

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ANSELMO GONZALEZ,
Appellant,

v.

CASE NO: D1-13-210

**MASSACHUSETTS
DEPARTMENT OF CORRECTION,**
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein¹

DECISION ON MOTION FOR SUMMARY DISPOSITION

The Appellant, Anselmo Gonzalez, appeals to the Civil Service Commission (Commission), pursuant to G.L.c.22C,§13 and G.L.c.31,§ §41-45, claiming to be aggrieved by the decision of the Massachusetts Department of Correction (DOC), which terminated his employment as a DOC Correction Officer. The pre-hearing conference was held on October 1, 2013 at which time the DOC filed a Motion for Summary Judgment [which the Commission treats as a Motion for Summary Disposition under 801 CMR 1.01(7)(h)] which Mr. Gonzalez opposed on January 17, 2014. The Commission held a motion hearing on February 6, 2014.

¹ The Commission acknowledges the assistance of Law Clerk David Roberson in the drafting of this decision.

UNDISPUTED FACTS:

1. Mr. Gonzalez is a tenured civil service employee who began his employment with DOC on May 24, 1998 as a Correction Officer I. (Stipulated Facts)
2. On January 13, 2010, detectives and other members of the Worcester police arrived at Mr. Gonzalez's residence, which they previously had put under surveillance, in search of Mr. Gonzalez's nephews who were believed to be fugitives.² The police asked Mr. Gonzalez if he had any firearms in his home, and Mr. Gonzalez stated he had one in his bedroom. (DOC's Motion, DOC's Ex. A P-14)
3. The police obtained a warrant to search Mr. Gonzalez's home for firearms and ammunition. The search resulted in the police finding a Glock .40 caliber firearm, loaded with nine (9) rounds of .40 caliber ammunition in his nightstand in his bedroom. (DOC's Motion, DOC's Ex. A P-14)
4. The police interviewed Mr. Gonzalez about the firearms he owned. Mr. Gonzalez answered that he owned the .40 caliber firearm. The police investigated the firearms that Mr. Gonzalez owned and discovered that Mr. Gonzalez also was the registered owner of another firearm (Beretta). (DOC's Motion, DOC's Ex. A P-16)
5. The police, through inquiry made with the federal ATF officials, subsequently learned that Mr. Gonzalez also had a record of purchasing a .22 caliber Beretta handgun on June 5, 2008. Mr. Gonzalez informed the officers that he was no longer in possession of the Beretta and that he had given the handgun to the former owner referred to as "D". (DOC's Motion, DOC's Ex. A P-16)

² Both nephews were wanted in connection to a shooting and murder. The question of whether Mr. Gonzalez was aiding his nephews in avoiding capture is a disputed fact in this case and is not taken into account in this Decision.

6. Mr. Gonzalez stated that on June 5, 2008 he received a call from D and that D explained that he had been arrested while carrying his firearm. Due to his arrest, D's right to carry a firearm was revoked. D asked Mr. Gonzalez to retrieve D's firearm on his behalf from the Webster Police Department. (DOC's Ex. A P-16)
7. Mr. Gonzalez and D met a Webster Police Officer at Sparky's Gun Shop, where Mr. Gonzalez filled out paperwork for transfer of a firearm (ATF Form 4473). Question 11A, on ATF Form 4473 asked, "*Are you the actual buyer of the firearm (s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm (s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm (s) to you.*" Mr. Gonzalez answered the question with a "Yes". (DOC's Ex. A P-17)
8. The following line on the form stated that answering yes to question 11A when you are knowingly not the actual buyer is a felony punishable up to 10 years in state prison. (DOC's Ex. A P-17) Mr. Gonzalez signed the adjoining line stating that he was aware of the punishment attached to accepting ownership of a firearm with the intent of selling or giving the firearm to an unlicensed person. (DOC's Ex. A P-17)
9. Upon leaving Sparky's Gun Shop, Mr. Gonzalez gave D the firearm. (DOC's Ex. A. P.17)
10. D was unlicensed to possess a firearm. (DOC's Ex. A P-21)
11. On January 15, 2010, Mr. Gonzalez and D met with ATF Special Agent Curren and Worcester Police Detective Sabatalo and handed over the firearm (Beretta) that was in D's possession. Both D and Mr. Gonzalez admitted that Mr. Gonzalez knowingly and illegally obtained the Beretta firearm with the intent of giving it to D although Mr. Gonzalez knew D was not authorized to possess a firearm. (DOC's Ex. A P-21)

12. Mr. Gonzalez was charged with two counts of Accessory After the Fact, Improper Storage of a Firearm, and Procuring weapons for Unlawful Use.³ (DOC's Ex. A P-18, Appellant's Opposition)
13. Mr. Gonzalez pled guilty to all four offenses and was sentenced to one (1) year probation. (Ex. A p. 46)
14. On July 11, 2013, DOC sent Mr. Gonzalez a Notice for Charges and Hearing informing him that he was required to attend a hearing concerning the aforementioned charges brought against him for the June 5, 2008 and January 15, 2010 incidents investigated by the Worcester Police. (DOC's Ex. B)
15. The hearing was held on July 24, 2013. Mr. Gonzalez was in attendance and testified at the hearing about his conduct on June 5, 2008 and January 15, 2010. Mr. Gonzalez admitted that he did obtain the firearm for D. (DOC's Ex. C)
16. The DOC Hearing Officer determined, based on testimony from Sgt. Shaw, a member of the DOC's internal affairs unit, Mr. Gonzalez's testimony, police reports and court documents, that Mr. Gonzalez violated General Policy I and Rule 1 of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, which requires, respectively, that all DOC officers to "render good judgment and full and prompt obedience to all provisions of law" and to "give dignity to their positions and be circumspect in personal relationships regarding the company they keep and the places they frequent." (DOC's Ex. C, D)
17. On September 6, 2013, Mr. Gonzalez received the decision from the DOC, stating that he was terminated. (DOC's Ex. B)

³ The Appellant disputes the felonious nature of the Improper Storage of a Firearm and for the purpose of this motion the Respondent does not rely on the two Accessory After the Fact charges.

18. On September 10, 2013, Mr. Gonzalez filed this appeal with the Commission (DOC's motion)

CONCLUSION

Applicable Civil Service Law

A tenured civil service employee may be discharged for "just cause" G.L.c.31,§41. An employee aggrieved by the decision of an appointing authority may appeal to the Commission. G.L. c.31, §43. Under Section 43, the appointing authority carries burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. Id. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000).

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); 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). For the Commission to uphold an appointing authority's decision, it must find, based on the facts, that "there was reasonable justification for the actions 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 (1984); See

Commissioners of Civil Service v. Municipal Court of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003); See McCarthy v. Brookline School Department, 21 MCSR 13, 16 (2008).

Standard of Review

The party moving for summary disposition pursuant to 801 C.M.R. 1.01(7)(g)(3) or (h) in an appeal before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., if, “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Gonzalez], the DOC has presented substantial and credible evidence that Mr. Gonzalez has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that he has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005); cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Statutory Bar

Under G.L.c.125, § 9, “no person who has been convicted of a felony or who has been convicted of a misdemeanor...shall be appointed to any position in the department of correction”. The Commission has generally held that the statutory requirements for obtaining a civil service position also apply as a requirement for maintaining such employment. See Hennessey v. MBTA Police Dep’t, 19 MCSR 383, 384 (2006).

Under G.L. c. 274, § 1, “a crime punishable by death or imprisonment in state prison is a felony.” According to G.L. c. 140, § 131E, anyone using their license with the purpose of purchasing a firearm for the unlawful use by another, or the resale or giving to an unlicensed

person, shall be punished with imprisonment for no less than two and one half (2 1/2) years and no more than ten (10) years in a state prison.

Thus, G.L. c. 125, § 9 bars the employment of a person as a correction officer who has been convicted of a felony. Mr. Gonzalez pled guilty and was sentenced for committing four offenses, including the felony offense of violating G.L.c.140, § 131E. Accordingly, the DOC had just cause to terminate his employment for having been found guilty of that offense.

Admission of Felonious Conduct

While the DOC can rely on criminal felony convictions to terminate the employment of a civil service employee, in an appropriate case, the DOC also may also rely on credible evidence that the employee admitted to felonious activity whether or not the employee was actually found guilty of the offense. See, e.g., City of Boston v. Boston Police Patrolmen's Ass'n, 74 Mass.App.Ct. 379 (2009), rev.den. 454 Mass. 1109. See also Boston Police Dep't v. Suppa, 79 Mass.App.Ct. 1121 (2011) (Rule 1:28 opinion) and cases cited.

Mr. Gonzalez admits to obtaining the Beretta firearm with the intention of turning it over to D. Mr. Gonzalez also admits to falsifying the ATF transfer form when he signed a statement that he was not obtaining the gun for an unlicensed person. Mr. Gonzalez also admits that upon receiving the firearm, he gave the firearm to D with full knowledge that D was not licensed to carry a firearm due to his revocation as a result of a recent arrest.

Mr. Gonzalez proffered no retraction of, and did not proffer any evidence to dispute his admission of these facts. Mr. Gonzalez argued that he never had an opportunity to answer the charges against him because he pled guilty, and, therefore, he is now free to deny those facts at a Commission hearing. This argument is without merit. In sum, the DOC had a reliable basis for concluding that Mr. Gonzalez had engaged in "felonious conduct", namely his admission of that fact, and this prior admission provided the DOC with independent grounds to justify his

termination. Thus, accepting the undisputed facts in the most favorable light to Mr. Gonzalez, the Commission finds that the DOC had reasonable justification to terminate him from his position of Correction Officer for engaging in “felonious conduct”, including making a false affidavit on the firearm transfer form and conspiring with D to violate the firearms laws of the Commonwealth, all in violation of the DOC’s rules of conduct expected of DOC officers.

For these reasons, the DOC’s Motion for Summary Disposition is granted and the appeal of the Appellant, Anselmo Gonzales, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on May 29, 2014.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Mary Yanneth Bermudes Camp, Esq. (for the Appellant)

Amy Hughes, Esq. (for the Respondent)