

The Commonwealth of Massachusetts

Decision mailed: 9/18/09
Civil Service Commission JS

SUFFOLK, ss.

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

WILLIAM HORAN,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: D1-07-321

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on September 17, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated June 5, 2009. The Commission received the Appellant's comments and Request for Oral Argument pursuant to 801 CMR 1.01 (11)(c)1 on July 6, 2009. The Commission received the comments of the Respondent on July 30, 2009. The Appellant's Request for Oral Argument is hereby denied. By a 3-2 vote, 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 appeal is hereby *denied*.

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - yes; Henderson - no, Marquis - yes, Stein - yes and Taylor - no, Commissioners) on September 17, 2009.

A true record. Attest.



Christopher C. Bowman
Chairman

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:

Stephen C. Pfaff, Esq. (for Appellant)
Carol A. Colby, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 NORTH WASHINGTON STREET, 4TH FLOOR
BOSTON, MA 02114

SHELLY L. TAYLOR
Chief Administrative Magistrate

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June 5, 2009

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

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2009 JUN -8 A 10:33
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

Re: William Horan v. Department of Correction
DALA Docket No. CS-08-296

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,


Shelly Taylor
Chief Administrative Magistrate

SLT/das

Enclosure

cc: Stephen C. Pfaff, Esq.
Carol A. Colby, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

William Horan,
Appellant
v.

Docket No. CS-08-296

~~(D-07-231)~~

DI-07-321

Department of Correction,
Respondent Appointing Authority

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Administrative Magistrate:

Bonney Cashin

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CIVIL SERVICE COMMISSION

SUMMARY OF RECOMMENDED DECISION

The appellant appeals the decision of the Department of Correction to terminate him for violating numerous DOC rules and two policies concerning security and sexual misconduct. I find that two violations alleged did not occur; nonetheless, I find just cause for discipline and that termination is appropriate.

RECOMMENDED DECISION

INTRODUCTION

William Horan appeals the decision issued on August 21, 2007 by the Department of Correction (DOC) to terminate him from his position as an Industrial Instructor II at Massachusetts Correctional Institution – Framingham (MCI-Framingham). The DOC took this action following numerous alleged violations of the DOC's rules and regulations governing all employees, as well as internal security procedures and the DOC's policy concerning staff sexual misconduct with inmates. Mr. Horan appealed under the provisions of G.L. c. 31, § 43.

I held a hearing at the Division of Administrative Law Appeals on May 5, 2008 and August 14, 2008. I declared the hearing to be private because neither party requested in writing that the hearing be public.

Mr. Horan testified on his own behalf. Inner Perimeter Security (IPS) Correction Officer Crystal Johnson, Correction Program Officer (CPO) Christine Dodd, and Superintendent Lynn Bissonnette testified for the DOC. I entered nine exhibits into evidence.¹ There are five cassette tapes of the hearing. The parties filed closing papers on October 1, 2008, after which the record closed.

FINDINGS OF FACT

Based on the evidence in the record and on an assessment of the credibility of the witnesses who appeared before me, I make the following findings of fact:

Procedural Background

1. Mr. Horan was hired by the DOC on October 4, 1998. (Exh. 10).

¹ During the hearing, the parties and I discovered that Exhibit 3 was incomplete. The DOC filed another copy and I have substituted the later-filed exhibit for the one with missing pages.

2. Mr. Horan was employed as an Industrial Instructor II at MCI-Framingham, an all-female facility, from January 2006 until May 21, 2007, when he was transferred to the Massachusetts Treatment Center pending the outcome of an investigation concerning him. (Exh. 3 at 59; Exh. 5).
3. Following the investigation, Mr. Horan was notified by DOC Commissioner Kathleen Dennehy in a letter dated February 8, 2007 that a hearing would be held to determine if he had violated various DOC rules, regulations, or policies and, if so, to determine the appropriate level of discipline to be imposed by the DOC. (Exh. 1).
4. Following the Commissioner's hearing on July 11, 2007, Mr. Horan was terminated from his position with the DOC, effective August 21, 2007. (Exh. 2).
5. Acting Commissioner Ronald Duval found that Mr. Horan violated Rule 6(a), Rule 8(a), 8(c), 9(b), 10(a), 12(a), 17(a), and 19(c) of the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction*; as well as the DOC's *Institution Security Procedures* at 103 DOC 501 and the DOC's *Staff Sexual Misconduct with Inmates Policy* at 103 DOC 519. (Exh. 2).
6. Mr. Horan timely appealed his termination to the Civil Service Commission (Appeal letter).
Investigation
7. On May 18, 2006, Inmate A told Spectrum Supervisor Anthony Melia that Mr. Horan was harassing her in a sexual manner in the following ways: he consistently called her "babe" although she had told him it made her uncomfortable; he placed his hands on her shoulders, which made Inmate A feel "not human;" and on several occasions he

- showed several inmates a large amount of cash and said "this is for the ladies on the ride home tonight." (Exh. 3 at 7-8, 46).
8. On May 19, 2006, IPS Johnson interviewed Inmate A, who described how Mr. Horan had touched her on three occasions. (Exh. 3 at 8, 47-48; Johnson Test.).
 9. Inmate A told IPS Johnson that on two occasions during the several months prior to the interview Mr. Horan rubbed her shoulders, continuing even after she tried to move away, and once, after coming indoors, he placed his hands on the back of her neck to show her that they were cold, continuing even after she moved away. (Exh. 3 at 47-48; Johnson Test.).
 10. On May 26, 2006, Supt. Bissonnette called Mr. Horan at home and informed him that she was transferring him to another facility pending the outcome of an investigation into an inmate's allegations that he had touched her inappropriately. (Exh. 3 at 8, 49).
 11. Mr. Horan asked Supt. Bissonnette what sort of touching was appropriate and what was inappropriate. (Exh. 3 at 8, 49).
 12. After Supt. Bissonnette replied that any touching would be inappropriate, Mr. Horan replied: "I see your point, hon." (Exh. 3 at 8, 49).
 13. CPO Dodd conducted an investigation into Inmate A's allegations from June 2, 2006 until January 16, 2007. (Exh. 3 at 7).
 14. On July 11, 2006, CPO Dodd interviewed Inmate A, who told CPO Dodd that: there were past incidents with Mr. Horan that she had not reported until finally she could not take it anymore; once he placed his hand on the back of her neck and as she backed away, he followed her; on two occasions he squeezed her shoulders; and he

always demeaned women and would say that the female inmates were there to clean up his messes. (Exh. 3 at 8-10; Dodd Test.).

15. CPO Dodd left two phone messages with Thomas Radcliffe, an Industrial Instructor who Inmate A said was present when Mr. Horan put his hands on the back of her neck and who has since retired; he did not return the calls. (Exh. 3 at 10, 18-19).

16. On July 14, 2006, CPO Dodd interviewed Inmate B, who told CPO Dodd that: Mr. Horan had a habit of touching workers' shoulders when asking if they were ready to work; on several occasions she observed Inmate A become aggravated when Mr. Horan touched her and Inmate A had repeatedly asked him not to do so; Mr. Horan was funny and always cracking jokes, but some of his jokes belittled women and were inappropriate; and Mr. Horan had once given her an unauthorized ink pen, which she gave back. (Exh. 3 at 11-12, 22-23, Dodd Test.).

17. Inmate B acknowledged she was "not good with long-term memory;" nonetheless she recalled two specific occasions when Inmate A told Mr. Horan that she did not want him to touch her. (Exh. 3 at 22).

18. On July 14, 2006, CPO Dodd interviewed Inmate C, who told her that Mr. Horan would leave oranges for her because she was diabetic. (Exh. 3 at 24).

19. According to Inmate C, Mr. Horan had not touched her or said anything inappropriate, nor had she witnessed Mr. Horan touching any other inmate. (Exh. 3 at 24).

20. On July 14, 2006, CPO Dodd interviewed Inmate F, who told her that Mr. Horan: secretly gave her cookies and candy; asked her to keep a look-out for him while he was napping and "to make a lot of noise so he would not get caught"; and gave

Inmate F an ink pen from her hometown that she was not allowed to have. (Exh. 3 at 27-29).

21. Inmate F also recounted that, while helping Mr. Horan move a cabinet that she had to climb up and over, Mr. Horan "grabbed my ass" and "grabbed ahold of my waist," then he grabbed her again when she had to climb over the cabinet a second time. (Exh. 3 at 27-28).
22. Mr. Horan asked Inmate F to rub his shoulders and she complied, although she knew it was wrong, it made her uncomfortable, and it raised memories of past incidents for her. (Exh. 3 at 27-28).
23. CPO Dodd also interviewed Inmates D and G, who did not work with Mr. Horan, and Inmate E, who worked with Mr. Horan once or twice but who did not witness any inappropriate conduct involving him. (Exh. 3 at 25, 26, 30-31).
24. On July 19, 2006, CPO Dodd interviewed Mr. Horan and he admitted the following:
he had an inmate periodically check his pulse during a time when he was experiencing an irregular heartbeat; he had rubbed the shoulders and upper arms of an inmate and then she rubbed his neck and shoulders; he had Inmate F rub his neck and shoulders "a couple of times"; he placed his hands on Inmate A's neck after coming inside during cold weather; he and Inmate F moved a large cabinet and Inmate F had to climb over it; he used the term "hon" when referring to women, including the inmates; he brought in candy for staff and inmates; he and others brought in fruit and other food for Inmate C, who was diabetic; he dozed off at work during a time when he was taking medication that made him drowsy; he occasionally showed the inmates

large amounts of money; and he occasionally gave an inmate a pen. (Exh. 3. at 13-15, 32-40, Dodd Test.).

25. Mr. Horan's responses to CPO Dodd's questions were at times evasive, vague, or inconsistent. (Exh. 3 at 32-40, Dodd Test.).
26. During the hearing Mr. Horan admitted that he touched Inmate A's neck, that he called inmates "hon," and that, when moving a large cabinet, he touched the small of Inmate F's back as she climbed over it. (Horan Test.).
27. Given the nature of his work at the DOC facilities, Mr. Horan handles tools and substances that need to be strictly controlled because they are dangerous or may be used in an escape, carries keys to many locations throughout the facility, and may access secure and unsecured areas, together with the inmate workers he supervises. (Bissonnette Test.).
28. Mr. Horan's training at various DOC facilities included the following:
 - a. an 8 week initial training program in 1998 that included correction practice, DOC rules and regulations, ethics, sexual harassment, and domestic violence;
 - b. in-service training in 2002 regarding sexual misconduct; and
 - c. in-service trainings in 2005 including sexual harassment, domestic violence and the Prison Rape Elimination Act (PREA). (Exh. 6; Exh. 9; Bissonnette Test.).
29. Mr. Horan did not receive a three-day site specific training when he was transferred to MCI-Framingham. (Bissonnette Test.; Horan Test.).

Progressive Discipline History

30. Mr. Horan has been disciplined on eleven occasions since August 7, 2002, beginning with a reprimand for his failure to follow a tool control policy and, most recently, a twenty day suspension and transfer to MCI-Framingham for a verbal altercation with another employee and the removal of bandages without authority.² (Exh. 10).

APPLICABLE LAW

Standard at c. 31, § 43

The standards that apply to disciplinary hearings before the Civil Service Commission -- and hence to DALA when it is asked to conduct a hearing on behalf of the commission -- are well settled. The Civil Service Commission must determine whether the appointing authority has proven by a preponderance of the evidence that just cause exists for the disciplinary action taken. *See* G.L. c. 31, § 43; *School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, 622 (1997). "Just cause" means that the disciplined employee must be guilty of "substantial misconduct that adversely affected the public interest by impairing the efficiency of public service." *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514, 451 N.E.2d 408, 412 (1983).

The commission does not determine "whether it would have acted as the appointing authority had acted, but whether, on the facts found by [it], 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 Serv. Comm'n*, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735, 738 (2004) *quoting* *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, 445 (1983). Stated differently, the commission may not "substitute its judgment about a valid exercise of discretion based on merit or policy

² Mr. Horan believes that the twenty day suspension is under appeal, but the record before me is unclear.

considerations by an appointing authority.” *Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923, 926 (1997).

Applicable DOC Rules and Regulations

Mr. Horan was disciplined for violating the following provisions of the DOC’s *Rules and Regulations Governing all Employees of the Massachusetts Department of Correction* (“the Blue Book”):

- a. Rule 6 (a), which provides that co-workers should be treated with “mutual respect, kindness and civility”;
- b. Rule 8 (a), which provides that relationships with inmates may be two-fold, that of counselor and disciplinarian simultaneously; when working with inmates employees should be “friendly not familiar, firm not harsh, vigilant not unduly suspicious, strict not unjust”;
- c. Rule 8 (c), which provides that employees must not associate with any inmates except for a chance meeting without approval; must treat all inmates impartially, and may not grant special privileges to any inmate;
- d. Rule 9 (b), which provides that employees “shall not, nor shall [they] allow others to deliver or procure to be delivered, or have in [their] possession with intent to deliver, to an inmate confined in a correctional facility, or deposit in or about any institution ... any articles or thing with the intent that an inmate shall obtain or receive it ... without the knowledge of the Superintendent or Commissioner of Correction”;
- e. Rule 10 (a), which provides that employees shall not use profane or abusive language;
- f. Rule 12 (a), which provides that employees shall exercise constant vigilance in the performance of their duties;
- g. Rule 17 (a), which provides that employees be in fit physical and mental condition; and
- h. Rule 19 (c), which provides that an employee must respond fully and promptly to questions asked during an investigation.

In addition, Mr. Horan was charged with a violation of security procedures found in Policy No. 103 DOC 501, *Institution Security Procedures*, and with a violation of Policy No. 103

DOC 519, *Staff Sexual Misconduct with Inmates*. Policy No. 103 COD 501, among other things, requires warnings signs that it is a felony to deliver any article to an inmate without the permission of the superintendent or commissioner. Policy No. 103 DOC 519 prohibits employees from engaging in intimate relationships with inmates. Intimacy is defined under the policy as “any behavior not defined as sexual contact or sexual abuse of an inmate including kissing, touching parts of the body not defined under sexual contact or other related acts including but not limited to sending/receiving personal letters/cards or receiving phone calls from the inmate.”

DISCUSSION AND CONCLUSION

I conclude that the DOC has satisfied its burden of proving just cause for its decision to terminate Mr. Horan. The DOC has shown that he violated numerous DOC rules and policies during his interactions with several inmates. Moreover, Mr. Horan failed to show that the discipline imposed was improperly motivated by political considerations or bias or was excessive under the circumstances.

Mr. Horan violated Rule 6 (a). He admitted at the hearing to calling Supt. Bissonnette “hon” during their phone conversation. Referring to a female co-worker, particularly a superior, as “hon” is disrespectful.

Mr. Horan violated Rule 8 (a) and Rule 8 (c). He admitted to touching Inmate A’s shoulders and neck and to touching Inmate F on her shoulders and near her waist. He admitted that he regularly asked an inmate to check his pulse. He admitted to CPO Dodd that he brought in jelly beans on one occasion. He admitted that he left fruit from his lunch for Inmate C to find and that he gave Inmate F cookies and candy. He admitted that he gave pens to Inmate B and Inmate F. Mr. Horan’s behavior moved well beyond friendly into the realm of the familiar,

thereby violating a rule important to the functioning of the correctional facility. Similarly, leaving food for some inmates and not others shows favoritism rather than impartiality.

Mr. Horan violated Rule 9 (b). He gave inmates food and pens. He did not present evidence that he had permission from Supt. Bissonnette or the Commissioner of Correction to do so.

Mr. Horan did not violate Rule 10 (a). Referring to an inmate as "hon" is offensive, but it is not within a common understanding of the terms "profane" or "abusive." It is a disparaging reference to gender, but not to color, creed, race, or crimes committed.

Mr. Horan violated Rule 12 (a). He admitted that he took medication that made him drowsy. He admitted to CPO Dodd that he might have dozed off while at work. During the hearing, however, Mr. Horan maintained that he simply sat down because he felt queasy and was just waiting for the feeling to pass. He said he had not fallen asleep because "there was no passage of time."

Mr. Horan's statements to CPO Dodd during the investigation are inconsistent with his testimony at the hearing and inconsistent with Inmate F's statement. He would have no reason to ask Inmate F to keep watch for him if he had only intended to sit down and wait until he felt better. He also had no plausible reason for not providing this explanation during the investigation. Consequently, it appears to be a later fabrication.

Mr. Horan violated Rule 17 (a). He admitted to CPO Dodd that he came to work under "some pretty heavy medications." He admitted that he took medication that made him drowsy. Even were I to accept Mr. Horan's testimony that he did not fall asleep, extreme drowsiness, even short of falling asleep, is not indicative of physical or mental fitness, which the rule requires.

Mr. Horan violated Rule 19 (c). His responses to CPO Dodd during the investigation were often evasive or vague and sometimes inconsistent, particularly with respect to his statements about touching inmates. He did not answer questions fully and promptly.

Mr. Horan did not violate the security procedures in Policy No. 103 DOC 501. The DOC argues that the Policy warns it is a felony to deliver any article to an inmate without the permission of the superintendent or commissioner. The language of the warning is quite similar to Rule 9 (b). Exh. 8 at 10. In fact, though, the Policy simply requires that posted signs warn that it is a felony to deliver any article to an inmate without the permission of the superintendent or commissioner. The Policy itself does not establish that the delivery of an article without permission is a violation. In the same vein, the Policy provides that employees with contraband, that is, essentially any unauthorized article, are not permitted to enter the institution without the superintendent's approval. Exh. 8 at 28. This does not mean, however, that an employee who brings in contraband without approval has violated the Policy. Rather, the employee who allows the entry has done so.

Mr. Horan violated Policy No. 103 DOC 519. By touching inmates on the waist, shoulders and neck, and by allowing an inmate to take his pulse and to rub his shoulders, Mr. Horan engaged in prohibited intimate relationships with inmates.

Mr. Horan's defense focused on his lack of training, particularly sexual harassment training, and the reliance by IPS Johnson and CPO Dodd on hearsay obtained from inmates. In neither respect are his arguments persuasive.

Upon his transfer, Mr. Horan did not receive a three-day training specific to the all-female population at MCI-Framingham. During his employment with DOC, however, he did attend other trainings that addressed the topics of sexual misconduct and sexual harassment.

Moreover, his conduct violated basic DOC rules that have been in place throughout Mr. Horan's employment. He needed no special training about sexual misconduct or sexual harassment to know, for example, that he should not give food or pens to inmates. Similarly, he needed no such specialized training to know that touching inmates around the neck and shoulders or waist, or asking an inmate to rub his shoulders implies a level of familiarity wholly inappropriate in a correctional setting. Consequently, I reject his argument that he should be reinstated to his position and provided with specialized training.

Mr. Horan also criticized the DOC for relying on hearsay statements from inmates. He argued that the statements were not credible, particularly when made by women who may have mental health issues.

IPS Johnson and CPO Dodd testified in a calm, confident, and professional manner about their conversations with the inmates. CPO Dodd specifically assessed Inmate A's statements and found her credible. It goes without saying that correctional officers must make credibility assessments routinely when carrying out their job responsibilities.

Many of the inmate's statements are substantiated in other ways. Inmate B corroborated Inmate A's statements that Horan touched her on several occasions, that she did not like it, and that she tried to move away. Many of the inmate statements are consistent with Mr. Horan's admissions. For example, he admits to touching Inmate A's neck and shoulders and Inmate B at the small of her back. He admits to leaving food for Inmate C and Inmate F. Hearsay that is corroborated by other evidence or is uncontradicted carries sufficient indicia of reliability and probative value. *Merisme v. Board of Appeals on Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 539 N.E. 2d 1052 (1989).

Mr. Horan needed to do more than suggest that the inmates were not credible. He needed to come forward with countervailing evidence that would support a finding that the hearsay evidence was not reliable. He failed to do so.

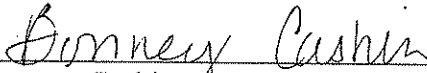
To summarize, I conclude that Mr. Horan violated Rules 6 (a), 8(a), 8(c), 9 (b), 12 (a) 17 (a), and 19 (c). He also violated Policy No. 103 DOC 519. Based on these violations, I conclude that the DOC has shown good cause for its decision to terminate Mr. Horan.

I see no reason to reduce the sanction. I may not substitute my judgment for a valid exercise of discretion by the DOC based on its policy considerations. *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. at 304, 682 N.E. 2d at 926. Mr. Horan's disciplinary record shows that lesser measures have not been successful and, thus, offers further support for termination.

Recommendation

I recommend that the Civil Service Commission uphold the action of the appointing authority.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Bonney Cashin
Administrative Magistrate

DATED: JUN 05 2009