

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

Decision mailed: 3/11/11
Civil Service Commission 03

RICHARD HOLDEN,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

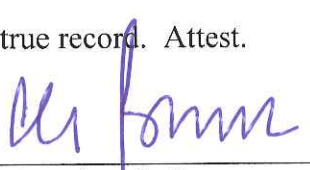
Case Nos.: D-10-15 (1-day suspension)
D-10-79 (3-day suspension)

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on March 10, 2011 to acknowledge receipt of the report of the Administrative Law Magistrate dated January 18, 2011, the objections of the Appellant received by the Commission on February 16, 2011 and the Respondent's response to Appellant's objections, received by the Commission February 22, 2011. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeals are hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein, Commissioners [Marquis – Absent]) on March 10, 2011.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

Brad Louison, Esq. (for Appellant)
Heidi Handler, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

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January 18, 2011

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

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2011 JAN 18 P 2:40
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Re: Richard Holden v. Department of Correction
DALA Docket No. CS-11-12
CSC Docket Nos. D-10-15 & D-10-79

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Bradford Louison, Esq.
Heidi Handler, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Richard Holden,
Petitioner

v.

Docket No.: D-10-15; D-10-79
DALA No.: CS-1142

**Massachusetts Department of
Correction,**
Respondent

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CIVIL SERVICE COMMISSION

Appearance for Petitioner:

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Boston, MA 02110

Appearance for Respondent:

Heidi Handler
Massachusetts Department of Correction
Division of Human Resources
One Industries Drive
P.O. Box 946
Norfolk, MA 02056

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF RECOMMENDED DECISION

Appeal dismissed where the Department of Correction proved by a preponderance of the evidence that there was just cause to suspend the Appellant twice—once for one day and again for three days—after he was late without authorization twice and absent without authorization on two additional occasions and failed to substantiate his absences.

RECOMMENDED DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Richard Holden, appeals the decisions of the Respondent, the Massachusetts Department of Correction, to suspend him by written notice dated December 3, 2009, for one (1) working day, and April 8, 2010 for an additional three (3) working days without pay. The appeals were timely filed on January 26, 2010 and April 15, 2010. A consolidated hearing on both suspensions was held on May 28, 2010 at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. Two cassette tapes of the hearing were made.

I admitted twenty (20) exhibits into evidence. Exs. 1-7. The Petitioner testified on his own behalf. The Respondent called Sheila Smith, Director of Security for the Department of Correction, as a witness. There are two cassette tapes of the hearing. The parties submitted 26 stipulated facts. Ex. 9, 15.

I held the record open for the Department to search its records for a copy of Exhibit 20, an illness certification form, that the Appellant claims he submitted to the Department. In response, the Department filed the affidavit of James O'Gara, Jr., a personnel supervisor at the Department. I have marked the affidavit as Exhibit 21. The record closed on July 23, 2010 upon the filing of the affidavit.

FINDINGS OF FACT

Based upon the stipulated facts and the evidence presented by the parties, I make the following findings of fact:

1. The Appellant, Richard Holden, is a tenured civil service employee of the Department of Correction, currently serving as a Lieutenant at the Massachusetts

Treatment Center (MTC) in Bridgewater. He has been employed by the Department since January 3, 1982. Testimony Holden.

2. Director of Security Sheila Smith was assigned to the MTC during the events of these appeals. One of her duties was to monitor employee attendance. She monitored certain employees more closely, including Mr. Holden, because they had ongoing and repeated attendance issues. Testimony Smith.

3. Mr. Holden works the 7:00 a.m. to 3:00 p.m. shift. Employees on that shift are required to report to the MTC at 6:50 a.m. to allow for a smooth shift change. The officers are paid overtime each day for these extra ten minutes. If officers arrive after 6:50 and before 7:00, then they forfeit the ten minutes of overtime pay; they are not subject to discipline for this infraction. If officers arrive after 7:00, though, they must account for their time by using sick leave, personal time or vacation time. If they fail to account for the time, then they are considered late, do not receive pay for the time they are absent, and are subject to discipline. Testimony Smith.

4. The Department of Correction Sick Leave Policy, 103 DOC 209 provides that "[a] unit 4 employee who utilizes forty-eight (48) hours of sick leave during the calendar year shall be required to provide satisfactory medical evidence for each absence thereafter for the remainder of the calendar year. For the purpose of this section, an absence is defined as using sick leave for any portion of an employee's schedule." 103 DOC 209.06 (1). Ex. 17.

5. The applicable collective bargaining agreement, Article 8, Section 1(k), provides "[a]n employee with forty-eight (48) hours of sick leave during the calendar year shall provide satisfactory medical evidence (as contained in the Department's Illness

Certification Form) for each absence thereafter for the remainder of the calendar year . . .

. Failure to provide such medical evidence within seven (7) days of its request or upon the employee's return to work may result, at the discretion of the Appointing Authority, in denial of the sick leave for the day(s) involved, and/or disciplinary action." Ex. 18.

6. Department of Correction Rule 18(a) states that "[p]unctual attendance for regular hours of duty must be strictly observed. Delay in terminating your tour of duty will not compensate for tardiness at its beginning. Notification of anticipated delay or absence due to unavoidable detention must be telephoned or sent promptly to the person designated by the Superintendent or DOC Department Head to receive and record such calls, in order that provisions may be made to cover your assignment. Absence from duty without permission or notice shall not be allowed." Ex. 16.

7. The Superintendent has designated the Shift Commander to receive and record sick and late calls. Testimony Smith.

8. Department of Correction Rule 18(b) states that, "[e]mployees who abuse sick leave, fail to produce satisfactory medical evidence of illness (physician's slip) when requested, or use sick leave for personal matters not related to illness, will be denied said sick leave, and may be subject to disciplinary action up to and including discharge, in compliance with all valid collective bargaining agreements." Ex. 16.

9. Mr. Holden suffers from Irritable Bowel Syndrome (IBS). Testimony Holden.

10. Due to his IBS, Mr. Holden applied for, and the Department granted, intermittent leave pursuant to the Family Medical Leave Act (FMLA). The effective dates of intermittent FMLA leave were set forth in letters from the Department to the

Appellant. It is incumbent upon the requesting employee to keep track of the extra FMLA leave that is granted by the Department. An August 18, 2009 letter granted Mr. Holden intermittent leave from August 13, 2009 to November 12, 2009. A November 25, 2009 letter granted him leave from November 25, 2009 to February 24, 2010. Each letter granted him five partial days of absence and three full days of absence for each covered period. Testimony Holden; Exs. 5, 12.

11. The August 18, 2009 FMLA leave letter directed the Appellant to apply for additional leave *prior to* the expiration of any current leave. After a period of FMLA leave had expired on November 12, 2009, Mr. Holden applied for more FMLA leave on November 13, 2009. The leave was approved on November 25, 2009, and the leave commenced from November 25, 2009 without being backdated to the end of his prior period of leave. Testimony Holden, Smith; Exs. 5, 12.

12. By September 2009, Mr. Holden had taken the forty-eight hours of sick leave allotted to him under the collective bargaining agreement. Testimony Smith, Holden.

13. All full absences, partial absences and late arrivals are noted in a sick log book. Testimony Smith.

14. On September 17, 2009, Mr. Holden arrived at the MTC at 7:13 a.m. The sick log book does not contain an entry that shows that he called to say that he would be using a partial FMLA leave day. Exs. 3, 6.

15. On September 24, 2009, at 6:48 a.m. Mr. Holden called the MTC to let the Shift Commander know that he would be taking FMLA leave that day. The sick log does not contain a similar entry for September 25, 2009. Ex. 6.

16. On October 1, 2009, Mr. Holden arrived at the MTC at 7:06 a.m. The sick log has no entry showing that he called the Shift Commander to indicate that he would be taking an FMLA partial leave day. Ex. 6.

17. On November 13, 2009, Mr. Holden called in sick. He failed to designate the day as an FMLA intermittent leave day, and he failed to provide substantial medical evidence within seven days to account for his absence. Ex. 12.

18. Mr. Holden attempted to claim November 13, 2009 as an FMLA intermittent leave day by submitting a leave slip on November 30, 2009. However, Mr. Holden had no intermittent leave available to him on November 13, 2009. Ex. 12.

19. A notice of charges and hearing was issued to Mr. Holden on December 3, 2009, for an absence from work on September 25, 2009. It alleged that Mr. Holden used sick leave and failed to substantiate it with medical evidence as required, and that Mr. Holden failed to call in to the Shift Commander when he was going to be late on September 17, 2009 and October 1, 2009. Ex. 2.

20. A hearing on these charges was held on January 8, 2010. Ex. 7.

21. On January 21, 2010 a discipline letter was issued to Mr. Holden advising him that he would be suspended for one day for failure to substantiate his September 25, 2009 absence from work with medical evidence as is required, and for failing to call in advance of the partial days for which he was absent on September 17, 2009 and October 1, 2009. Ex. 2.

22. On January 26, 2010, Mr. Holden timely appealed to the Civil Service Commission. Ex. 9.

23. On January 25, 2010 another notice of charges and hearing was issued to Mr. Holden. This one alleged that he was absent from work on November 13, 2009 without prior authorization or permission. Ex. 10

24. A hearing on these charges was held on March 23, 2010. Ex. 10.

25. On April 8, 2010 a discipline letter was issued to Mr. Holden advising him that he would be suspended for three days for failure to substantiate his November 13, 2009 absence from work with medical evidence as is required. Ex. 10.

26. On April 15, 2010, Mr. Holden timely appealed to the Civil Service Commission. Ex. 14, 15.

27. Mr. Holden's discipline history includes a one-day suspension on October 7, 2008 for refusing a direct order, being disrespectful to a superior officer and being in possession of a tobacco product; a reprimand on July 10, 1998 for unauthorized leave, a demotion from Captain to Lieutenant on February 29, 1996 for unsatisfactory performance as a manager; a reprimand on September 17, 1986 for tardiness; a one-day suspension on January 29, 1986 for tardiness; and a reprimand on December 21, 1985 for tardiness. Ex. 19.

CONCLUSION AND RECOMMENDATION

After reviewing all the testimony and evidence in this case, I conclude that the Department has demonstrated by a preponderance of the evidence that there was just cause to suspend Mr. Holden from his position as a Correction Officer III (Lieutenant) for a total of four (4) days.

Standard of Review

The role of the Civil Service Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *City of Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304 (1997). See also *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003); *Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 408, 411 n.5 (2000); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). 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.” *City of Cambridge*, 43 Mass. App. Ct. at 304 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928)); *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 259 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 the public service.” *School Comm. of Brockton v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997) (quoting *Murray v. Justices of Second Dist. Court of Eastern Middlesex*, 389 Mass. 508, 514-15 (1983)).

If the Commission finds that the appointing authority has proven 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; otherwise it shall reverse such action and the person concerned 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. *Town of Falmouth v. Civil Service*

Comm'n, 61 Mass. App. Ct. 796, 800 (2004); *Town of Watertown*, 16 Mass. App. Ct. at 334. Though, a modification of a penalty must be accompanied by an explanation for the modification, and it must be supported by the facts and rest upon correct conclusions of law. *Police Comm'r of Boston v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 602 (1996).

“[T]he question before 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.” *Town of Watertown*, 16 Mass. App. Ct. at 334.

Applicable Rules

Department of Correction Rule 18(a) provides that

[p]unctual attendance for regular hours of duty must be strictly observed. Delay in terminating your tour of duty will not compensate for tardiness at its beginning. Notification of anticipated delay or absence due to unavoidable detention must be telephoned or sent promptly to the person designated by the Superintendent or DOC Department Head to receive and record such calls, in order that provisions may be made to cover your assignment. Absence from duty without permission or notice shall not be allowed.

The Superintendent has designated the Shift Commander to receive and record sick and late calls. Department of Correction Rule 18(b) provides that,

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

The Department of Correction Sick Leave Policy, 103 DOC 209.06(1) provides that

[a] unit 4 employee who utilizes forty-eight (48) hours of sick leave during the calendar year shall be required to provide satisfactory medical evidence for each absence thereafter for the remainder of the calendar year. For the purpose of this section, an absence is defined as using sick leave for any portion of an employee's schedule.

The applicable collective bargaining agreement, Article 8, Section 1(k), provides that

[a]n employee with forty-eight (48) hours of sick leave during the calendar year shall provide satisfactory medical evidence (as contained in the Department's Illness Certification Form) for each absence thereafter for the remainder of the calendar year Failure to provide such medical evidence within seven (7) days of its request or upon the employee's return to work may result, at the discretion of the Appointing Authority, in denial of the sick leave for the day(s) involved, and/or disciplinary action.

D-10-15

The Department has proven by a preponderance of the evidence that Mr. Holden arrived late to the MTC without authorization on September 17, 2009 and October 1, 2009.

MTC employees who work the 7:00 a.m. to 3:00 p.m. shift are required to arrive at the institution ten minutes early at 6:50 a.m. for roll-call. It is essential that employees arrive that ten minutes early because it is required for an orderly shift change and because a major head count is performed at 7:05 a.m., when the new shift should already be in place. The employees are compensated overtime for their early arrival. If they arrive after 6:50 a.m. but before 7:00 a.m. they are not paid overtime. If they arrive after 7:00 a.m. then they are considered absent from work and must use their own time—personal, sick, vacation, FMLA, comp time—to account for the absence; otherwise, they are “not on payroll” and may be disciplined. For all late arrivals, late employees must call the Shift Commander before their late arrival so that the Shift Commander can determine whether or not someone else will fill in until the late employee arrives. Late employees

must notify the Shift Commander directly; this is especially important in the case of Mr. Holden because he was a Lieutenant and because he was responsible for running the 7:05 a.m. count. Being late for the count without authorization is clearly substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service. *See School Comm. of Brockton*, 43 Mass. App. Ct. at 488.

Mr. Holden's time cards show that he arrived after 7:00 a.m., on September 17, 2009 at 7:13 a.m. and on October 1, 2009 at 7:08 a.m. The sick log book does not show that he called the Shift Commander in advance of his absence on those days.

Mr. Holden testified that he did call the MTC on those days but that the person he spoke with did not record his calls in the sick log book. Mr. Holden also admitted that he was required to speak with the Shift Commander on duty if he is calling in late, but he could not recall with whom he allegedly spoke on either day. In short, Mr. Holden's memory of the events was hazy at best.

MTC Director of Security Sheila Smith testified that she spoke with the Shift Commander, Captain Gentile, who was on duty on the days in question. He did not have a specific recollection of that day, but he said that his regular business practice was to record all late arrivals in the sick log book. *See Beal Bank, SSB v. Eurich*, 444 Mass. 813, 815-16 (2005) (business records presumed to be reliable because entries in business records are routinely made by those charged with the responsibility of making accurate entries and are relied on in the course of doing business). Testimony and analysis of the log book at the hearing showed that the log book is not error free, but the log contained multiple calls from Mr. Holden on other dates. In addition, Ms. Smith was carefully monitoring Mr. Holden's attendance; it is unlikely that under this extra scrutiny the Shift

Commander would fail to record two of Mr. Holden's late calls in the span of two weeks. And even if Mr. Holden called in late to another correction officer and not the Shift Commander, then that call was not sufficient to register his lateness.

The Department has likewise proven by a preponderance of the evidence that Mr. Holden was absent from the MTC without authorization on September 25, 2009.

The parties agree that Mr. Holden did not work that day, but they do not agree whether or not Mr. Holden called the Shift Commander prior to the commencement of his shift to report his absence. The sick log book reflects that Mr. Holden called in sick for September 24. Under the "Hrs." column there is a notation that says "IN WHEN HE CAN." Below that are the numbers "9-25." Mr. Holden first argued that the "9-25" indicated that he told the Shift Commander that he would also be absent on September 25. A careful examination of the original sick log book, however, defeated this argument, as the "9-25" notation clearly applied to the next call on the list, from C. Medeiros.

Mr. Holden next argued that he submitted an illness certification form for his absence on September 29 because he believed that he had already used his allotted sick time for September by taking off September 7, 25 and 28. At the hearing, Mr. Holden submitted a copy of the form that he claims he submitted to the Department, Ex. 20. The Department did not receive the form, however; this is made clear by Personnel Supervisor James O'Gara's affidavit submitted after the hearing, Ex. 21. Based on the evidence submitted by the parties, it is more likely that Mr. Holden lost track of how many days off he had taken. Being absent without authorization from a correction

facility likewise impairs the efficiency of the public service. *See School Comm. of Brockton*, 43 Mass. App. Ct. at 488.

D-10-79

The Department has proven by a preponderance of the evidence that Mr. Holden was absent from the MTC without authorization on November 13, 2009.

The sick log reflects that Mr. Holden called in sick for November 13. He did not provide any medical evidence within seven days of his return to work. Instead, he claims that he tried to use an FMLA day off and did not call in sick and thus does not need to substantiate the time off. This argument must fail because Mr. Holden did not have any FMLA leave to take on November 13. His last period of FMLA leave ended the day before, on November 12. He did not request more FMLA leave until November 25. Therefore, he could not have taken November 13 as an FMLA leave day. Therefore, his day off on November 13 was unauthorized.

Mr. Holden claims that his November 25 request and approval of further FMLA leave should have been backdated to the expiration of his last period of FMLA leave because that was the common practice at the MTC. First, neither of the FMLA leave approvals in evidence mentions backdating. Second, each letter states that any requests for additional leave must be submitted prior to the expiration of any period of leave. Mr. Holden's self-serving testimony that back-dating was the Department's policy is not enough to prove that it actually was the policy when several documents in evidence contradict his assertion.

Punishment

The Department imposed a one-day suspension for the September 17 and October 1 tardiness and the September 25 absence. Mr. Holden provided no evidence that he has been treated differently from any other similarly situated DOC employees. And he has been disciplined for tardiness in the past and has received a one-day suspension for an unrelated offense. In this context, a one-day suspension for this tardiness and absence is appropriate. Similarly, imposing a three-day suspension for another unauthorized absence which occurred so soon after the one-day suspension is progressive discipline and is appropriate.

Conclusion

For the above-stated reasons, Mr. Holden's appeals under Docket numbers D-10-15 and D-10-79 are dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton
Administrative Magistrate

DATED: **JAN 18 2011**