC employees to "give dignity to their position."

The Appellant violated the **General Policy** and **Rule 1** when he submitted a doctor's note that he knew to be fraudulent, and when he spent $6,000.00 that had been mistakenly deposited into his bank account at the credit union that he knew was not rightfully his. Both actions constitute improper conduct reflecting upon the DOC,

do not demonstrate good judgment and prompt obedience of all provisions of law, and do not give dignity to the Appellant's position as a Correction Officer.

The Appellant testified at hearing that he wrote the statement on the back of Dr. McGaugh's legitimate note to remind himself to ask her for a note that covered his absence on December 11, 2007. When he submitted the note on December 18, 2007, he said, he forgot that he had written on the back of the note. I found the Appellant's explanation to be not credible. His behavior is especially egregious in light of the fact that he had previously been disciplined and placed on final warning for submitting an altered doctor's note.

Rule 2(b) requires a DOC employee to report promptly in writing "any involvement with law-enforcement officials pertaining to any ... court appearance." The Appellant did promptly report in writing that he was going to be making two court appearances, but he did not disclose the fact that he had been charged criminally with larceny over $250.00. His behavior does not violate the letter of this regulation, although it may violate the spirit of the regulation. (The Appellant was disciplined again in January 2008 for failure to disclose an arrest for assault and battery with a weapon.)

In any event, the fact that the Appellant spent $6000.00 that he knew did not belong to him violated both the **General Policy** and **Rule 1.**

Rule 18(b) may subject a DOC employee to disciplinary action up to and including discharge for failing to submit a satisfactory physician's slip when requested. The physician's slip submitted by the Appellant for his absence on December 11, 2007 was not satisfactory because it included information added to the

back of the note by the Appellant. When questioned, the Appellant lied to Captain Martin when he insisted that Dr. McGaugh had written both sides of the note. Lying to Captain Martin violated **Rule 19(c)** which requires a DOC employee to respond "fully and promptly" to any question relative to his own conduct. This behavior was especially egregious in light of the fact that the Appellant had previously been disciplined and received a final warning in August 2007 for altering a doctor's note. The Appellant's assertion that his lie to Captain Martin was a mistake because he was tired is not credible.

G. L. c. 268, s. 6A provides in pertinent part:

> Whoever, being an officer or employee of the commonwealth ... in the course of his official duties executes, files or publishes any false written report, minutes or statement, knowing the same to be false in a material matter, shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.

The submission of the fraudulent doctor's note may have violated this statute. It does, however, violate the **General Policy** and **Rule 1,** as previously discussed.

I recommend that the Civil Service Commission affirm the action of the Appointing Authority.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imparato
Administrative Magistrate

DATED: AUG 28 2009