

# The Commonwealth of Massachusetts

Decision mailed: 10/23/09  
Civil Service Commission

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

**ALVIN LaROCHE,**

*Appellant*

v.

**DEPARTMENT OF  
CORRECTION,**

*Respondent*

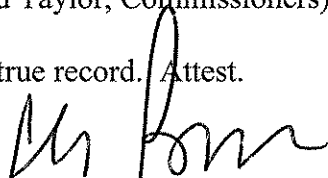
**Case No.: D-09-58**

## DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 22, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 17, 2009. The Commission received the Appellant's comments on September 17, 2009. 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 vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 22, 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:

Robert A. Stewart, Esq. (for Appellant)

Jeffrey Boldger (for Appointing Authority)

Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
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August 17, 2009

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


RECEIVED  
2009 AUG 18 A 10:08  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

Re: Alvin LaRoche v. Department of Correction  
DALA Docket No. CS-09-201

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  
Acting Chief Administrative Magistrate

RCH/das

Enclosure

cc: Robert A. Stewart, Esq.  
Jeffrey Bolger

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

**Division of Administrative Law Appeals**

**Alvin LaRoche,**  
Appellant

Docket No. D-09-58  
DALA No. CS-09-201

v.

**Department of Correction,**  
Appointing Authority

**Appearance for Appellant:**

Robert A. Stewart, Esq.  
Louison, Costello, Condon & Pfaff, LLP  
67 Battery March Street  
Boston, MA 02110

**Appearance for Appointing Authority:**

Jeffrey Bolger  
Department of Correction  
P.O. Box 946  
Industries Drive  
Norfolk, MA 02056

**Administrative Magistrate:**

**Joan Freiman Fink, Esq.**

**SUMMARY OF DECISION**

The Appointing Authority has demonstrated just cause to suspend the Appellant for a period of one day from his position as a Correction Officer III/Lieutenant with the Department of Correction in that despite having received an oral warning and a written warning, the Appellant was tardy in reporting for work on four occasions in July of 2007.

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CIVIL SERVICE COMMISSION

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31 §43, the Appellant, Alvin LaRoche, is appealing the January 27, 2009 decision of the Appointing Authority, the Department of Correction, suspending him for a period of one day from his position as a Correction Officer III/Lieutenant with the Department of Correction. (Exhibit 3.) The Appellant filed a timely appeal of this decision with the Civil Service Commission (Exhibit 2).

A hearing in this matter was held on May 22, 2009 at the offices of the Division of Administrative Law Appeals, 98 N. Washington Street, Boston, MA. As no written request was received from either party, the hearing was declared to be private. Various documents were entered into evidence at the hearing. (Exhibits 1– 17.) Two cassette tape recordings were made of the hearing.

The following employees of the Department of Correction testified on behalf of the Appointing Authority: Brad Cowen, Director of Security at MCI Framingham, and Steven Dehestani, a Captain and Shift Commander who was assigned to MCI Framingham from 2002 through 2009. The Appellant testified in his own behalf.

The Appointing Authority maintains that just cause exists to suspend the Appellant from his employment as a Correction Officer for violation of Rule 18(a)<sup>1</sup> of the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction*. (Exhibit 12.) Specifically, the Appointing Authority alleges that despite having received both a verbal and written warning about tardiness, the Appellant was late for work on July 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup>.

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<sup>1</sup> Rule 18(a) provides in part that: "Punctual attendance for your regular hours of duty must be strictly observed. ....Absence from duty without permission or notice shall not be allowed ...."

**FINDINGS OF FACT**

Based on the documents entered into evidence (Exhibits 1 – 17) and the testimony of Brad Cowen, Steven Dehestani, and Alvin LaRoche, I make the following findings of fact:

1. The Appellant, Alvin LaRoche, commenced employment as a Correction Officer I with the Department of Correction on August 5, 1988. He was assigned to work at MCI Concord. (Testimony of the Appellant.)
2. In or about 1998, the Appellant was promoted to the position of Correction Officer II/Sergeant and was assigned to work at MCI Shirley. (Testimony of the Appellant.)
3. In or about November of 2006, the Appellant was informed that there was an opening for a Correction Officer III/Lieutenant position at MCI Framingham and that he could be promoted to that position if he wanted to work at the Framingham facility. (Testimony of the Appellant.)
4. The Appellant voluntarily accepted the promotion to the position of Correction Officer III/Lieutenant at MCI Framingham at that time even though he has lived and continues to live in Winchendon, MA, a distance of approximately 60 miles from Framingham (Testimony of the Appellant.)
5. Upon arriving at MCI Framingham, the Appellant was assigned to work the 3 p.m. to 11 p.m. shift. (Testimony of the Appellant.)
6. All Correction Officers including Correction Officers III/Lieutenant are required to report for duty ten minutes prior to the commencement of their assigned shifts. (Testimony of Brad Cowen.)

7. **Article 7 Section 9** of the Collective Bargaining Agreement in effect between the Commonwealth of Massachusetts and the Massachusetts Correction Officers Federated Union provides that: "Effective July 1, 1998, all employees in the titles ... Correction Officer III shall be required to attend daily roll-call which shall commence ten (10) minutes before the start of their regular shift. The roll-call period shall be counted as time worked for compensation purposes." (Exhibit 10.)

8. Although Correction Officers no longer have to stand for an official roll-call, they are briefed by the Commanding Officer (usually the Lieutenant) of the previous shift when they report for duty ten minutes prior to the start of their assigned shifts. If a Correction Officer is late, the Lieutenant on the outgoing shift may have to be paid overtime to remain at his/her post for a longer period of time. (Testimony of Brad Cowen.)

9. On May 7, 2007, the Appellant received a written reprimand from Superintendent of MCI Framingham, Lynn Bissonnette, for violation of the Department's attendance policy in accordance with Rule 18(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. (Exhibit 14.)

10. On June 30, 2007, the Appellant was late for work. Captain Dehestani met with the Appellant that day and reprimanded him verbally for being tardy. Captain Dehestani stressed that the Appellant needed to improve his attendance record, that further absences would result in discipline, and that as a Lieutenant, the Appellant should be a role model for his subordinates. (Testimony of Captain Dehestani.)

11. The Appellant was late on July 23<sup>rd</sup>, July 24<sup>th</sup>, July 26<sup>th</sup>, and July 27<sup>th</sup>. On each of these occasions, the Appellant called MCI Framingham and notified a supervisor that he was caught in traffic and that he would be late. (Testimony of the Appellant.)

12. During the course of his shift on July 23<sup>rd</sup>, the Appellant learned that the major traffic jam he was involved in that day resulted from an airplane having landed on Route 49. For the remaining three days he was tardy, i.e., July 24<sup>th</sup>, July 26<sup>th</sup>, and July 27<sup>th2</sup>, the Appellant was not aware of any unusual problems that resulted in significant traffic tie-ups. (Testimony of the Appellant.)

13. Captain Dehestani was on vacation the week of July 23<sup>rd</sup> and when he returned, he noticed that the Appellant's attendance record for the previous week included four instances of tardiness. Captain Dehestani brought this information to management's attention and then asked permission to conduct a fact-finding hearing concerning the Appellant's tardiness. Permission to hold such a hearing was subsequently granted. (Testimony of Captain Dehestani.)

14. On August 10, 2007, Captain Dehestani held a fact-finding hearing. During the course of that hearing, Captain Dehestani asked the Appellant why he was late on the four occasions in late July. The Appellant offered no explanation but stated that "no one says anything when I come in early." (Exhibit 6; Testimony of Captain Dehestani.)

15. On August 21, 2007, Captain Dehestani sent Director of Security Brad Cowen a memorandum indicating that he (Dehestani) is of the opinion that the Appellant should receive a one day suspension for his tardiness. (Exhibit 8).

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<sup>2</sup> On July 23<sup>rd</sup>, the Appellant was twenty-two minutes late. On the remaining three days, the Appellant was approximately seven minutes late each day.

16. On December 16, 2008, the Appointing Authority held a hearing concerning the Appellant's attendance record in July of 2007 and on January 27, 2009, it issued a decision suspending Correction Officer III/Lieutenant LaRoche for a period of one day for being late on four occasions in July of 2007 despite having received a verbal and written warning concerning the necessity of reporting to work on time. (Exhibit 3.)

17. On February 14, 2009, the Appellant filed a timely appeal of this decision with the Civil Service Commission (Exhibit 2).

### **CONCLUSION AND RECOMMENDATION**

After reviewing all the testimony and evidence in this case, I conclude that the Appointing Authority has demonstrated by a preponderance of the evidence that just cause exists to suspend the Appellant for a period of one day from his position as a Correction Officer III/Lieutenant with the Department of Correction. The Appointing Authority established that the Appellant violated Rule 18(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction by being late for work on four occasions in July of 2007, *i.e.*, July 23<sup>rd</sup>, July 24<sup>th</sup>, July 26<sup>th</sup> and July 27<sup>th</sup>.

The Civil Service 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). In reviewing an appeal brought pursuant to G.L. c. 31 §43, if the Civil Service 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 basis of my conclusion rests with my finding that the testimony of both Brad Cowen and Steven Dehestani was extremely credible. In *Connor v. Connor*, 77 A.2d 697 (Pa. 1951), the Pennsylvania Appeals Court held that the "opportunity to observe demeanor and appearance of witnesses in many instances becomes the very touchstone of credibility." *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112, 120 (1978); *New England Canteen Service, Inc. v. Ashley*, 372 Mass. 671 (1977).

Captain Dehestani gave compelling testimony to the effect that on June 30, 2007, he personally warned the Appellant that his (LaRoche's) tardiness was unacceptable and that continued tardiness would result in disciplinary action. Captain Dehestani also reminded the Appellant that as a supervising officer, he should be a role model for his subordinates. Despite this verbal warning and a previous written warning issued in May of 2007, the Appellant was late on four occasions in late July.

The Appellant acknowledged that he was late on the four days in question but stressed that there was unusually heavy traffic on July 23<sup>rd</sup> as a result of a small plane landing on the highway. He also testified that there was an abnormal amount of traffic on the three other days and noted that his home in Winchendon, MA is located approximately sixty (60) miles from MCI Framingham.

Arguing in his own behalf, the Appellant offered that he had called on each and every day that he was late, notifying his superiors that he was on route to work. The Appellant further argued that he felt that Captain Dehestani had treated him unfairly and was biased against him, especially since he (LaRoche) had told the Captain during the

fact-finding hearing that his tardiness was predicated on circumstances out of his control, *i.e.*, heavy traffic volume.

I do not find the Appellant's explanation to be persuasive or convincing. In the first instance, the Appellant voluntarily chose to accept the promotion to the position of Lieutenant at MCI Framingham. The Appellant testified that at the time he accepted the promotion, he knew that Framingham was a long distance from his home in Winchendon.

The Appellant stressed that on all four occasions in July of 2007 he had called the institution to notify his superiors that he would be late. As such, the Appellant argues that he should not be disciplined for these four instances of tardiness. Notwithstanding the Appellant's prior notification of intended tardiness, Rule 18 (a) expressly provides that "punctual attendance for your regular hours of duty must be strictly observed ...." The Appellant was well aware of the fact that traffic conditions were variable and should have made the necessary accommodations to ensure his timely arrival at work. Moreover, no evidence was introduced to substantiate the Appellant's allegation that Captain Dehestani was biased against him (LaRoche); rather, I conclude that Captain Dehestani offered the Appellant an opportunity to explain why he was absent on repeated occasions despite having been adequately warned of the consequences of such action.

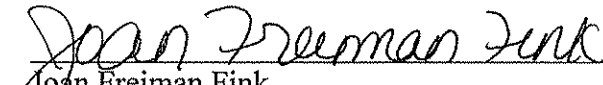
In conclusion, the Appointing Authority has demonstrated by a preponderance of the evidence that on four occasions in July of 2007, he was late for his assigned tour of duty at work.

In determining the appropriateness of the discipline to be imposed, I reviewed the Appellant's prior disciplinary record which included a both a written warning and a specific verbal warning from his supervisor, Captain Dehestani, to the effect that any

further instances of tardiness would result in the imposition of disciplinary action. After due deliberation, I conclude that based on the facts and circumstances of this case, the Appointing Authority was fully justified in suspending the Appellant for a period of one day from his position as a Correction Officer III/Lieutenant with the Department of Correction.

Accordingly, I recommend that the Civil Service Commission affirm the action of the Appointing Authority in this matter.

DIVISION OF ADMINISTRATIVE LAW APPEALS

  
Joan Freiman Fink  
Administrative Magistrate

Dated: **AUG 17 2009**