

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STEPHEN KENNEDY,
Appellant

v.

D-06-51

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Pro Se
Stephen Kennedy

Respondent's Attorney:

Amy Hughes, Esq.
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Stephen Kennedy (hereinafter "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") claiming that the Department of Correction (hereinafter "Appointing Authority" or "DOC") did not have just cause to suspend him for ten (10) days without pay. The Appellant filed a timely appeal. A hearing was held on March 27, 2008 at the offices of the Commission. Since no notice was received from either party, the hearing was declared private. Two (2) tapes were made of the hearing and are retained by the Commission. Based on the request of one of the parties, all witnesses were sequestered.

FINDINGS OF FACT:

Based on the seventeen (17) exhibits entered into evidence and the testimony of:

For the Appointing Authority:

- Kerry Rice, Labor Relations Advisor;
- Steven Ayala, Director of Special Operations;
- Edward Fitzgerald, former Wrentham Police Officer;

For the Appellant:

- Sergeant Stephen Kennedy, Appellant;

I make the following findings of fact:

- 1) The Appellant is a tenured civil service employee and has been employed at DOC for approximately seventeen (17) years since his appointment to the position of Correction Officer I on May 17, 1992. On March 20, 1998, the Appellant was promoted to the position of Correction Officer II "Sergeant." On November 27, 2006, the Appellant was appointed to the position of Correction Officer III "Lieutenant." (Testimony of Appellant)
- 2) The Appellant has been the subject of two separate disciplinary actions prior to this appeal. The Appellant's disciplinary history includes a five (5)-day suspension (2 days in abeyance) for leaving his service weapon on a table in the restroom outside the Superintendent's office at MCI Cedar Junction on February 16, 2001. The Appellant also received a letter of reprimand for leaving a round of ammunition on the floor outside of the Administration Control Room at MCI Cedar Junction on June 23, 2004. (Testimony of Rice, Testimony of Appellant, Exhibit 1)
- 3) In the instant matter, the Appellant was a Sergeant Investigator with the DOC Office of

Investigative Services (“OIS”) Internal Affairs Unit. In that capacity, the Appellant was issued a firearm and permitted to wear it on duty as well as carrying it to and from work.

(Testimony of Appellant, Testimony of Ayala)

- 4) On October 22, 2005, the Appellant was assigned to work at the DOC headquarters in Milford, Massachusetts from 9:00 a.m. to 5:00 p.m. Upon ending his tour of duty, the Appellant drove in his personal vehicle to the residence of Lieutenant Tina Goins, (hereinafter “Goins”) an officer in the OIS Internal Affairs Unit. (Testimony of Appellant)
- 5) The Appellant unloaded his firearm; properly secured his weapon with a DOC issued trigger lock and stored it at Goins’ home. They then went to a nearby restaurant for dinner and drinks. The Appellant allegedly had three drinks over the course of several hours.
(Testimony of Appellant, Exhibit 11)
- 6) The Appellant and Goins then returned to Goins’ home where the Appellant retrieved his secured holstered firearm and placed it in the center console of his vehicle. The Appellant drove home alone. (Testimony of Appellant, Exhibit 11)
- 7) At approximately 1:00 a.m., the Appellant was traveling northbound on Route 1 at 73 MPH in a 50 MPH zone when he was stopped by Wrentham Police Officer Edward Fitzgerald who had been traveling southbound. The stop was preceded by Fitzgerald slowing down, turning around, accelerating up behind the Appellant and activating his lights. (Testimony of Appellant, Testimony of Fitzgerald, Exhibit 7)
- 8) Fitzgerald asked for the Appellant’s license and registration and asked what he had been doing. As he spoke with the Appellant, Fitzgerald detected the smell of alcohol from within the vehicle and also observed the Appellant fumbling for his license. Fitzgerald observed that the Appellant’s eyes were bloodshot and glassy. When asked if he had been drinking,

the Appellant replied that he had had a couple of beers. The Appellant also disclosed that he was employed by the DOC. (Testimony of Appellant, Testimony of Fitzgerald, Exhibit 4)

- 9) Fitzgerald was unaware at the time of the traffic encounter of the Appellant's medical condition. Specifically, the Appellant had just had ear surgery causing temporary nerve damage to his tongue distorting his speech distorting his speech. (Testimony of Appellant, Fitzgerald, Exhibit 16)
- 10) Per Fitzgerald's request, the Appellant stepped out of his vehicle. The Appellant invoked his right under the Fifth Amendment of the Constitution of the United States to not conduct the requested Breathalyzer requested by Fitzgerald. When the Appellant respectfully declined Fitzgerald's request, he was placed under arrest. (Exhibit 4, Testimony of Appellant, Testimony of Fitzgerald)
- 11) The Appellant then informed Fitzgerald of the secured holstered firearm in his center console. A second responding officer, Sergeant Robillard, retrieved it and secured it. The firearm was unloaded. There were also two (2) additional loaded magazines, O.C. spray, handcuffs, an expandable baton, body armor and files from the DOC in the motor vehicle. (Exhibit 11)
- 12) The Appellant was charged with G.L. ch. 90§ 24 (1) (a) - Operating under the Influence of Alcohol and G.L. ch 90 § 17-speeding. The Appellant acknowledged that he had been speeding but contested that he was under the influence of Alcohol. (Exhibit 5, Testimony of Appellant)
- 13) The Appellant was arraigned on October 24, 2005 in the Wrentham District Court. (Exhibit 5)

- 14) Wrentham Police notified the DOC of the incident. The DOC detached the Appellant from his duties with pay and without prejudice immediately following the incident for a period of two weeks. (Testimony of Appellant, Exhibit 5, Exhibit 11)
- 15) Upon the Appellant's return to duty, he was transferred from IAU to the Bridgewater State Hospital temporarily while the details of the incident were investigated. (Testimony of Appellant, Exit 11)
- 16) On December 12, 2005, the Appellant appeared in Wrentham District Court and was found not guilty of driving under the influence of alcohol and he admitted to sufficient facts on the charge of speeding. The Appellant was found "responsible for this traffic offense and fined \$150. (Testimony of Appellant, Exhibits 5 and 11)
- 17) The Appellant stated that the arresting officer testified at this trial that he was cooperative and acted in a professional during his arrest. The Appellant's driver's license was restored on December 30, 2005 with no restrictions and his license to carry was restored by the Carver Chief of Police on January 11, 2006. (Testimony of Appellant, former Wrentham Police Officer Fitzgerald & Exhibit 13)
- 18) The DOC held a disciplinary hearing regarding this incident on January 17, 2006 with Jeffrey S. Bolger, Director of Employee Relations serving as the hearing officer. On January 30, 2006, Jeffrey S. Bolger was directed to schedule a new hearing and to ensure that Joel Berner, Chief of Investigative Services was present at the hearing.
- 19) The February 14, 2006 was held and Hearing Officer Bolger found that while there was no specific rule or regulation prohibiting the Appellant's actions on October 22, 2005, he did exercise poor judgment. That poor judgment could be seen as a violation of the DOC Rules and Regulations, General Policy I. The Appellant was suspended for ten (10) days

without pay. (Exhibit 13,Exhibit 2)

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." Cambridge v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997). See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). 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 Civ. Serv. 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 Comm. of Brockton v. Civ. Serv. Comm'n, 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. Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue for 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Appellant is charged with violating the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction*, General Policy I. The General Policy states, in part, "Improper conduct affecting or reflecting upon... the Department of Correction in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations." (Exhibits 2 and 3)

There is no dispute of the facts in this case. The Appellant admits that he was drinking with co-workers, that he was stopped for speeding, and that he had a weapon in his motor vehicle. The issue of poor judgment arose when he placed the weapon with a loaded clip in his center console after he had been drinking. Due to his experience in law enforcement, Special Operations Director Ayala is qualified to testify on what constitutes poor judgment. He confirmed that the Appellant's behavior would be considered poor judgment at best. The Appellant failed to present any evidence that a similarly situated individual had been treated differently from himself. Further, the Appellant has been disciplined on at least two prior occasions for incidents relating to irresponsibility dealing with his Departmental issued weapon and ammunition.

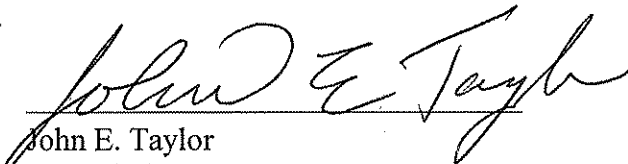
The Appellant exercised poor judgment in placing his departmental issued weapon in the

center console of his vehicle after having several alcoholic beverages. Accordingly, DOC was justified in imposing the stated discipline.

The Department of Correction had just cause for suspending the appellant for ten (10) days without pay.

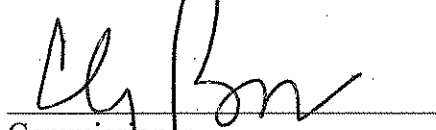
For all of the above reasons, the Appellant's appeal filed under Docket No.D-06-51 is hereby *dismissed*.

Civil Service Commission


John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Marquis, Stein, Taylor, (Yes) Henderson (No) Commissioners) on September 25, 2008.

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:

Stephen Kennedy (Appellant)
Amy Hughes, Esq. (for Appointing Authority)