# COMMONWEALTH OF MASSACHSETTS
# CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
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AARON GILL & SAMUEL RAMOS,
*Appellants*

v.

DEPARTMENT OF CORRECTION,
*Respondent*

**Case Nos:**
D-03-463: GILL
D-03-464: RAMOS

## DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on January 18, 2007 to acknowledge receipt of the report of the Administrative Law Magistrate dated December 8, 2006 and the comments received from the Respondent on January 2, 2007. (Both attached) The Commission voted to adopt the findings of fact of the magistrate, but, based on the findings of facts, respectfully rejects the conclusion of the magistrate to allow the Appellant's appeals. Instead, the Commission concluded that the appeals should be dismissed.

Pursuant to 801 CMR 1.01 (11)(c)(2), if the Commission does not accept the Administrative Law Magistrate's decision, it shall provide "an adequate reason for rejecting those portions of the tentative decision it does not affirm and adopt. However, the Agency may not reject a Presiding Officer's tentative determinations of credibility of witnesses personally appearing. The Agency's decision shall be on the record, including the Presiding Officer's tentative decision, and shall be the final decision of the Agency not subject to further Agency review." Below are the reasons for rejecting the Magistrate's conclusion.

*Commission Reasons for Rejecting Magistrate's Decision*

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).

In the instant case, the Department of Correction ("DOC") disciplined two correction officers, Aaron Gill and Samuel Ramos ("Gill", "Ramos" or "Appellants") for refusing a direct order and encouraging and intimidating others into refusing work assignments and direct orders. Ramos, who had no prior record of discipline, was suspended for ten (10) days while Gill, who had a lengthy discipline record, was suspended for twenty (20) days. Gill Exhibits 31-35 outline Appellant Gill's prior discipline, which began shortly after his probationary period ended, including: a 1-day suspension in 1999 for disobeying an order; a 3-day suspension in 2000 for rule violations including failing to obey a direct order; a 2-day suspension in 2002 for confronting, threatening and swearing at a superior officer; another 3-day suspension in 2002 for a rule violation; and a 5-day suspension in 2003 for sending a threatening and harassing card to a Captain.

Approximately 30 minutes prior to the end of the Appellants' shift on December 23, 2002, an inmate covered his cell with his own feces. The lieutenant on duty sought volunteers to clean up the cell, an admittedly ugly task. Unable to recruit any volunteers, the lieutenant would eventually have to order certain correction officers to perform this task. Finding of Fact #6 in the Magistrate's proposed decision provides the first clear indication of the Appellants' mischief and wrongdoing in this case, stating, "Ramos told CO Johnson…that Lt. Guerard was going to give a direct order that no one would be allowed to leave the unit until the inmate's cell was cleaned. CO Ramos told CO Johnson that everyone was going to refuse to clean the feces. CO Gill was close by and heard some part of the conversation." (emphasis added) The above-referenced Finding of Fact #6 establishes that both Appellant Ramos and

Gill were aware that an order was about to be given by a superior officer to clean the cell in question as well as the intent to refuse that order.

According to Finding of Fact #7, Correction Officer Johnson agreed to clean up the cell, but didn't want other officers to know that he had agreed to do so, lending strong credence to DOC's assertion that Johnson was intimidated by the Appellants during the night in question. While the Commission defers to the credibility assessments of the Magistrate, including that regarding Mr. Johnson's testimony at the Magistrate's hearing regarding these appeals, we can not reconcile the findings of fact with a particular credibility assessment made in this case. Specifically, the Commission believes that the testimony by Johnson at the Magistrate's hearing that Johnson did not feel intimidated by the Appellants during the night in question, needs to be viewed in the very real context of an individual who is not eager to point the finger at fellow correction officers who are still employed by the Department of Correction. Finding of Fact #12 actually confirms that the Appellants sought to intimidate Johnson that night stating, "At some point, CO Ramos and CO Gill passed by Inner Control and CO Ramos asked Johnson if he was staying to clean. CO Ramos told Johnson that he did not have to stay." (emphasis added) It is actually somewhat astounding that Ramos, a correction officer, felt empowered to give such a directive to his fellow correction officer.

According to Finding of Fact #8, "Lt. Guerard came back to CO Gill and said he was giving him a direct order to stay and clean." (emphasis added) Gill, also according to Finding of Fact #8, said, "No, I'm sick and I haven't been trained to clean feces. Plus I'm on light duty not subject to strenuous work." This finding of fact can not be reconciled with the conclusion of the Magistrate that stated in part, "there is not enough evidence to conclude that either (Appellant) refused a direct order to stay and clean feces off the cell." The Commission concludes that an order was indeed given to Gill and he refused. It is axiomatic that when faced with a directive from an employer, employees are required to comply with the directive and then file a grievance, rather than disregarding and/or disobeying the directive and then

filing a grievance. Elkouri & Elkouri, How Arbitration Works, 5th Ed., Bureau of National Affairs, Inc., Washington DC (1997) pp. 28-39.

According to Finding of Fact #15, after Johnson and two sergeants agreed to clean the cell, Lt. Guerard said to several officers waiting in the trap area, including the Appellants, "You guys are all set; you can head out front. You're not getting paid for this time." Appellant Gill, again according to Finding of Fact #15, told Guerard, "We're waiting for the guys who are cleaning the cell to finish so we can leave together. This isn't about the money." The Magistrate concluded that this was not an "order" but rather a "suggestion". The Commission disagrees. It is well established that when a superior officer in a paramilitary operation such as the Massachusetts Department of Correction tells an employee to do something, as Lt. Guerard did in this case, the employees should know it is an order. The Commission concludes that Ramos and Gill were ordered to leave the facility by a superior officer and refused.

For all of the above reasons, the Commission concludes that the discipline against the Appellants was justified as 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.

The Appellants' appeals under docket numbers D-03-463 and D-03-464 are hereby ***dismissed.***

By a 4-0 vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis, Commissioners [Taylor – Absent]) on January 18, 2007.

A true record. Attest.

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Lydia Goldblatt
Chairman

Either party may file a motion for reconsideration 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 MGL c. 30A S. 14(1) for the purpose of tolling the time for appeal.

Under the provisions of MGL c. 31 S. 44, 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 to:

Kimberly Fletcher, Esq.
Stephen C. Pfaff, Esq.
Marcelino LaBella, Esq.