COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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

MARK J. HOBART,
Appellant

v.

CASE NO: D-07-302

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:	Edward P. Ryan, Jr., Esq. O'Conner and Ryan, P.C. 61 Academy Street Fitchburg, MA 01420
Department of Correction Representative:	Jeffrey S. Bolger Director of Employee Relations Department of Correction P.O. Box 946, Industries Drive Norfolk, MA 02056
Commissioner:	Paul M. Stein

DECISION

The Appellant, Mark J. Hobart, acting pursuant to G.L.c.31, §§41 thru §43, duly appealed a decision of the Department of Correction (DOC), the Appointing Authority, to suspend him for sixty days after finding he posted a message on an internet website threatening a supervisor, in violation of DOC rules and regulations concerning workplace violence and dishonesty. A full hearing was held by the Civil Service Commission (Commission) on June 18, 2008. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered. DOC called three (3) witnesses. The Appellant called one (1) witness and testified on his own behalf. Twenty-six (26) exhibits were received in evidence. The hearing was recorded on three audiocassettes.[1]

[1] The Commission notes that part of initial testimony of DOC Sergeant Pina that recited his prior experience and duties inadvertently was omitted during the recording process.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of DOC Superintendent James T. Walsh, DOC Lieutenant Mark McCaw, DOC Sergeant Jeffrey Pina, DOC Sergeant Wayne Beckwith and the Appellant, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

The Appellant

1. At the time of the incident in question on January 20, 2007, the Appellant, Mark Hobart, was a tenured civil service employee within DOC's employ in the position of Correction Officer (CO) I, assigned to the Lemuel Shattuck Hospital Correctional Facility (Lemuel Shattuck). CO Hobart had been employed by DOC since August 6, 1989. (*Undisputed Facts; Exhibit 16; Testimony of CO Hobart*)

2. Except for the discipline imposed for the incident involved in this appeal, CO Hobart has never been disciplined or sanctioned as a result of any conduct in or out of work. His work record includes numerous commendations and performance evaluations that have consistently rated him at the "meets" or "exceeds/excels" level. (*Undisputed Facts; Exhibit 15; Testimony of CO Hobart*)

3. CO Hobart has been recognized for outstanding performance as "Employee of the Year" on two occasions during his DOC career, most recently in September 2005. (*Exhibits 15, 16*)

4. CO Hobart was selected to serve as a "Superintendent's pick", which is an appointment made by the Superintendent on the basis of an assessment of the individual's trustworthiness, judgment and loyalty and other qualities. (*Testimony of Sup't Walsh*)

5. As a Superintendent's pick, CO Hobart was exempted from having to bid his shift

or job assignment under the applicable union contract. Persons serving in the capacity of Superintendent's picks are sometimes the subject of jealousy among other officers and are sometimes negatively referred to as "suckballs." Superintendent Walsh testified that these officers need to have a "thick skin" as they are from time to time subjected to verbal abuse and harassment from their peers because of their status as a Superintendent's pick. (*Testimony of Sup't Walsh*)

6. On or about January 12, 2007, CO Hobart was notified that he had been selected for promotion to the position of Correction Officer II [Sergeant], effective February 4, 2007. This promotion was "put on hold" for a period of one year, as a result of the investigation and discipline imposed from the incident involved in the pending appeal. At the time of the hearing of this appeal in June 2008, CO Hobart had not yet been promoted, and the Commission infers that he remains in the position of CO I. (*Exhibits 17, 18, 19; Appellant's Proposed Decision*)

Applicable DOC Rules and Regulations

7. The DOC has promulgated "Rules and Regulations Governing All Employees of the Massachusetts Department of Correction" (DOC Blue Book) binding on all DOC personnel, of which CO Hobart acknowledged his receipt. (*Exhibits 5, 6, 10, 13*).

8. The portions of the DOC Blue Book relevant to this appeal include:

> Rule 6. INTERPERSONAL RELATIONSHIPS AMONG EMPLOYEES
>
> "(a) Correctional goals and objectives can best be achieved through the united and loyal efforts of all employees. In your working relationships with coworkers, you should treat each other with mutual respect, kindness and civility, as become correctional professionals. You should control your temper, exercise the utmost patience and discretion, and avoid all collusions, jealousy and controversies in your relationships with co-workers. Unverified information (rumors) should not be conveyed to any person other than your direct supervisor. . . . "
>
> "(b) Do not foster discontent or otherwise tend to lower the morale of any employee, and be particularly discreet in your interest of the personal matters of any co-worker, or when

discussing personal matters of yourself or another. You must not inspect . . . official documents or papers other than that which is necessary in the official performance of your duties."

"(c) The duties assigned to you should demand your entire attention. Prolonged conversations between employees should be kept at a minimum except for that which is necessary in the fulfillment of your duties. When assigned a confidential mission or task you must not discuss same with another employee unless discussion is necessary to complete such task or mission. Be meticulous and circumspect in your conduct and manner when within sight or hearing of an inmate."

"(d) Relations between supervising and subordinate employees should be friendly in aim yet impersonal and impartial to such a degree that no subordinate employee may justly feel themselves favored or discriminated against. . . . .Report all infractions of law, rules and orders to a higher authority."

Rule 19. ADMINISTRATIVE PROCEDURES

"(c) Since the sphere of activity within [the DOC] may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. . . . ."

(*Exhibit 5*)

9. In May 2000, DOC Commissioner Michael Maloney issued a Memorandum concerning "Internet Abuse" that was distributed to all personnel on or about May 26, 2000 (DOC Internet Abuse Memo). The DOC Internet Abuse Memo states:

"I have recently received information which indicates that some [DOC] employees have participated in the anonymous and cowardly act of posting degrading, threatening, and humiliating messages regarding other employees on Internet message boards. This conduct contributes to hostility in the workplace and violates . . . Section 6(a) of the Blue Book . . . that in your working relationships with coworkers, you treat each other with mutual respect, kindness and civility. All allegations will be thoroughly investigated. Please be advised that the Department will prosecute any offensive and disrespectful behavior to the full extent of its authority, both administratively and criminally. Any employee found to have engaged in such conduct will be discipline, up to and including termination."

(*Exhibit 9*)

10. By Executive Order No. 442, dated October 30, 2002, Acting Governor Jane Swift established a policy of "zero tolerance for workplace violence in any form" to include "disruptive or aggressive behavior that causes a reasonable person to be in fear of their own safety or that of a colleague or that causes the disruption of workplace

11. In addition, DOC employees are required to comply with regulations concerning "Prevention and Elimination of Workplace Violence" promulgated pursuant to law and codified in 103 CMR 237 (Workplace Violence Regulations) (*Exhibits 12 & 24*)

12. The Workplace Violence Regulations define "Workplace Violence" as follows:

> "Includes but is not limited to any behavior 1) that communicates a direct or indirect threat of physical behavior, including oral, written, and electronic communications, gestures and expressions; 2) that involves an actual confrontation, including but not limited to, bullying, intimidation, harassment, stalking, concealment of or brandishing a weapon; and physical assault; 3) that damages property that is owned or leased by the Commonwealth; 4) that damages the property of others; 5) that uses Commonwealth resources to perpetrate such acts (i.e., fax machines, electronic mail, telephone, etc.); 6) that causes a reasonable person to be in fear of their own safety or that of a colleague; or 7) causes disruption of workplace productivity."

13. E.O. 442 mandates, and 103 CMR 237 implements reporting and investigation requirements whenever suspected or potential workplace violence come to the attention of any DOC personnel. (*Exhibits 8, 10, 12*)

The Internet Posting Incident

14. For years, DOC staff have used a message board known as VoyForum at www.voy.com to post and view messages concerning work-related matters, which all DOC personnel call the "bitch board".[2] (*Testimony of Sup't Walsh, Lt. McCaw, Sgt.Pina, CO Hobart; Exhibit 14*)

[2] I construe the term "bitch board" in this context as commonly used slang for "a complaint; grumble" or "something unpleasant" and not with taboo or offensive sexual connotation. See, e.g., AMER. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th Ed.2009); OXFORD DICTIONARY OF MODERN SLANG (1996). The Commission is aware, however, that the terminology may be offensive to some. The Commission does not condones its use as appropriate for public employees, either in a public or a workplace setting.

15. The VoyForum message board on which these postings appear is accessible from any personal computer with Internet access. (*Testimony of Sup't Walsh, Lt. McCaw*)

16. DOC personnel are not permitted to access the Internet while on duty or utilize DOC computers to post to the VoyForum message board. (*Testimony of Sup't Walsh, Sgt. Pina; Exhibit 14*)

17. At one point, however, a prior DOC Commissioner authorized DOC managers to view postings on the VoyForum message board in the belief that it was a source of "good intelligence" about DOC matters.(*Testimony of Sup't Walsh*)

18. On January 15, 2007, the following posting appeared on "VoyForum:SHCU", a specific voy.com message board used by DOC personnel employed at Lemuel Shattuck:

> **Subject: Change is in the air Jiff!**
>
> **Date Posted**: *15:24:37 01/15/07 Mon*
>
> **Author**: lenny baxter — Can't wait to throw a party when the SMELL moves on.

19. On Saturday, January 20, 2007, while off duty and using his home computer, CO Hobart posted on "VoyForum:SHCU", immediately below the previously described message. (*Exhibit 14A; Testimony of CO Hobart, Lt. McCaw*) CO Hobart's post on VoyForum:SHCU stated:

> **Subject: THE LAST RAT**
>
> **Date Posted**: *19:13:40 01/20/07 Sat*
>
> **Author**: A C.O. — SEEMS PINA IS NOTHING BUT A BIG CHICKEN SHIT. baaaaaaaaaaaaaaaaaaaaaawwwwwwwwwwkkkkkkk. BACK IN THE OLD DAYS WE USE TO PUT CHICKENS LIKE HIM OVER THE STUMP OUT BACK ON THE FARM. THE AX CAME A COMING.
>
> JUST LIKE NOW JEFF, YOU HIDE BEHIND YOUR DOOR ALL DAY. whoops…..time for an investigation and now your nowhere to be seen.
>
> YOU KNOW WHO I AM.
>
> YOUR DAYS ARE NUMBERED…….asshole!

20. The individual to whom CO Hobart's January 20, 2007 message refers is DOC (then Captain) Sergeant Jeffrey Pina. (*Exhibit 14; Testimony of Sup't Walsh, Sgt Pina, CO Hobart*)

21. On January 21, 2007, the following posting appeared on VoyForum:SHCU:

Subject: WONDER IF WE WILL SEE THE FAT ASS THIS WEEK

Date Posted: *19:30:06 01/21/07 Sun*

Author: AOL — IF THIS GUY MAKES IT IN 2 DAYS INA ROW HE'S BUYING THE SUCKBALL PICKS A TV FOR TJE SUPERBOWL.

(*Exhibit 14A*)

22. The January 21, 2007 message above, referring to "the Fat Ass", appearing immediately following CO Hobart's post, by an unknown party, is believed to be a "shot" at Superintendent Walsh. The message contains the derogatory term described earlier that some DOC officers used to demean the "Superintendent's picks", which include CO Hobart. (*Testimony of Sup't Walsh*)

23. The document introduced in evidence containing these three posts to the VoyForum:SHCU message board appears to be one page in a string of postings then listed on the web page at the time, covering approximately 29 pages in all. (*Exhibit 14A*).

24. These postings are apparently typical of the general tenor of the subject matter that appears on the VoyForum message board used by DOC personnel to vent their gripes or grievances in the most graphic, unprofessional terms. (*Testimony of Sup't Walsh, Lt. McCaw, CO Hobart; Exhibit 14*)

25. Although DOC command seems to be extremely familiar with the voy.com website and its founder, and concedes that the message board is problematic, no specific action has been taken to prevent DOC personnel from using the website's message board when off-duty, perhaps partly because of concerns for employees' First Amendment

. No attempt was made to identify the source of the other two posting immediately prior to and immediately after CO Hobart's posting or any other postings then on the message board. (*Testimony of Sup't Walsh, Lt. McCaw; Exhibit 20*)

26. At some point prior to approximately 8:00 p.m. on January 24, 2007, CO Hobart's post on VoyForum was removed from the web site. The person who removed the posting was not identified, but I find that, by a preponderance of evidence, only the voy.com webmaster or site moderator is able to remove a posting and CO Hobart's post was not removed as a result of specific action initiated by Sup't Walsh or any other DOC personnel. (*Testimony of Sup't Walsh, Sgt. Pina, Lt. McCaw, CO Hobart; Exhibit 14*)

Related On-Going Investigations and Events

27. In January 2007, the DOC had on-going investigations involving complaints by and against Capt. Pina. (*Exhibit 14; Testimony of Sup't Walsh, Lt. McCaw, Sgt. Pina*)

28. DOC Dep. Sup't Burgwinkle reported he caught Capt. Pina smoking on duty in November 2006, which is a violation of DOC rules, triggering an investigation into these charges which has been called the "Smoking I" investigation. (*Testimony of Sup't Walsh*)

29. Capt. Pina was also under investigation for at least two prior complaints, including making inappropriate remarks to a female officer and making inflammatory remarks about Lemuel Shattuck staff. (*Exhibit 14*)

30. At some point in November 2006, Capt. Pina began treatment for what he considered work-related stress and was prescribed medication, which he has taken continuously since that time. (*Testimony of Capt. Pina*)

31. On November 30, 2006, Capt. Pina filed a complaint that Sup't Walsh and Dep. Sup't Burgwinkle were engaged in an unethical and fraudulent scheme involving the

32. On January 9, 2007, Lt. Mark Rose, reported that, while in his presence, Capt. Pina stated that he "will have Officer Mark Hobart and Sergeant Beckwith fired . . .[and] the weasel Deputy Superintendent Burgwinkle and Superintendent Walsh will also be fired." Lt. Rose also reported that, after Capt. Pina made these comments, he stated that if "anyone is looking for me they can find me out in the parking lot smoking." (*Exhibit 26*)

33. On January 23, 2007, Lt. McCaw, assigned to the DOC Special Investigations Unit, interviewed Capt. Pina in connection with the time card investigation against Sup't Walsh and Dep. Sup't Burgwinkle. This interview was tape recorded and has been kept pursuant to the ordinary practice of the DOC in the time card investigation file. (*Testimony of Lt. McCaw, Sgt. Pina; Exhibit 14*)

34. In the course of that interview, Lt. McCaw asked Capt. Pina if he was aware of any other conduct that he considered inappropriate, and Capt. Pina replied that his life had been threatened. (*Testimony of Lt. McCaw, Sgt. Pina; Exhibit 14*)

35. At first, Lt. McCaw was puzzled about what the connection that remark had to the time card investigation. Capt. Pina directed Lt. McCaw to the computer monitor in his (Pina's) office where he showed him the postings described above from the VoyForum:SHCU web page. Lt. McCaw told Capt. Pina to report this matter to Sup't Walsh. (*Testimony of Lt. McCaw, Sgt. Pina; Exhibit 14*)

36. Thereafter, at approximately 2:50 p.m., Capt. Pina proceeded to Sup't Walsh's office where he repeated to Sup't Walsh that his life had been threatened by someone on

37. Approximately five to ten minutes later, Sup't Walsh went to check on the status of the report he had ordered Capt. Pina to prepare and came to learn that Capt. Pina had left the facility for the day without writing the report and without punching out. (*Testimony of Sup't Walsh, Lt. McCaw; Exhibit 14*)

38. The following morning, Capt. Pina submitted a confidential incident report stating that he interpreted the internet posting as a "threat on my life" as well as "a racial slur" and wanted his local police department notified. He also stated that he believed the posting was in retaliation for his having reported that Superintendent's picks were abusing comp time. (*Testimony of Sgt. Pina; Exhibit 14*)

39. At approximately 7:45 a.m. on January 24, 2007, Sgt. Beckwith, encountered Capt. Pina in the hallway of the administration building and informed him that he (Beckwith) needed to interview Capt. Pina regarding the investigation of his smoking on duty (Smoking I) to get his version of the events. After some initial discussion in the hallway, Sgt. Beckwith arranged to meet in Capt. Pina's office to get the required statement. (*Testimony of Sgt. Beckwith; Exhibit 14*)

40. Approximately ten minutes later, Sgt. Beckwith arrived at Capt. Pina's office to find him packing up his desk. Capt. Pina said he was "sick of the Irish Mafia bullshit that goes on around here", he was "out of here until we can figure this shit out" and "People

41. Capt. Pina stayed out on injured on duty (IOD) leave from January 24, 2007 through April 13, 2007. (*Testimony of Sgt. Pina; Exhibit 14*)

42. At some point after his return, Dep. Sup't Burgwinkle reported that he had found Capt. Pina again smoking on duty which initiated what was called the "Smoking II" investigation. (*Testimony of Sup't Walsh*)

43. The upshot of the time card investigation was a determination that the charges were unsubstantiated and no inappropriate conduct had been committed. (*Testimony of Sup't Walsh, Lt. McCaw, Exhibit 14*)

44. The upshot of the investigation of Capt. Pina resulted in his demotion to the rank of Sergeant and transfer to Norfolk MCI. (*Testimony of Sup't Walsh, Lt. McCaw, Sgt. Pina*)

The Investigation of the Appellant

45. On January 24, 2007, after receiving Capt. Pina's report, Sup't Walsh initiated an "intake" that ordered an investigation into the alleged internet threat, which investigation was assigned to Lt. McCaw. (*Testimony of Sup't Walsh, Lt. McCaw, CO Hobart; Exhibit 14*)

46. On Friday, February 2, 2007, Lt. McCaw processed an administrative subpoena to Comcast for information concerning the internet traffic on the voy.com website, which traced the January 20, 2007 posting to an IP address associated with CO Hobart's home computer. (*Testimony of Lt. McCaw*)

47. Dep. Sup't Burgwinkle, acting in the absence of Sup't Walsh on February 2, 2007, placed CO Hobart on administrative leave with pay and "without prejudice" from his CO I position, pending the results of an investigation. A letter to that effect was issued by Sup't Walsh on Monday, February 5, 2007. (*Testimony of Sup't Walsh; Exhibit 14*)

48. By letter dated February 9, 2007, CO Hobart was informed that his promotion to CO II would be "placed on hold due to a pending investigation." (*Exhibit 18*)

49. On February 9, 2007, Lt. McCaw interviewed CO Hobart. Initially, CO Hobart denied he posted the internet message in question. When Lt. McCaw told him that he had obtained evidence from Comcast that the posting emanated from his home computer, CO Hobart stated his wife had made the posting because she was upset that Capt. Pina had been causing trouble for her husband. Only later in the interview did CO Hobart admit that he had made the posting. (*Testimony of Lt. McCaw, CO Hobart; Exhibit 14*)

50. CO Hobart told Lt. McCaw that he posted the message because he was angry with Capt. Pina making "bogus" claims against him (meaning the time card investigation) and getting away with a lot of things (e.g., smoking on duty). CO Hobart said he didn't mean it as a threat or a racial slur and did not intend Capt. Pina any physical harm. He said he had stated that Capt. Pina's "day's are numbered" because Capt. Pina would be disciplined upon the conclusion of the on-going investigation of charges that he had been smoking on duty. (*Testimony of Lt. McCaw, CO Hobart; Exhibit 14*)

51. On March 19, 2007, Lt. McCaw interviewed Capt. Pina at his home. At this time, Capt. Pina stated he first learned of CO Hobart's posting on the morning of January 23, 2007, prior to the interview with Lt. McCaw that afternoon, because someone else called it to his attention while at work, but he didn't know who had posted it. He also said that

52. Capt. Pina stated that, as a black man, the "old days" and getting the "ax" reminded him of the Ku Klux Klan. He also stated that he visited the VoyForum:SHCU web page most every day while on duty as a way of "gauging the climate of the institution" and, while having logged on the website between January 20, 2007 and January 23, 2007, he never noticed the post about him. He stated he was "just surfing" and repeatedly denied ever posting a message himself while on duty, which he know would be "a death nail in his coffin." (*Testimony of Lt. McCaw; Exhibit 14*)

53. Lt. McCaw, personally, saw "no problem" with the content of CO Hobart's post and, having knowledge of the intimate details of the situation did not see the post as a threat of physical harm to Capt. Pina. He also stated that he considered his responsibility to determine not just what he thought, but whether there was a reasonable basis for another person to take the posting as a threat. (*Testimony of Lt. McCaw*)

54. Prior to his interviews, Lt. McCaw determined from examination of data retrieved from DOC network monitoring software that CO Hobart never accessed the VoyForum website while on duty. The data did show, however, that Capt. Pina had accessed that

[3] (*Testimony of Lt. McCaw; Exhibit 14*)

55. Based on this information about Capt. Pina's on-duty use of the internet to access the VoyForum website to view and post messages, Lt. McCaw concluded that there was "no way" Capt. Pina could not have seen CO Hobart's post prior to the morning of January 23, 2007, and I so find. (*Testimony of Lt. McCaw; Exhibit 14*)

56. On March 20, 2007, Lt. McCaw interviewed Sup't Walsh who stated he did not know the identity of the VoyForum moderator and assumed the message was removed because the moderator though it was inappropriate. (*Exhibit 14)*

57. On April 12, 2007, Lt. McCaw submitted a written report of his investigation to Chief John McLaughlin, Office of Investigative Services which made findings that (A) CO Hobart had posted a threatening internet message in violation of DOC Blue Book Rules 6(a) through (d) and DOC Workplace Violence Regulations, 103 CMR 237 and (B) CO Hobart had lied about posting the message several times during his interview in violation of DOC Blue Book Rule 19(c). Lt. McCaw found that CO Hobart had stated he intended no physical harm to Capt. Pina and that the message was in reference to impending discipline Capt. Pina was facing, but did not make any specific findings that he believed or did not belief CO Hobart in this respect. (*Exhibit 14*)

58. As to Capt. Pina, Lt. McCaw's report made the following findings: (A) Capt. Pina lied during his interview when he denied posting a message to the VoyForum website on January 22, 2007 when the "evidence clearly established that he did", in violation of

[3] The content of the message was not produced, but Lt. McCaw's report describes it as continuing information about the job duties of a correctional officer which Capt. Pina said he posted "in response to other disparaging messages on the website".(*Exhibit 14*)

DOC Blue Book Rule 19(c); (B) Capt. Pina inappropriately used the DOC network to access the VoyForum website and other websites on numerous occasions and posted a message while on duty in violation of DOC Internet Procedures, 103 CMR 757 and DOC Policy on Information Technology System, 103 CMR 756; and (C) Capt. Pina's allegation that Sup't Walsh compromised the investigation by having the message removed on or about January 24, 2007 was not substantiated, nor was there any indication of criminal activity associated with the removal of the message. (*Exhibit 14*)

59. On April 26, 2007, after an executive review of Lt. McCaw's report, Dep. Sup't Burgwinkle concurred in the findings and referred matter for a Commissioners' hearing as to both officers.[4] (*Exhibit 14*)

60. The Commissioner's hearing as to CO Hobart was held on July 13, 2007 before Joseph Santoro, DOC Labor Relations Advisor, serving as the Commissioner's designee. CO Hobart was represented by his union which asserted that his actions were free speech protected under the First Amendment as "expression" of thoughts and frustration concerning a matter involving a governmental entity, posted for everyone to see and be able to sense his "frustration at the system", and not to confront or threaten Capt. Pina. The Hearing Officer found that CO Hobart was "extremely sorry for posting the remarks on the message board." (*Exhibit 14*)

61. Capt. Pina testified at the Commissioner's hearing that the message scared him because the references to getting taken "out back" and the "old days' reminded him of the Ku Klux Klan, and he took it as a threat on his life. He also stated that Sup't Walsh had

[4] Dep. Sup't Burgwinkle's executive review refers to CO Hobart as "Sergeant Hobart". There was no evidence that this document was delivered to CO Hobart and all other documentation clearly infers that the promotion of CO Hobart to Sergeant (CO II) had been held in abeyance pending the investigation. (*Exhibit 14*) I do not draw any inferences to the contrary solely from Dep. Sup't Burgwinkle's executive review.

authorized him to access the VoyForum website on duty. (*Exhibit 14*)

62. Sup't Walsh testified at the Commissioner's hearing that he interpreted CO Hobart's posting to relate to the pending investigation of Capt. Pina and did not view the posting as a "direct or indirect threat" towards Capt. Pina. Sup't Walsh denied giving permission, formal or implied to access the message board while on duty. (*Exhibit 14*)

63. The Hearing Officer found: "Although, I do not believe CO Hobart had any intention of taking the life of Captain Pina, the message in itself implies a threat" that Capt. Pina believed to be "real". The Hearing Officer stated that the "context of the message and how it was delivered meets the prerequisites to show a violation as charged and, therefore, constitutes hostility in the workplace". (*Exhibit 14*)

64. On August 17, 2007, based on the Hearing Officer's findings, Acting Commissioner Duval imposed a 60 day suspension upon CO Hobart for violation of DOC Blue Book Rules 6(a) thru (d), 19(c), and DOC Workplace Violence Regulations, 103 CMR 237, which he served from August 20, 2007 through November 12, 2007; and, in addition, "in light of the seriousness of the offense" issued a "final warning" that any "further actions of this type" warranted termination from employment. (*Exhibit 14*).

65. This Appeal ensued. (*Exhibit 1*)

Evidence Presented to the Commission

66. Sup't Walsh is a career DOC professional with 28 years experience including service as the Superintendent at several DOC facilities, including two tours at the Lemuel Shattuck, most recently beginning in 2004. His testimony and demeanor as a witness leads me to credit as true the facts and beliefs to which he testified, much of which is

67. Sup't Walsh had nothing but high praise for CO Hobart, indicating that his performance up to the events in question had "no blemish at all" and that CO Hobart had his complete trust as a loyal and good employee who exercised good judgment. He clearly understood the frustration CO Hobart felt from the actions of Capt. Pina and personally saw the internet posting as venting, and not a threat of any physical harm. He testified that CO Hobart previously had never engaged in anything that hinted of sarcasm toward Capt. Pina or any other DOC staff, and treated everybody professionally. (*Testimony of Sup't Walsh*)

68. Lt. McCaw is another consummate career DOC professional, who has conducted over 1000 disciplinary investigations. He has considerable knowledge about the VoyForum website. His testimony appeared sincere and honest. I credit his testimony as completely truthful. (*Testimony of Lt. McCaw*)

69. Neither Sup't Walsh nor Lt. McCaw took CO Hobart's posting as posing a serious threat, knowing the circumstances surrounding it. I infer that they both were troubled by what they lawfully could do about the VoyForum website and the fact that DOC personnel were airing workplace grievances, often in crudely expressed form, on a public website that is accessible by anyone and is not secure. I also infer that they concluded since Capt. Pina <u>said</u> he took the posting as a threat, his <u>*subjective*</u> belief, alone, was sufficient grounds to allow the DOC to consider the posting as a threat of workplace violence within the meaning of DOC rules and regulations. (*Testimony of Sup't Walsh, Lt. McCaw; Exhibit 14*)

70. Sergeant Beckwith is a sixteen year DOC veteran and a black male who once lived in the American South. He testified that he did not take CO Hobart's posting as a threat or as a racial slur and did not see anything in the posting that raised any specter of the Ku Klux Klan. He read the reference to the chickens out back getting the ax as a metaphor for getting fired. He described CO Hobart as a "consummate professional" whom he had never known to direct any threats or racial epithets toward coworkers, but he did state that CO Hobart's posting was "borderline" in term of the civility required by DOC Blue Book Rule 6(a). I credit Sgt. Beckwith's testimony as truthful. (*Testimony of Sgt. Beckwith*)

71. CO Hobart presented as a very well-spoken, sincere witness. His prior employment record at DOC is impeccable. In all material respects, his testimony was generally consistent with his prior statements during the investigation and Commissioner's hearing and his demeanor before this Hearing Commissioner had all the indicia of someone who was telling the truth. CO Hobart acknowledged his prior acts of untruthfulness and showed sincere remorse for his conduct and gave convincing assurances that he would never repeat the same mistake. (*Testimony of CO Hobart, Exhibits 14, 15 &17*)

72. I find that CO Hobart was truthful in stating that he had no intention of causing any physical harm to Capt. Pina and that it "never entered his mind" that the posting would be treated as a threat or any other violation of DOC rules and regulations that could subject him to disciplinary action. (*Testimony of CO Hobart*)

73. This Hearing Commissioner draws very different inferences about the testimony given by Sergeant Pina. His testimony did not carry the ring of truth and candor that I

74. In particular, I find it incredible that Capt. Pina would have been put in fear of his life by seeing CO Hobart's posting, yet wait hours (or even days) until he was being interviewed on the time card investigation before mentioning to anyone, and, then, abruptly leave work without filing a follow up report as Sup't Walsh ordered. I also find it hard to believe that the language in CO Hobart's post would trigger severe emotional distress in the mind of a seasoned DOC superior officer such as Capt. Pina. (*Testimony of Sup't Walsh, Lt. McCaw, Sgt. Pina; Sgt. Beckwith; Exhibits 14 & 25*)

75. To the contrary, I find that testimony to be disingenuous and self-serving hyperbole. I find that Capt. Pina's motivations for belatedly complaining about the posting, and whatever anxiety or stress he claimed he experienced, are more likely due to the cumulative impact of the pre-existing charges of misconduct then weighing on him, as well as his knowledge that he had made unfounded retaliatory allegations against Sup't Walsh, Dep. Sup't Burgwinkle, CO Hobart and others, all of which anxiety and stress (by his own admission) caused him to seek medical attention long before and long after

76. I find that CO Hobart's posting was neither meant as a threat of any physical violence nor was Capt. Pina ever at risk of violence. There was no substantial credible evidence that Capt. Pina had anything to fear in the way of harm to his person from CO Hobart (or any other DOC officer). I also find that the posting was not racially motivated. (*Testimony of Sup't Walsh, Lt. McCaw, Sgt. Beckwith, Sgt. Pina, CO Hobart; Exhibits 12, 14, 15 & 24)*)

77. I do find, however, that the posting was an insensitive, intentional, anonymous and cowardly act of publicly posting a disrespectful, uncivilized and degrading message about a fellow DOC employee that was meant to be seen by him and his peers, and that CO Hobart knew or should have known his action would offend and humiliate Capt. Pina. That conduct does justify a finding that CO Hobart violated the DOC Blue Book Rules 6(a) through (d) and the DOC Internet Abuse Memo. (*Exhibits 5 & 9; Testimony of CO Hobart*)

78. I also find that CO Hobart admitted that he was less than truthful within the meaning of DOC Blue Book Rule 19(c) in his original answers to Lt. McCaw during his interview on February 9, 2007, before he took full responsibility for the posting. He candidly admitted these misrepresentations to the Commission and has been otherwise forthcoming and truthful in all other respects. (*Testimony of Lt. McCaw, CO Hobart*)

Evidence of Disparate Treatment

79. The DOC presented no evidence that any DOC personnel had been disciplined in any way for posting or viewing messages on the VoyForum website, whether or not

80. The message posted immediately above CO Hobart's message was a derogatory and offensive message which was directed at Sup't Walsh, which he took as a direct "shot" at him, yet no investigation of this anonymous posting was initiated. (*Testimony of Sup't Walsh, Lt. McCaw; Exhibit 20*)

81. The disciplinary records in evidence pertaining to dozens of other violations of DOC Blue Book Rules 6(a) thru (d) and 19(c), which span the period from approximately 2000 to 2008, reveal that most instances of a violation of those Rules resulted in discipline ranging from reprimands to suspensions of one to fifteen days even when the violations involved threats on duty, face to face or coupled with acts of physical violence, insubordination or other outbursts. In some cases only transfers were ordered. In a number of cases the discipline was imposed on the condition that it could not be used as the basis for denial of any future promotion. (*Exhibit 20*)

82. In one 2007 case, a correction officer was disciplined with a 3-day suspension and transfer for violating the same rules as CO Hobart, under circumstances involving actual physical and verbal threats of two officers on DOC premises on multiple occasions and being untruthful in the investigation, (*Exhibit 21; Testimony of Sup't Walsh, Lt. McCaw*)

CONCLUSION OF THE MAJORITY (HENDERSON, STEIN, TAYLOR)

Summary

The preponderance of the evidence does not establish that CO Hobart violated the DOC Workplace Violence Regulations, but the evidence is sufficient to justify severe discipline upon him for extremely unprofessional conduct in violation of DOC Blue Book

Rules 6(a) thru (d). In addition, the undisputed evidence established just cause to discipline CO Hobart for being less than truthful in his initial answers to questions posed on him in the investigation of the charges against him, a violation of DOC Blue Book Rule 19(c). Since the 60-day suspension was based, in part, on the unjustified charge of workplace violence, and the totality of other mitigating circumstances render that penalty grossly disproportionate to discipline imposed by DOC upon other officers for violations of the same Blue Book rules, including many involving more egregious behavior than CO Hobart committed in this case, the Commission Majority exercises its discretion to modify the discipline to a 30-day suspension, 25 days to be deemed held in abeyance; if CO Hobart been responsible for no other violations of DOC rules and regulations for the duration of this appeal, the additional discipline will be remitted and the suspension may not be used as the basis for any future promotion or progressive discipline.

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*)

Under Section 43, the Commission must "conduct 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).

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 Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "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).

> *The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,'* in order that he may make the necessary finding. . . .*[I]f on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined.* The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) 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) It is the function of the hearing officer to determine the credibility of evidence presented through witnesses who appear before the Commission. See 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).

Workplace Violence

Every civil service employee is entitled to a workplace that is reasonably free of violence. The Commission Majority stands firmly behind the Governor's Executive Order 442 and fully supports the DOC's right to strictly enforce its Workplace Violence Regulations to prevent acts that are deemed in its sound discretion to present an unacceptable risk of harm to staff, inmates and visitors while on DOC premises. The Commission Majority concludes, however, that, as applied to CO Hobart, the application of the DOC Workplace Violence exceeds the bounds of sound discretion and intrudes into the realm of unlawful, arbitrary and capricious punishment, and, therefore, violates CO Hobart's rights under the basic merit principles of the civil service law.

To be sure, it is entirely appropriate for an Appointing Authority to exercise sound discretion to prevent a risk of violence that the Appointing Authority may reasonably believe is unacceptable, and that is precisely how the Commission reads the Governor's Executive Order 442 and the DOC Workplace Violence Regulations. It is one thing, however, to rely on the sound discretion of an Appointing Authority to define what reasonably may be perceived as a threat of workplace violence, but it goes too far to sustain discipline decisions solely on the subjective whim of the alleged victim that he has been put in fear of his safety, when all the other credible, objective evidence is to the contrary.

Here, no evidence (save for discredited testimony from Jeffrey Pina as to his own state of mind) supports an inference that anyone thought CO Hobart's posting amounted to a threat of harm. All other witnesses before the Commission, and the first-level investigation and Commissioner's hearing by the DOC, uniformly saw the message as a harmless, sarcastic poke at Capt. Pina that, knowing the individuals involved and the factual context, was not to be taken literally. Although the posting is problematic for other reasons described below, the Commission Majority concludes that the preponderance of evidence does not establish that it represented a threat, real or perceived, under the terms of the DOC's Workplace Violence Regulations.

Racial Discrimination

Although Capt. Pina alleged that he took CO Hobart's posting as a "racial slur", the DOC investigation did not make any findings that CO Hobart's actions were racially motivated and the reasons for the DOC Commissioner's decision to impose discipline did not include a violation of the DOC rules and regulations on employment discrimination.

Accordingly, for that reason alone, any charges of alleged racial discrimination cannot now be raised as a reason to justify discipline in this case. See M.G.L.c.31, §41. Moreover, there was no credible, substantial evidence that CO Hobart harbored any racial animus against Capt. Pina. No other DOC personal took CO Hobart's posting as a racial slur. Indeed, the evidence established Capt. Pina made use of far more explicit ethnic epithets on occasion (i.e. "Irish Mafia"). Even assuming a racially inappropriate meaning to these statements, evidence of one stray remark is generally not proof of discrimination, especially when the purportedly offended party is a participant in equally bad behavior. See, e.g., Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673 (1993) (an offensive "culture of profanity" existed in the workplace, in which the plaintiff participated, was not sexual harassment); Prader v. Leading Edge Products, Inc., 39 Mass.App.Ct. 616, 619-20 (1996) (anti-discrimination law is not a "clean language act").

Unprofessional Conduct

The Commission Majority knows the job of correction officer is arduous and requires an advanced measure of self-control and spirit of structured teamwork expected of members of a paramilitary organization such as the DOC. In furtherance of this mission, the DOC Blue Book justly demands unconditional trust and truthfulness from correction officers as well as requires that they be held to a high standard of civility and respect in their interactions with other staff, inmates and visitors. DOC Rule Book Rules 6 and 19.

CO Hobart was fully aware of these obligations. Although he meant no harm, he surely knew or should have known that ridiculing Capt. Pina, calling him a "rat" and a "chicken shit" whose days were numbered and would soon get the "ax", although meant in jest, could be viewed as insulting and provocative from Capt. Pina's perspective. As a

Superintendent's pick and aspiring Sergeant himself, CO Hobart should be expected to be a role model who knows that when he lowers his standards, his actions also reflect adversely on the DOC and all of his superiors. The fact that CO Hobart's initial response to being caught was to deny responsibility confirms he knew what he had done was seriously wrong. The DOC has established that it was fully justified to discipline CO Hobart for his disrespect for the rules and his untruthful attempt to cover up his action.

CO Hobart argues that the 60-day suspension and loss of his promotion amounted to unreasonably severe and disparate punishment for the misconduct he committed. He requests that the Commission exercise its discretion to modify the discipline to a three-day suspension. The Commission Majority agrees that the 60-day suspension is unduly severe and essentially unprecedented and, for the following reasons, will order a modification of the penalty in this case.

First, the penalty imposed by DOC presumed a violation of the workplace violence regulations, which, as explained above, was not justified. To the extent that the discipline reflected this erroneous application of the DOC Workplace Violence Regulations, a modification of the discipline is appropriate.

Second, CO Hobart's transgression was an isolated episode in an unusually volatile controversy into which he had been drawn by Capt. Pina's false accusations against him and against his Superintendent. While there can be no excuse for throwing fuel on the fire, a 60-day suspension for a first offense by an officer with an otherwise stellar record over his 18-year career does appear especially harsh. Indeed, the evidence contains many other examples of far lesser discipline for similar and lesser offenses. The typical

discipline for violation of Blue Book Rules 6 and/or 19 (even when workplace violence is involved) seems to be in the range of 5 to 15 days.

Third, CO Hobart made a convincing case that he had "come clean", he is truly sorry for his transgression, and he will never permit it to happen again. While post-hoc rationalization often can be self-serving, in this case, CO Hobart's remorse and evidence of his rehabilitation rings true. By force of circumstances, more than two years have elapsed since the episode in question. If CO Hobart had not truly learned his lesson, that trait would likely have become apparent by now. Under the merit principle, discipline is meant to rehabilitate more than to punish; thus, the convincing evidence of a minimal risk of recidivism in this case is a factor that the Commission Majority has considered in its choice of mitigation of discipline.

Fourth, the application of the DOC Workplace Violence Regulations to the off-duty posting of remarks on a public internet website do present a gray area of concern for balancing the rights of employees and employers to a violence-free work place with the rights of all citizens under the Constitutions of the United States and the Commonwealth of Massachusetts to freely express their opinions, on matter of public (as opposed to personal) interest. See generally Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951 (2006) (5-4 decision); Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968); Donahue v. Staunton, 471 F. 2d 475 (7th Cir. 1972) (2-1 decision), cert.den., 410 U.S. 955, 93 S.Ct. 1419 (1973).

Prior to CO Hobart, the DOC appears to have shown considerable ambivalence towards restraining the culture at DOC that condoned the use of the VoyForum website as a "bitch board" for employee grievances that would clearly be intolerable in any other

workplace context. See Duquette v. Department of Correction, 19 MCSR 337 (2006) (racial and sexually offensive cartoon posted on DOC premises grounds for termination) No discipline appears to have been imposed for postings made on the site, no matter how offensive. See Exhibit 20; cf. Araujo v. Department of Correction, 17 MCSR 59, reh'g.den., 17 MCSR 114 (2004) (lewd poem about female correction officer in connection a pending discipline of her was posted on MCI Concord message board without apparent consequence) Whether due to constitutional law concerns or for other reasons (such as using the message board as a management tool to gain "good intelligence"), the DOC appears to have been an unwitting participant in promoting the the VoyForum as a "no-holds-barred" message board. The Commission Majority concludes that, the long history of prior ambivalence in addressing the issue and the constitutional uncertainties that motivated all parties concerned is another factor that should be taken into account in assaying the appropriate level of discipline. It was arbitrary and unfairly disparate treatment to summarily single out CO Hobart, in the first instance, for severe, unprecedented punishment, when the DOC has let pass so much other similar, and even more egregious postings for so long, especially, as noted, for a first offense and without any prior attempt at progressive discipline.

The VoyForum message board, and the culture at DOC which sustained it, is plainly intolerable. The Commission Majority does applaud the DOC for acting to dissuade such inappropriate behavior, that is clearly inconsistent with the goals of professionalism and respect demanded of its employees, and agrees that, in the future, DOC is warranted to treat misuse of the VoyForum message board as a very serious offense. The Commission Majority encourages the DOC, together with appropriate bargaining unit representatives,

and, perhaps, the Human Resources Division, to continue to pursue acceptable, uniformly applied policies that will bring this highly unprofessional and unproductive engine of disruption under firm and effective control. Not only does the practice reflect poorly on the officers who make use of the VoyForum message board, it erodes public perception about all civil servants generally.

There must be ways, within the confines of applicable constitutional principles and civil service law, to permit employees to let off steam and resolve workplace conflicts so that employees do not feel permitted or obliged to air these petty grievances in such an offensive and public manner. Surely, there are limits to what the First Amendment condones. Just as there is no freedom of expression to shout "FIRE", in jest, in a crowded theater or to coerce, threaten or intimidate another person, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs" and "while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.' " Garcetti v. Ceballos, 547 U.S. 410, 420, 126 S.Ct. 1951, 1959 (2006); Connick v. Myers, 461 U.S. 138, 149, 103 S.Ct. 1684, 1692 (1983)

While framing the specifics of such a policy is beyond the scope of this Commission, and rests with the sound discretion of the appointing authority in the first instance, we note that the case law gives governmental employers considerable latitude to regulate the public actions of its employees. See, e.g., Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690 (1983) ("when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to

review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"); Pickering v. Board of Education, 391 U.S. 563, 570n3, 88 S.Ct. 1731, 1735 (1968) (envisioning "certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them"). See also Garcetti v. Ceballos, 547 U.S. 410, 422-24, 126 S.Ct. 1951, 1960-61 (2006) ("our precedents [afford] government employees sufficient discretion to manage their operations. . . . A public employer that wishes to encourage its employees to voice concerns privately retains the option to institute internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.")

The Commission Majority will support appropriate action taken by the DOC in the future or any other public employer that hews to these principles. Thus, while the mitigating circumstances in this case justify modification of the discipline of CO Hobart, we will have no reservation about upholding DOC's appropriate enforcement of violations of the Internet Abuse Policy with strong measures up to and including termination in the future.

RELIEF TO BE GRANTED

For the reasons stated above, the appeal of the Appellant, Mark Hobart, is hereby ***allowed in part.*** The Commission Majority exercises its discretion to modify the discipline imposed on the Appellant to a 30-day suspension, 25 days of which are to be deemed held in abeyance for the duration of this appeal and to be expunged provided CO Hobart has not been found responsible for any other violations of DOC rules and

regulations during that period. Furthermore, in the absence of any such violations, the 5-day suspension may not be used as the basis for any future promotion or progressive discipline. The DOC will return to CO Hobart all compensation and other rights to which CO Hobart is entitled consistent with this Decision.

Civil Service Commission

Paul M. Stein
Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [NO]; Henderson [AYE], Marquis [NO], Stein [AYE] and Taylor [AYE], Commissioners) on July 23, 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:
Edward P. Ryan, Jr. (for Appellant)
Jeffrey S. Bolger (for Appointing Authority)
John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARK HOBART,
Appellant

v. D-07-302

DEPARTMENT OF CORRECTION,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves a 60-day suspension imposed on the Appellant, a correction officer at the Massachusetts Department of Correction (DOC).

The following facts are undisputed.

The Appellant posted the following comments on a website regarding a black superior officer:

> **Subject: THE LAST RAT**
>
> **Date Posted**: *19:13:40 01/20/07 Sat*
>
> **Author**: SEEMS PINA IS NOTHING BUT A BIG CHICKEN SHIT.
> A C.O. baaaaaaaaaaaaaaaaaaaaaawwwwwwwwwwkkkkkkk. BACK IN THE OLD DAYS WE USE TO PUT CHICKENS LIKE HIM OVER THE STUMP OUT BACK ON THE FARM. THE AX CAME A COMING.
>
> JUST LIKE NOW JEFF, YOU HIDE BEHIND YOUR DOOR ALL DAY. whoops…..time for an investigation and now your nowhere to be seen.
>
> YOU KNOW WHO I AM.
>
> YOUR DAYS ARE NUMBERED…….asshole!

When first confronted about this posting, the Appellant lied to DOC investigators and denied that he was responsible for the posting. When DOC investigators told the Appellant they had verified via an IP address that the posting came from his home computer, the Appellant lied again and blamed his wife for the posting.

The target of this posting told DOC investigators that he felt threatened by the posting and that, as a black man, the reference in the posting to the "old days" and getting the "ax" reminded him of the practices of the Ku Klux Klan.

After an investigation and hearing regarding this matter, DOC concluded that although the Appellant did not intend to take the life of Captain Pina, the message implied a threat that Captain Pina believed to be real and that the context of the message and how it was delivered constituted hostility in the workplace. As a result, DOC suspended the Appellant for sixty (60) days and issued him a final warning for violating various rules regarding the interrelationships among employees and workplace violence.

After a hearing before the Civil Service Commission, the majority has decided to reduce the sixty (60)-day suspension and final warning to a five (5)-day suspension assuming that the Appellant has not engaged in any other misconduct in the past two years. The majority decision makes the following findings or conclusions:

- The Appellant's posting was not racially motivated (Finding 76);
- It is "hard to believe" that the language in the posting would trigger severe emotional distress in the mind of a seasoned DOC superior officer such as Captain Pina (Finding 74);

- Captain Pina did not have anything to fear in the way of harm to his person and DOC's charge of workplace violence was unjustified (Finding 74 and Majority Conclusion);
- A 60-day suspension for a first offense by an officer with an otherwise stellar record over his 18-year career is especially harsh (Majority Conclusion);
- There are many other examples of far lesser discipline for similar and lesser offenses; (Majority Conclusion);
- The "minimal risk of recidivism" and the Appellant's show of remorse at the Commission hearing justifies a reduction in the discipline imposed (Majority Conclusion).

I dissent for the following reasons.

First, I reach the reasonable conclusion that the Appellant's posting, which stated: "Back in the old days we use to put chickens like him over the stump out back on the farm. The ax came a coming", had racial overtones. There is no place for such racially biased comments in the modern workplace. (See Duquette v. Dep't of Correction, 19 MCSR 337 (2006). (Commission upheld the termination of a correction officer for creating an offensive cartoon about a superior officer with racial overtones.) (See also Blais v. Framingham, 20 MCSR 642, 647 (2007) (Commission upheld the suspension of a police officer who asked an African-American teenager if he was "fighting over the last piece of fried chicken".)

Second, while I defer to the credibility assessments of the hearing officer, I disagree with his conclusion that it was "hard to believe" that this posting would trigger emotional distress by Captain Pina or that he would feel threatened by the posting. To

the contrary, I find it difficult to believe that any reasonable person would not be distressed by the racial overtones of this posting, including the target of the posting. Further, I find it reasonable that Captain Pina would feel threatened by a posting which ends with an ominous message which stated, "You know who I am. Your days are numbered…..asshole!" For this reason, I also disagree with the majority's conclusion that DOC's workplace violence policy is not applicable here.

Third, it was an error for the majority to justify a modification of the penalty imposed here because of the Appellant's 18-year career at DOC. It is precisely because of the Appellant's long tenure, training and experience at DOC that he should have understood, at the time, that his conduct was inappropriate and that lying to DOC investigators – twice – was also inappropriate. Similarly, it was an error to reduce the penalty imposed at the time because of the purported remorse the Appellant displayed at a subsequent hearing before the Commission and the "minimal risk of recidivism".

I also disagree with the majority's conclusion that the Appellant was subject to disparate treatment and I believe the majority has misapplied when a finding of disparate treatment can justify the Commission's intervention in the form of a dramatic reduction in the penalty imposed, such is the case here.

The Supreme Judicial Court recently addressed this issue in Boston v. Boston Police Patrolmen's Ass'n., 443 Mass. 813 (2005), a case in which an arbitrator overturned the termination of a police officer and modified the penalty to a one-year suspension. The arbitrator had based her modification of discipline in part on evidence "that, under the Department's current and immediate past leadership, police officers found to have engaged in similar or more serous misconduct had received penalties short of

termination." Id., at 817. The Supreme Judicial Court overruled the decision of the arbitrator stating:

> "…That other police officers may have received lesser sanctions for their serious misconduct avails nothing here. Each case must be judged on its own facts, and the factual record in those cases is not before us… Nor do we credit the association's argument that the prior dispositions worked as an estoppel of the department's termination in this case. Leniency toward egregious police misconduct in the past (assuming leniency occurred) cannot lead an officer to commit reprehensible actions in the expectation that he will receive a light punishment." 443 Mass. 813, 822, n.9 (2005)

Also, in Downer v. Burlington, 19 MCSR 411 (2006), the Commission expressly rejected the claim that the Town's prior imposition of a five-day suspension on a public works manager for a racist comment would insulate a police sergeant from demotion for similar behavior.

Finally, I am unable to reconcile the majority's finding that the Appellant's posting was an "insensitive, intentional, anonymous and cowardly act of publicly posting a disrespectful, uncivilized and degrading message about a fellow DOC employee that was meant to be seen by him and his peers" with their decision to dramatically reduce the 60-day suspension to five days.

For all of the above reasons, I respectfully dissent.

_____

Christopher C. Bowman
Chairman
July 23, 2009