COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

PETER GARIEPY,
Appellant

v.

D-04-361

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Jennifer Smith Miguel, Esq.
Miguel Law Offices
161 Wilbur Avenue, Suite 208
Somerset, MA 02725
(508) 402-7095
jennifer@miguellawoffices.com

Respondent's Attorney:

Elizabeth Day, Esq.
Assistant Labor Counsel
Department of Correction
70 Franklin Street, Suite 600
Boston, MA 02110-1300
(617) 727-3300, ext. 167
ejday@doc.state.ma.us

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Peter Gariepy (hereafter "Gariepy" or "Appellant"), is appealing the decision of the Department of Correction (hereafter "DOC" or "Appointing Authority") on July 29, 2004 to terminate him from his position as a Correction Officer I for using excessive force on an inmate who was in restraints and subdued on March 30, 2004. The appeal was timely filed. Hearings were held on September 20, 2006 and September 29, 2006 at the offices of the Civil Service

Commission before Commissioner Bowman. As no written notice was received from either party, the hearing was declared private. Six (6) tapes were made of the hearings. All witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Based on the forty-five (45) documents entered into evidence (Joint Exhibits 1-25; Appellant Exhibits 26-38 & 42-43; and Appointing Authority Exhibits 39-41 & 44-45) and the testimony of the following witnesses:

For the Appointing Authority:

- David Nolan, Director, Policy Development and Compliance Unit;
- Lieutenant Al Saucier, DOC Internal Affairs;
- Steve Ayala, Director, Special Operations Division;
- Adrianne Level, DOC Employee Relations;

For the Appellant:

- Peter Gariepy, Appellant;
- Dana Carling, Correction Officer;
- DOC Lt. Daniel Lussier;

I make the following findings of facts:

1. The Appellant, Peter Gariepy, was a tenured civil service employee in the position of Correction Officer I on March 30, 2004. He had been employed by DOC for over 12 years prior to being terminated on July 29, 2004 for using excessive force on an inmate that was in restraints and subdued on March 30, 2004 at MCI-Cedar Junction. (Exhibit 1: Stipulated Facts and Exhibit 16)
2. The Appellant had no prior discipline. (Testimony of Appellant)

3. On March 30, 2004, the Appellant was working the 8:00 A.M. to 4:00 P.M. shift at MCI-Cedar Junction in Walpole, MA. (Exhibit 1: Stipulated Facts; Testimony of Appellant)
4. On the same date, an inmate broke several Plexiglas windows in Cell #4 of the Health Services Unit ("HSU") where the inmate was being held. (Exhibit 1: Stipulated Facts)
5. At approximately 9:45 A.M. on March 30, 2004, the Appellant was ordered to report to the Health Services Unit for a possible forced movement of the inmate. (Exhibit 8)
6. The Appellant responded to the order and reported to the Health Service Unit with a "Move Team Box" that contains full extraction team equipment. (Testimony of Appellant)
7. Upon arriving at the Health Services Unit, the planned extraction of the inmate (from Cell #4) was terminated as the inmate cooperated with prison personnel and was placed in restraints. (Exhibit 1: Stipulated Facts; Testimony of Appellant)
8. The inmate, who at this point was cooperative and in restraints, was taken by the Appellant to a triage room where he was evaluated by medical staff. No injuries were noted by medical staff at this point. (Exhibit 8; Testimony of Appellant)
9. Following the medical evaluation, the inmate was then placed into Cell #2 (as opposed to Cell #4, where he had broken the Plexiglas) by the Appellant. (Exhibit 1: Stipulated Facts)
10. Lt. Daniel Lussier determined that the inmate needed to be strip searched in order to confirm that he (the inmate) did not have any of the broken Plexiglas on his person. (Testimony of Lussier)

11. The inmate was ordered to proceed to the door of the holding cell in order to remove his restraints so that a strip search could be conducted. (Exhibit 7)
12. The inmate refused to be strip searched and tried to "slip his cuffs". (Testimony of Appellant)
13. The fact that the inmate was trying to "slip his cuffs" was conveyed to Lt. Lussier, who, in turn, called the shift commander, Captain Thomas Borroni, to report the situation. (Testimony of Lussier)
14. Lt. Lussier testified before the Commission that Captain Borroni ordered them to go in and "stop him" (the inmate). (Testimony of Lussier)
15. Lt. Lussier, in turn, ordered the Appellant and Correction Officer Carling into Cell #2. (Testimony of Lussier)
16. At approximately 10:57 A.M., the Appellant, Officer Carling and Lt. Lussier entered the Cell #2. (Testimony of Appellant, Lussier, Carling and Exhibit 11)
17. An issue that permeated the two days of hearings was the fact that the Appellant, when entering the cell, was wearing his regular uniform, as opposed to having the benefit of wearing extraction team equipment and/or having the assistance of a 5-member extraction team that would enter the cell after an "extraction team briefing". Counsel for the Appellant would subsequently argue that this should be considered a mitigating factor when determining if DOC had reasonable justification for terminating the Appellant.
18. Lt. Lussier was subsequently suspended for five days for using poor judgment in not assembling an extraction team before he ordered the Appellant and Officer Carling into the holding cell. Lussier's suspension was overturned at arbitration.

19. Two "Inner Perimeter Security" officers (Officers Rosario and Tosca) were in the Health Services Unit with a video camera on a different matter and were about to leave before Lussier, Carling and the Appellant entered Cell #2. Lt. Lussier ordered them to stay and record the officers while they were in Cell #2. (Testimony of Lussier)
20. The videotape, which includes audio, captures the events which occurred in Cell #2 between 10:56:59 and 11:11:48 on March 30, 2004. The videotape was entered as Appointing Authority Exhibit 11 and was played multiple times during the two days of hearing before the Commission. (Exhibit 11)
21. It is undisputed that at 10:57:40, the Appellant punched the inmate twice. At issue in this appeal is whether or not these punches represented "reasonable force" or "excessive force".
22. DOC regulations state in part, that "under no circumstances shall an employee use or permit the use of excessive force, or use of force as punishment." (Exhibit 11)
23. DOC regulations define "excessive force" as "force which exceeds reasonable force, or force which was reasonable at the time its use began but was used beyond the need for its application." (Exhibit 11)
24. DOC regulations define "reasonable force" as "the force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful order". (Exhibit 3)
25. Examples of force considered "reasonable" under DOC regulations include, but are not limited to, preventing an act which could result in death or serious bodily injury to

himself or another; defending himself or another against a physical assault; moving an inmate who has refused a proper order by an employee; conducting the search of an inmate who has refused a proper order by an employee to submit to said search; and preserving the safety of an employee. (Exhibit 3)

Incident Report Completed by the Appellant Shortly After the Use of Force Incident

26. The Appellant completed a report regarding the March 30, 2004 incident on a DOC computer. The report was entered as part of Exhibit 7, Page 49A. On two different places on the report, it is dated "3/30/04", the same day of the incident. The Appellant testified at the Commission that he completed the report the next day, on the morning of March 31, 2004. Asked during direct testimony if he included "every aspect of this event", the Appellant testified, "it didn't include all the facts that are being disputed today" explaining that he was told at 10:00 A.M. the morning after the incident to get the report in by 11:00 A.M. whether it was finished or not. The Appellant testified that approximately one hour after filling out the report, he was called out to the Superintendent's office and detached with pay. (Testimony of Appellant; Exhibit 7, Page 49A)

27. The incident report completed by the Appellant (dated 3/30/04) contains absolutely no reference to the inmate resisting, spitting or trying to turn his head while on the ground, as later alleged by the Appellant. Moreover, there is no reference to the fact that the Appellant punched the inmate two times. (Exhibit 7, Page 49A)

28. DOC's Use of Force Regulations require an officer's report to include: "(a)n accounting of the events leading up to the use of force; (b) a precise description of the incident and the reasons for employing force; (c) a description of the type of force

used, and how it was used; (d) a description of the injuries suffered, if any, and the treatment given, if known along with attached photographs, if any, and (e) a list of all participants and witnesses to the incident." (Exhibit 3)

29. On March 31, 2004, then-Superintendent David Nolan was conducting his morning meeting with his senior staff at which time he reviewed the videotape of the incident that occurred the previous day. (Testimony of Nolan)
30. Then-Superintendent Nolan observed what he believed was an unjustified use of force and filed an Investigative Services Intake Form, for the purpose of initiating an investigation. (Testimony of Nolan; Exhibit 24)
31. Also on March 31, 2004, then-Superintendent Nolan detached the Appellant, Officer Carling and Lt. Lussier with pay pending DOC's investigation into the use of force. (Exhibit 1: Stipulated Facts)

Interview with Appellant One Week After the Use of Force Incident

32. On April 1, 2004, Lt. Al Saucier, Internal Affairs Unit, was assigned to conduct an investigation into the use of force incident which is the subject of this appeal. (Testimony of Saucier; Exhibit 7)
33. On April 6, 2004, approximately one week after the incident, Lt. Saucier interviewed the Appellant. During this interview, the Appellant stated that the inmate was "resisting" once he was on the floor. (Testimony of Saucier, Exhibit 7)
34. As referenced above, the Appellant did not characterize the inmate as "resisting" in his initial incident report dated March 30, 2004. (Exhibit 7, Page 49A)
35. Also during his April 6, 2004 interview with Lt. Saucier, the Appellant initially told Saucier that he struck the inmate "a couple of times in the face to stop struggling."

When asked where he specifically struck him, the Appellant stated to Saucier, "I think the eye". (Testimony of Saucier, Exhibit 7)

36. During the April 6, 2004 interview, the Appellant also told Saucier, that *after* he punched the inmate, the inmate complied and layed flat on his stomach. (Exhibit 7)

37. Toward the end of the April 6, 2004 interview, Lt. Saucier played the videotape for the Appellant. Upon reviewing the videotape, the Appellant confirmed that he can be seen striking the inmate two times and then described the inmate as "tense" at the time he struck him. (Exhibit 7)

Supplemental Report Filed by the Appellant Shortly After his April 6, 2004 Interview

38. At the conclusion of the above-referenced interview, the Appellant was instructed to write a supplemental report regarding his participation and actions during the use of force incident in question. (Testimony of Saucier and Exhibit 7)

39. The Appellant complied with the request to complete a supplemental report by filing a written memorandum to Superintendent Nolan dated April 6, 2004. (Exhibit 8)

40. In his April 6, 2004 supplemental report, the Appellant, in addition to stating that the inmate was resisting after he was down on the floor, stated, "Inmate was spitting blood while continuously yelling." (emphasis added) The Appellant further stated in the supplemental report that, "I struck him in the face or eye approximately twice to make him stop struggling and to comply with the strip search orders. Inmate then complied with the strip search procedure." (emphasis added) (Exhibit 8)

41. During his prior interview with Lt. Saucier, the Appellant never stated that the inmate was spitting blood. (Exhibit 7 and Testimony of Saucier)

Testimony of Appellant Before the Commission

42. Both the Appellant and fellow officer Carling testified before the Commission that as they entered Cell #2 they were nervous and fearful for their safety, partly because they weren't wearing protective gear, and believed the inmate may have a weapon (Plexiglas). (Testimony of Appellant and Carling)
43. The Appellant testified before the Commission that when he entered the cell, the inmate, "who was acting suspicious" sat down on the bench and "I engaged him around his head and the top of his body; at that point he pushed forward off the bench; he was struggling." (Testimony of Appellant)
44. The Appellant testified that once the inmate was down on the floor, he was not under control and the inmate started screaming about his eye and he (the inmate) had blood running down his face. The Appellant testified that, "I believe my watch scratched his eye". (Testimony of Appellant)
45. The Appellant also testified that, "there was a lot of blood running down his face…blood was flying out of his (the inmate's) mouth; he was yelling and screaming". (Testimony of Appellant)
46. The Appellant then testified that when Lt. Lussier asked for a handcuff key, he (the Appellant) took his left hand off of the head of the inmate, "who was spitting blood everywhere" for a moment to reach his hand back to get the key from his rear pocket. At this point (just before the Appellant punched the inmate at 10:57:40), the Appellant testified that, "<u>that's when the inmate tried to turn his head toward me</u>." Asked during direct testimony to elaborate on this, the Appellant stated, "I thought he was trying to bite me or spit at me…I couldn't allow him to turn his head towards me

to infect me with AIDS or hepatitis or any of that…bite me on the knee…I didn't know if he could have had a weapon in his mouth, but I had to stop him immediately…I struck the inmate two times with my right hand. I handed the cuff key off with my left hand; I tried to regain control with my left hand and then I hit him with my right hand two times." The Appellant testified that he is left-handed. (Testimony of Appellant)

47. As previously referenced, the Appellant never mentioned that the inmate was trying to move his head in the initial March 30, 2004 incident report, the interview with Lt. Saucier or the supplemental report filed with Superintendent Nolan.

48. Asked during direct testimony if the inmate was under control *after* the two punches, the Appellant stated, "he was still not compliant; he was less combative". (Testimony of Appellant)

49. As previously referenced, the Appellant told Lt. Saucier on April 6, 2004 that the inmate "complied and layed flat on his stomach" after he inflicted the two punches. (emphasis added) Further, in his supplemental report dated April 6, 2004 to Superintendent Nolan, the Appellant explicitly stated that after he punched the inmate, "inmate then complied with the strip search procedure." (emphasis added) (Exhibits 7 & 8) While this case centers around whether or not the inmate was compliant *prior* to being punched by the Appellant, the Appellant's testimony regarding the inmate's behavior directly after being punched is one in a series of troubling contradictions regarding the Appellant's recall of what happened while he was in Cell #2 on the morning of March 30, 2004.

50. The Appellant testified that upon removing the inmate from the cell to bring him back to the triage room, he noticed blood on the floor of the cell. (Testimony of Appellant)

Review of the Videotape at the Commission Hearing

51. The videotape of the incident was played multiple times during the Commission hearing and this Commissioner reviewed the tape at least half a dozen additional times subsequent to the hearing. As referenced above, there is no dispute that the Appellant punched the inmate twice at 10:57:40 on March 30, 2004. In dispute is whether or not the inmate was resisting when the Appellant landed the blows.

52. According to the Appellant's testimony before the Commission, the inmate was neither compliant before *or* immediately after he punched him at 10:57:40. The Appellant's testimony can not be reconciled with the videotape evidence. The inmate, who was on the floor, face down, in handcuffs, was not moving before or immediately after Peter Gariepy punched him twice in the face. (Exhibit 11)

Testimony of Other Percipient Witnesses

53. Dana Carling was the other correction officer ordered into the cell on March 30, 2004 and he testified on behalf of the Appellant at the Commission hearing.

54. Carling was suspended for five days because he implemented the wrist restraints on the inmate that day. Carling's suspension was reduced to a written reprimand which would be removed from his file after six months if he received no further disciplinary action during that time.

55. Carling was not a good witness and I give no weight to his testimony. Throughout his testimony, Carling's arms were folded, he rocked nervously in his chair and his answers, tinged with anger, reflected an almost palpable intent to reflect the

Appellant in the best light possible, as opposed to being a thoughtful reflection on what actually occurred in the cell that morning. Even Mr. Carling, however, despite testifying that the inmate was "violently resisting" was unable to identify during a re-playing of the videotape when the inmate was resisting either before or after the Appellant struck him. (Testimony, Demeanor of Carling)

56. Lt. Lussier was also in the cell that morning and he testified on behalf of the Appellant at the Commission. His testimony was just as incredulous as Mr. Carling, even adding an unsubstantiated dimension to the incident which not even the Appellant alleged. According to Lt. Lussier, the inmate "lunged" at the Appellant while he was in the cell, apparently justifying the two punches inflicted by the Appellant. Asked during cross examination why he never mentioned this during his initial report to DOC, Lussier testified that "lunging" and "resisting" are interchangeable terms. Regrettably, I give no weight to this senior officer's testimony. (Testimony, Demeanor of Lussier)

Question of Disparate Treatment

57. Counsel for the Appellant cited two prior DOC disciplinary investigations to illustrate what she believes proves disparate treatment by DOC against the Appellant in this case.

58. The first investigation cited by counsel for the Appellant regarding disparate treatment involves an incident in which then-Superintendent Nolan exonerated a correction officer who punched an inmate while the inmate was in handcuffs. The incident in question is markedly distinguishable from the instant matter as the inmate in the other case cited had successfully grabbed hold of the correction officer's

testicles during a violent struggle. Hence, it was determined by DOC that the correction officer's decision to strike the inmate in order to free himself was an example of reasonable force. (Exhibits 29 and 30)

59. The other disciplinary investigation cited by counsel for the Appellant involved then-Superintendent Nolan himself and an incident that occurred on July 26, 2004. An investigation of that well-publicized incident resulted in DOC's Internal Affairs Department concluding that then-Superintendent Nolan violated DOC's use of force policy. The incident involved then-Superintendent Nolan's order to spray or "hit" an inmate with a chemical agent as part of a larger effort to quell a possible uprising at the institution. Internal Affairs later concluded that the inmate in question was not resisting and that the order to spray him with a chemical agent was a violation of the use of force policy. (Exhibits 36 and 37)

60. Although then-Superintendent Nolan was removed from his duties as Superintendent as a result of the investigation, he was able to remain with DOC in the senior management position he still occupies, Director of Policy Development and Compliance. (Testimony of Nolan)

61. DOC submitted evidence which shows that they have terminated other employees who have been found to have used excessive or unwarranted physical force on an inmate in violation of the Use of Force regulations. (Exhibit 41)

STANDARD FOR REVIEW:

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service

Commission, 43 Mass. App. Ct. 300,304 (1997). *See* Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

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

When the Commission modifies an action taken by the Appointing Authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from partisan political control. Id. at 600. Town of Falmouth v. Civil Service Commission**.** 61 Mass. App. Ct. 796, 801 (2000).

CONCLUSION OF THE MAJORITY (Taylor, Marquis, Guerin, Commissioners)

The majority of Commissioners adopt the findings of fact of Commissioner Bowman, who was the hearing officer regarding this appeal, but respectfully disagree with Commissioner Bowman and Chairman Goldblatt regarding their conclusion, noted below as the conclusion of the minority.

More specifically, the majority concludes that, given the totality of the known circumstances in this case in addition to the disparity of discipline imposed against a DOC senior manager for a similar offense, the Department of Correction has not shown reasonable justification for terminating the Appellant. Rather, the Appellant has proven that a reduced penalty is warranted.

Peter Gariepy, a 12-year veteran of the Department of Correction, had a stellar employment record prior to the incident in question on March 30, 2004. While working the 8:00 A.M. to 4:00 P.M. shift on March 30th at one of the more dangerous correctional facilities in Massachusetts, he was ordered to the Health Services Unit to remove an unruly inmate from a cell where the inmate was breaking plexiglass. Notably, Gariepy responded to the order by bringing a move team box that contained extraction team equipment. By the time the Appellant arrived at the Health Services Unit, the inmate had become cooperative, but had already damaged the cell in question by breaking plexiglass that could potentially be concealed and used as a weapon. As the inmate was cooperative, no extraction team equipment was needed in order to move him from the cell to be examined by a medical professional. After his medical examination, the inmate was placed in a different cell. Lt. Lussier, wanting to ensure that the inmate was not concealing any pieces of plexiglass, ordered the inmate to be strip-searched. Lussier's strip search order did not sit well with the inmate, who began trying to slip his handcuffs. The inappropriate response by senior DOC command staff that directly followed the inmate's attempt to slip his cuffs is at the center of this discipline --and must be considered a mitigating factor in regard to the allegations against the Appellant in this case.

Aware that the inmate was slipping his handcuffs, Lt. Lussier contacted Captain Thomas Borroni, who was in a different location. According to Lt. Lussier, Captain Borroni ordered them to go into the cell and "stop him" (the inmate). Even though a move box with extraction gear was only feet away, having been previously brought to the area by the Appellant, Lussier immediately ordered the Appellant and fellow Correction

Officer Carling into the cell to stop the inmate from slipping his handcuffs, without the benefit of the gear, let alone a full extraction team. There is no dispute that this was a gross error in judgment. Even DOC acknowledged the error, slapping Lussier with a five-day suspension that would eventually be overturned by an arbitrator. Nevertheless, Gariepy and Carling were ordered into the cell at their own peril, with direct orders to stop the inmate from slipping his handcuffs, an act that is indisputably an act of resistance and non cooperation.

Once in the cell, the inmate, who had moved to the back of the cell and sat himself down on a bench, was brought down to the floor of the cell by Gariepy. What happened during the next few seconds, as seen on the videotape viewed by all five members of the Commission during the preparation of this decision, would eventually cost Gariepy his job. While difficult to see, given the chaotic nature of what was happening and the speed at which it happened, the Appellant released one of his hands from the inmate's head in order to pass off keys to Lt. Lussier. At that moment, the Appellant, lacking any protective gear or the assistance of a full-fledged extraction team, punched the inmate twice. The majority defers to Commissioner Bowman regarding his credibility assessment of the Appellant and whether or not the Appellant was telling the truth when he testified before the Commission that the inmate was trying to turn his head toward him after he removed one of his hands from the inmate's head. However, there can be no question, after viewing the videotape, that the Appellant was in a highly dangerous situation, mainly because of DOC's failure to assemble an extraction team, which would have allowed extraction team members, including the Appellant, to wear appropriate extraction equipment lessening the dangers associated with an inmate potentially turning

his head and spitting blood at a correction officer. Inexplicably, DOC appears to have disregarded this obvious mitigating factor when determining the appropriate penalty to impose against the Appellant. To the majority of the Commissioners, DOC's failure to recognize its own part in this debacle as a mitigating factor, shows a bias on behalf of the Appointing Authority that warrants the Commission's intervention and a modified penalty.

The Appellant in this case has also demonstrated, in stark terms, a glaring disparity between the degree of discipline dispensed by DOC against a senior manager for a similar offense. Then-DOC Superintendent David Nolan, who also happened to be the Superintendent who first viewed the videotape in this case and noticed the Appellant punching an inmate, himself was the subject of excessive force allegations a few months after the incident involving the Appellant. DOC found that then-Superintendent Nolan had used excessive force when, as part of an attempt to quell a possible inmate uprising, Nolan ordered the use of a chemical agent against an inmate that DOC determined was compliant at the time of the order. Rather than being terminated, as Correction Officer Gariepy was, Nolan was "demoted" to another management position, "Director of Policy Development and Compliance" for the Department of Correction. DOC's explanation of this disparity has a hollow ring to it, arguing that Nolan owned up to his mistake, as opposed to Gariepy, who DOC asserts was untruthful and tried to cover up his misconduct by failing to mention the incident in question in his initial report. Exhibit 16 is the July 29, 2004 termination letter from DOC to the Appellant in this case. There is absolutely no reference to the termination being directly or indirectly related to untruthfulness on the part of the Appellant. Rather, the letter relates solely to the alleged

excessive use of force by the Appellant, the same offense committed by the individual now serving as DOC's Director of Policy Development and Compliance.

The majority of Commissioners concludes that DOC has not shown by a preponderance of the evidence that termination is warranted in this case. Rather, the Appellant has shown that DOC, in failing to recognize its own negligent role in this matter, has displayed a bias preventing them from recognizing an obvious mitigating factor that must be considered when determining the appropriate discipline. Further, the Appellant has shown that the discipline imposed is not uniform, as shown by DOC's decision to demote, rather than terminate, a senior manager, guilty of violating the very same policy regarding excessive force.

CONCLUSION OF THE MINORITY (Goldblatt, Chairman; Bowman, Commissioner / Hearing Officer in the Instant Appeal)

The minority of Commissioners (Chairman Goldblatt and Commissioner Bowman) adopt the findings of fact and conclude that the termination was justified as they believe it was based on adequate reasons supported by credible evidence and there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the penalty imposed.

For twelve years, Peter Gariepy held one of the most dangerous jobs in Massachusetts – correction officer. At the time of the incident which precipitated the instant appeal, Mr. Gariepy was assigned to MCI Cedar Junction at Walpole, a maximum security prison for male offenders. There is no understating the perils associated with this job nor the gratitude that is warranted to the men and women who perform it.

It is precisely because of the job's inherent dangers, and the paramilitary nature of the organization, however, that rules and regulations must be strictly adhered to in order to maintain order and protect the safety and well-being of DOC employees and inmates. Among the most important regulations promulgated by DOC in this regard are those dictating when a correction officer's use of force against an inmate is considered "reasonable" as opposed to "excessive".

DOC regulations state in part, that "under no circumstances shall an employee use or permit the use of excessive force, or use of force as punishment." DOC regulations define "excessive force" as "force which exceeds reasonable force, or force which was reasonable at the time its use began but was used beyond the need for its application." DOC regulations define "reasonable force" as "the force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to subdue an attacker, overcome resistance, effect custody, or gain compliance with a lawful order". Examples of force considered "reasonable" under DOC regulations include, but are not limited to, preventing an act which could result in death or serious bodily injury to himself or another; defending himself or another against a physical assault; moving an inmate who has refused a proper order by an employee; conducting the search of an inmate who has refused a proper order by an employee to submit to said search; and preserving the safety of an employee.

In the instant case, there is no dispute that the Appellant struck an inmate while the inmate was face down on the floor in handcuffs. The Appellant's justification for punching the inmate has evolved so markedly over time that ithas seriously undermined his credibility regarding his assertion that the inmate was resisting at the time the

Appellant struck him. Within 24 hours of the incident in question, the Appellant submitted a written incident report in which he failed to even mention that he punched the inmate, let alone providing any justification. Mr. Gariepy was a twelve-year veteran of the Department of Correction at the time of the incident. His explanation that he was rushed to write the report and, therefore, wasn't able to capture all relevant details, including the fact that he punched the inmate, is simply not believable. It was only after Mr. Gariepy was placed on administrative leave and informed that he was the subject of a disciplinary investigation that he even acknowledged striking the inmate. During the initial disciplinary interview, conducted approximately one week after the incident, Mr. Gariepy acknowledged that he punched the inmate, but claimed it was necessary as the inmate was "resisting" and that he became "compliant" after he punched him. Shortly after the interview, Mr. Gariepy completed a supplemental report stating, for the first time, that the inmate was "spitting blood". In this supplemental report, he reiterated what he told the investigator, that the inmate became compliant after he punched him. Over two years later, during his testimony before the Commission, Mr. Gariepy, for the first time, testified that he punched the inmate, who was "spitting blood everywhere," because the inmate was trying to turn his head toward him. Further, contrary to his prior statement to the DOC investigator and his own supplementary report, Mr. Gariepy testified before the Commission that even after punching the inmate, he was still not compliant.

All witnesses, including the Appellant, can be excused for recalling events somewhat differently over time, particularly when over two years have elapsed since the incident in question. The Appellant in this case, however, has dramatically changed his account of

what happened in the holding cell that day, thus undermining his defense before the Commission that he only exercised reasonable force on the morning in question. Moreover, the Appellant's current version of events is not supported by the videotape evidence, which clearly shows that the punches were inflicted after the inmate was face down, in handcuffs, not moving. The testimony of the two other percipient witnesses, who both testified on behalf of the Appellant, was not credible and was given no weight. Notwithstanding the lack of candor of these percipient witnesses who testified on behalf of the Appellant, even one of them was unable to identify on the videotape when the inmate was resisting just before or after the Appellant punched the inmate.

Counsel for the Appellant argues that the Commission should consider the fact that the correction officers, including the Appellant, were ordered into the cell without first establishing an extraction team and donning extraction team gear, as a mitigating factor. DOC acknowledges, in retrospect, that establishment of an extraction team would have been a wiser course of action before entering the cell that day. That poor call, on the part of DOC, however, does not change the fact that the inmate in this case was already compliant, face down, in handcuffs, not moving, when the Appellant punched him in the face two times. Moreover, it does not change the fact that the Appellant has offered evolving, contradictory testimony that can not be reconciled with the videotape evidence, confirming that he engaged in excessive force on the morning in question.

Finally, there is the issue of alleged disparate treatment. The first case cited to show disparate treatment missed the mark. In that case, a struggling inmate had managed to grab hold of a correction officer's testicles. The correction officer struck the inmate to break free of the assaulting inmate. The incident couldn't be more distinguishable from

the incident which is the subject of the instant appeal. More troubling, however, was DOC's response in the incident involving then-Superintendent Nolan, the individual who, upon reviewing the videotape in this case, first spotted the Appellant punching the inmate and requested an internal investigation. Only four months later, Mr. Nolan himself would become the subject of a now well-publicized investigation regarding whether he used excessive force against an inmate when he ordered the use of a chemical agent. Mr. Nolan spoke openly and candidly about this incident when he testified before the Commission as a witness for DOC in the instant appeal involving the Appellant. While Nolan believed at the time that the order to use the chemical agent was reasonable and necessary as part of an effort to quell a possible inmate uprising, he has never denied giving the order, and, in his words, has answered all questions honestly and has accepted DOC's determination that his decision that day was an error in judgment. As a result of "owning up" to his actions, Nolan, although removed from his assignment as Superintendent, was able to maintain a management position at DOC lower in rank. Given DOC's record of harsh punishment in response to cases of excessive force, it is hard to square their decision to retain Nolan at the senior management level. Nevertheless, it is the opinion of the minority that the two cases, particularly in light of Nolan's cooperation, forthrightness, and willingness to accept responsibility for his actions, distinguishes his case from that of the Appellant. Moreover, there is absolutely no evidence to show that DOC's decision to terminate the Appellant was based on political considerations, favoritism or bias. In fact, the Appellant, by all accounts, is a well-liked individual who has forged many friendships at DOC. Even those witnesses

testifying on behalf of the Appointing Authority appeared to harbor nothing but goodwill toward the Appellant and his prior work history at DOC.

The Department of Correction terminated the Appellant because he used excessive force against a restrained inmate, an act that adversely affects the public interest. The minority of Commissioners conclude that the termination was justified as they believe it was based on adequate reasons supported by credible evidence and there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the penalty imposed.

FINAL DECISION

For all of the reasons stated in the conclusion of the majority, the Appellant's appeal is hereby ***allowed***, the termination is hereby revoked and the discipline reduced to a 90-day suspension. The Appellant shall be returned to his position without any loss of compensation or other benefits beyond the 90-day suspension.

Civil Service Commission

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Christopher C. Bowman, Commissioner (As to Findings of Fact Only)

By a 3-2 vote of the Civil Service Commission (Goldblatt, Chairman – NO; Bowman, Commissioner – NO; Guerin, Commissioner – YES; Marquis, Commissioner – YES; Taylor, Commissioner - YES) on January 11, 2007.

A true record. Attest:

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Commissioner

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

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:
Jennifer S. Miguel, Esq.
Peter Tekippe, Esq.
Elizabeth Day, Esq.