

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

WILLIAM HORAN,  
Appellant

v.

D-05-264

DEPARTMENT OF CORRECTIONS,  
Respondent

Attorney for the Appellant:

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Commissioner:

Daniel M. Henderson<sup>1</sup>

**DECISION**

William Horan (hereinafter “the Appellant” or “Horan”) filed an appeal pursuant to G.L. c. 31 §43, claiming that the Department of Correction (hereinafter “DOC”) did not have just cause to impose a three day suspension without pay. A hearing was held before the Civil Service Commission (hereinafter “Commission”) on April 23, 2008. Two tapes were made

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<sup>1</sup> The Commission acknowledges the assistance of Legal Intern Kate Borgondy in the preparation of this Decision.

of the hearing. As no notice was received from either party, the hearing was declared private.

Based on the documents entered into evidence (Exhibits 1 through 16) and the testimony of William Horan, Ronald Hilbrunner, Thomas Midura and William Devine, I find the following:

1. On September 28, 2004, the Appellant was a tenured civil service in the position of Industrial Instructor. The Appellant has been employed by the DOC in that capacity since 1998. (Testimony of Appellant)
2. The Appellant is a licensed plumber, whose position requires him to supervise inmates who perform plumbing maintenance and repairs throughout the prison. (Testimony of Appellant)
3. Employees of the DOC are subject to the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (hereinafter “the Blue Book”) as well as 103 DOC 237 The Prevention and Elimination of Workplace Violence. (Exhibits 11 and 14).
4. The Appellant had received a copy of these Rules and Regulations. (Exhibit 15). Additionally, the Appellant signed the Prevention and Elimination of Workplace Violence from Commissioner Dennehy’s memorandum to all employees dated on July 14, 2004. (Exhibit 11).
5. Tool Control Sgt. Midura had previously informed the Appellant, as well as others, that he needed to get his tools prior to the 8:15 A.M. inmate work call. This was to ensure better efficiency; otherwise, inmates are not given the tools to perform their assigned

6. On September 28, 2004, the Appellant came to the tool crib window with a work order with twenty plus tools written on it at 8:45 A.M., 30 minutes after inmate work call had begun. (Testimony of Hilbrunner)
7. The Appellant attempted to cut the line of approximately 11 inmates waiting to be issued their tool boxes. (Testimony of Hilbrunner)
8. The Appellant gave Industrial Instructor II Ronald Hilbrunner (hereinafter “Hilbrunner”), who dispersed the tools, a work order for numerous tools which Hilbrunner estimated would take him 10 or 20 minutes to collect. (Testimony of Hilbrunner).
9. Hilbrunner told the Appellant to wait until the inmates received their tool boxes, which were prepared and ready to be efficiently distributed. Hilbrunner told the Appellant that Sgt. Midura directed him to provide the inmates first their tool boxes after the 8:15 work call if the Appellant came late, which he had a reputation for doing. (Testimony of Hilbrunner)
10. Sgt. Midura also confirmed that he told Hilbrunner to give the inmates their tool boxes before the Industrial Instructors who arrived after 8:15 A.M., unless there was an emergency. (Testimony of Midura)
11. Hilbrunner told the Appellant that his instructions were to give the inmates their tool boxes first, and asked the Appellant to step back. (Testimony of Hilbrunner)

12. The Appellant became agitated. He stuck his finger towards Hilbrunner's face, and said "[T]his is your doing and Midura didn't tell you that." The Appellant was standing on the other side of a window and leaning in, about 2 or 3 feet away. (Testimony of Hilbrunner)
13. This interaction took place in front of approximately 20 people, including the 11 inmates in line. (Testimony of Hilbrunner)
14. Hilbrunner called Sgt. Midura on the phone and the radio and told him about the unfolding incident with the Appellant. (Testimony of Hilbrunner)
15. Sgt. Midura came to the area and spoke to the Appellant, again reiterating that he needed to pick up the tools before the inmate work call began at 8:15. (Testimony of Midura).
16. Sgt. Midura also noted he had earlier seen the Appellant in the building, "hanging around" before the inmate work call when Sgt. Midura arrived at 7:30 A.M. The Appellant therefore could have complied with the requirement of getting his daily tools before the inmate work call commenced. (Testimony of Midura)
17. The Appellant told Sgt. Midura that he waited to get his tools because he did not know what tools he may need that day until the inmates received their assignments.
18. The Appellant was still very agitated. Sgt. Midura observed the Appellant appear visibly upset, and speaking in a raising tone of voice that revealed his exasperation and frustration. (Testimony of Midura)
19. The Appellant held the work order piece of paper and lifted it up towards Sgt. Midura's face, and ripped the work order up. He let the pieces fall to the floor and walked away from Sgt. Midura. The Appellant then left the DOC premises. (Testimony of Midura)

20. I find that the DOC witnesses: Ronald Hilbrunner, Thomas Midura and William Devine to be straight forward and responsive in their answers and professional in their demeanor. I did not detect any inaccuracy or inconsistency in their answers. Their individual testimony corroborated the other's testimony in reliable detail without mimicking. I found that Hilbrunner admitted his dislike of the Appellant's consistent rule bending and provocative behavior, in this area but I also find him to be a credible and reliable witness. I find that Midura bent over backwards to avoid placing the Appellant in a bad light and most certainly did not hold any bias against him. I find the DOC witnesses to be professional, credible and reliable. (Testimony and demeanor of Ronald Hilbrunner, Thomas Midura and William Devine)
21. The Appellant's testimony at this hearing was emotionally charged. He testified that there was a "crisis" on that morning of September 28, 2004, which justified his urgency, although he could not identify the substance of this alleged crisis or emergency. (testimony of Appellant)
22. I find the Appellant to be an emotional bundle of nerves at this hearing, both on and off the witness stand. His emotional temperament appears to be beyond his control. He physically reacted to testimony he disagreed with, by grimaces and nearly lifting out of his chair. He allows bothersome circumstances to build up to the point that he reacts with strong emotion. His emotional temperament colors his perception of events. Therefore his testimony is unreliable. (Testimony and demeanor of Appellant)
23. General Policy 1 states in part: "All persons employed by the [DOC] are subject to the provisions of these rules and regulations. Improper conduct affecting or reflecting upon any correctional institution or the [DOC] in any way will not be exculpated whether or

24. Rule 12(a) states: “Employees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities through presumption and must familiarize yourself with assigned tasks and responsibilities including institution and [DOC] policies and orders.” (Exhibit 14)
25. Rule 19(a) states: “It is your responsibility to scan the official bulletin board when going to and coming from your official tour of duty. Failure to view the official orders and notices posted thereon shall not excuse you for noncompliance with such orders or notices. Any person tampering with, removing, defacing, or making such orders or notices on the official bulletin board, without authorization, shall be subject to disciplinary action.” (Exhibit 14)
26. Rule 19(b) states: “Efforts will be taken to ensure that orders are reasonable and considerate, however, if you disagree with the intent or working of an order, time permitting, you may be heard and the order withdrawn, amended, or it may stand. Without such prompt action on your part, no excuse will be tolerated that you did not comply with the order because it was faulty, unworkable, or for any other cause.” (Exhibit 14)
27. Rule 19(c) states” Since the sphere of activity within an institution or 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. Pending investigation into the circumstances and your possible involvement therein, you may be detached

28. Rule 19(d) states in part, “It is the duty and responsibility of all institutions and [DOC] employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasingly so, according to rank.” (Exhibit 14)
29. 103 DOC 237 The Prevention and Elimination of Workplace Violence targets, but is not limited to, 1) behavior that communicates a direct or indirect threat of physical violence, harassment, intimidation, or other disruptive behavior, including oral...communications, gestures, and expressions; 2) behavior that involves an actual confrontation, including but not limited to bullying, intimidation, harassment. . . .; 3) behavior that damages property that is owned by the Commonwealth....[skipping 4) and 5)]; 6) behavior that causes a reasonable person to be in fear of their own safety or that of a colleague; or 7) behavior that causes disruption of workplace productivity.” (Exhibit 11)
30. The Appellant was notified by the DOC that he was suspended for 3 days in a letter on April 5, 2005, because of the September 28, 2004 incident which was deemed to violate General Policy and Blue Books Rules 12(a), 19(a), 19(b), 19(c), and 19(d) and The Prevention and Elimination of Workplace Violence. (Exhibit 4)

### **CONCLUSION**

The role of the Civil Service Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for

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



The DOC has demonstrated that it had sound and sufficient reasons or just cause to suspend the Appellant due to his actions on September 28, 2004. See eg. Commissioners of Civ. Serv. v. Mun. Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civ. Serv. 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) (explaining an appointing authorities 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

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997); see also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); Connor v. Connor, 77 A. 2d. 697 (1951) (noting opportunity to observe the demeanor and appearance of witnesses the critical touchstone of credibility). The Appellant had a high-strung demeanor when he testified before the Commission, appearing emotional and anxious. Further, the critical interactions that gave rise to the suspension are not in dispute: 1) the Appellant went to get his tools after the inmate work call began at 8:15, 2) the Appellant had a heated exchange with Industrial Inspector Hilbrunner in the presence of inmates, 2) Sgt. Midura also spoke to the Appellant, and the Appellant was upset and angry, 3) the Appellant tore up the work order in front of Sgt. Midura. Based on the agreed upon facts and the demeanor of the Appellant as he testified before the Commission, the DOC has met their burden of establishing the 3 day

suspension was reasonably justified. Commissioners of Civ. Serv. v. Mun. Ct. of Boston, 359 Mass. at 214 (explaining reasonable justification standard).

The testimony before this Commission established by a preponderance of the credible and reliable evidence in the record that the Appellant lost his temper on the day in question and acted in a provocative and disruptive manner. 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). Indeed, even the Appellant admits to pointing his finger close to Industrial Instructor Hilbrunner's face and saying words in anger. The incident was sufficient reason to discipline the Appellant. Further, no evidence was presented to suggest that the discipline was disparately harsh or severe to other DOC employees similarly situated.

The Appellant's testimony before the Commission was emotionally charged. He indicated there was a "crisis" that morning, which justified his urgency, although he could not point towards the substance of this crisis. 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. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The circumstances as presented here in which both Inmates and Correction Officers were present as observers and participants clearly establish the significance of the unfolding events. The fact that tools, (potential weapons) are being distributed in a regular,

orderly and predictable manner to insure accountability and safety accentuates the significance of the events. Inmates could be expected to seek an advantage during any disturbance or disruption of routine procedure. The appearance of division or derision among the officers might also encourage inmates to act advantageously.

Further, the Appellant has not demonstrated that there was any improper motivation or bias against him that is the true reason for the appointing authority's discipline. The appointing authority has established by a preponderance of the reliable evidence in the record that there was just cause for its action. In light of the reasonableness of the discipline under these circumstances and without a suggestion of improper motivation, the Commission is required to affirm the action of the appointing authority.

WHEREFORE, based on the foregoing, the DOC has shown by a preponderance of the credible evidence in the record that it had reasonable justification to suspend the Appellant from employment for three (3) days without pay.

For all the reasons stated above, the Appellant's appeal under Docket No. D-05-264, is *dismissed*.

Civil Service Commission,

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Daniel M. Henderson,  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Stein, Henderson, Taylor and Marquis, Commissioners) on August 20, 2009

A true record. Attest:

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Commissioner

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

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

Notice:

Valerie A. McCormack, Atty.

Jeffrey S. Bolger - DOC