

Decision mailed: 7/30/10  
Civil Service Commission *CS*

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JAMES LEAHEY,  
Appellant

v.

D-06-85

DEPARTMENT OF CORRECTION,  
Respondent

Appellant's Attorney:

Mary Notaris, Esq.  
45 Stiles Road, Suite 104  
Salem, NH 03079

Respondent's Attorney:

Jeffrey S. Bolger  
Director of Employee Relations  
P.O. Box 946  
Norfolk, MA 02056

Commissioner:

Daniel M. Henderson

DECISION

The Appellant, James Leahey (hereinafter "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the Department of Correction (hereinafter the "DOC" or "Appointing Authority") to suspend him for thirty (30) working days without pay for (1) failure to fully report inappropriate conduct by an inmate; (2) and failure to report a written communication received from said inmate, (hereinafter "accusing inmate"). Specifically, via a letter dated March 27, 2006, Officer Leahey was suspended for violating the General Policy and Rule 8(c) and Rule 10(b) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction ("Blue Book")

as a result of his action on February 12, 2004 when he received an extortion letter from an inmate while on duty and he failed to notify the proper authorities.

The Appellant filed a timely appeal with the Commission. A hearing was held at the offices of the Civil Service Commission (hereinafter "Commission") on April 9, 2008. The hearing was declared private and the witnesses were sequestered. The hearing was digitally recorded and a copy of the hearing is retained by the Commission. Only the Respondent submitted a proposed decision. The Appellant's attorney was contacted several times by e-mail regarding filing a proposed decision, but the attorney still failed to file same.

#### **FINDINGS OF FACT:**

Sixteen (16) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

##### *For the Appointing Authority:*

- Captain Richard Curtis, Department of Correction
- Lieutenant Kenneth Arsenault, Department of Correction
- Lieutenant Thomas Bonci, Department of Correction

##### *For the Appellant:*

- James Leahey, Appellant

**I make the following findings of fact:**

1. The Appellant, James Leahey, a tenured civil service employee of the DOC, has been employed as a Correction Officer I ("CO I") since June 24, 1990. (Stipulation of Fact).
2. The Appellant was assigned to the 11pm to 7am shift at the North Central Correctional Institution, (NCCI) at Gardner. On Thursday, February 12, 2004, the Appellant reported to his regularly scheduled shift. However, the Appellant was then just newly assigned to this facility. (Testimony of Appellant, Stipulation of Fact)
3. Thursday, February 12, 2004 was also the last day that the Appellant ever worked at North Central Correctional Institution, (NCCI) at Gardner. (Testimony of Appellant)
4. Just as he was finishing his shift, "on the way out the door " at 7:00 AM on Thursday, February 12, 2004 an inmate approached the Appellant and told him that he had to bring cigarettes into the correctional facility for him or he would "tell people" that the Appellant was having sex with him at night. (Testimony of Appellant, Exhibit 2).
5. At that time, the accusing inmate made the verbal threat and demand for cigarettes he also handed the Appellant a crumpled up piece of paper (a letter), and the Appellant took the crumpled up paper and stuck it into his pocket without reading it. (Testimony of Appellant, Exhibit 2).
6. The Appellant did not read the letter right away but finally did read it the following Monday or Tuesday. The letter documented and detailed the inmate's verbal threats to report to the DOC and the D.A. the allegation that the Appellant and he had sexual relations. The accusing inmate demanded that the Appellant deliver things, like cigarettes or he would report the alleged relationship. The accusing inmate also stated that he had already mailed boxer shorts with the Appellant's DNA on it, to his

“uncle” as evidence. Then the Appellant worried and thought to himself, “Here it goes again” since he had previously had problems by being sexually harassed by DOC employees and inmates going all the way back to at least 1992-1993. He didn’t know what to do. He called his Worker’s Compensation attorney, Attorney Kohl for legal advice. (Testimony of Appellant, Exhibit 1)

7. The Appellant did previously suffer repeated sexual harassment from both DOC employees and inmates which resulted in his filing a civil action in superior court versus the DOC in 1992-1993, when he was assigned to MCI Concord. The result of this filing was: the DOC firing one officer; demoting and transferring a DOC Lieutenant to another institution and reprimanding 2 other officers. The Appellant was then out on Worker’s Compensation from November, 1993 to January, 1997. The Appellant suffered sexual harassment on the DOC job from DOC staff throughout his career since 1992-1993. (Testimony of Appellant)
8. When the Appellant returned to work after being on Worker’s Comp, in January, 1997 he was assigned to work at Longwood, what he thought would be a safe work place. However, an inmate there knew that he was gay from reading articles in the Boston Globe and Boston Herald regarding the lawsuit he had filed against the DOC for sexual harassment. The Appellant suffered sexual harassment from both DOC staff and inmates while he was assigned at Longwood. He filed “formal complaints” versus the DOC for this sexual harassment. From 1997 to 2000 he was out on Worker’s Comp for approximately six months due to stress and depression from this sexual harassment. (Testimony of Appellant)
9. During the period he was at MCI Concord, he was accused by an inmate of sexually fondling the inmate. The Appellant filed a written report with the DOC regarding this

allegation. The DOC then placed him immediately on administrative leave and escorted him off of the DOC property. He was not read his Miranda rights at that time. This allegation was investigated by the DOC and **not** sustained and no criminal charges resulted from this investigation. There was another incident when he was assigned to MCI Concord, where he and other officers were sued in Concord District Court for "physical assault". The Appellant and the other officers were represented by the DOC lawyers and the inmate was pro se. The Appellant testified and was cross-examined by the pro se inmate and had to admit in his testimony that he was gay. The Appellant believes that this information was spread around by that inmate.

(Testimony of Appellant)

10. The Appellant had problems at NCCI Gardner, immediately upon being assigned there in September, 2000. He was left alone in the training room for his one week orientation and training session at Gardner. After, his orientation he was assigned but did not know where the assignment was located nor any of the supervisory personnel. He had not received any tour of the facility or any introductions. The Appellant was very upset over this treatment. He assumed this treatment was because he was gay.

(Testimony of Appellant)

11. While assigned at NCCI Gardner, he received repeated sexual harassment from the DOC staff. This was usually in the form of comments and loud statements of which the Appellant provided numerous examples. Some were very degrading. One less degrading was a loud yelled out statement by staff: "Don't put that faggot with me." The Appellant assumed that he was put on the 11-7 shift so that he would have less contact with the inmates, who were asleep. The Appellant had not informed anyone at NCCI Gardner that he was gay. The Appellant became observably upset while

testifying to these unpleasant events. The memory of them seems to have provoked anguish anew. His voice quaked, he appeared nervous, shaking and near tears.

(Testimony and demeanor of Appellant)

12. The Appellant's experience while employed at the DOC, when juxtaposed to his prior military and employment history shows a dramatic contrast. He enlisted in the US Navy after graduation from high school in 1980. He was in the Navy from September, 1980 until October, 1989. He had an enjoyable and blemish free career in the Navy. He received several meritorious awards and an honorable discharge. He left the Navy in October, 1989 due to the serious illness of his father. After leaving the Navy he worked several jobs, including the US Postal Service, before beginning at the DOC in June, 1990, and had no problems at any job prior to the DOC. (Testimony and demeanor of Appellant, reasonable inference)

13. The Appellant's greatest concern at the time of the February 12, 2004 incident; was the threat of criminal prosecution for serious offenses, which could lead potentially to his own incarceration and the loss of his DOC job and therefore any means of financial support. Coupled with his past bad experiences at the DOC, this caused him great worry, stress and depression. (Testimony and demeanor of Appellant, Exhibits 1, 13, 15 and 16)

14. From February 13 – 21, the Appellant had swap-time off and days off through Monday. And then he called in sick because he was suffering from a herniated disc. (Testimony of Appellant, Exhibit 13).

15. On February 22, 2004, the Appellant called in sick again. He spoke to Captain Richard Curtis (hereinafter "Curtis"), the Shift Commander of the 3pm to 11pm shift. In this call, he reported his encounter with the accusing inmate. The Appellant felt

that Captain Curtis was a person he could trust. The Appellant identified the inmate by his first name and the first letter of his last name and the phonetic spelling of the name. He did not mention the letter. The Appellant provided Curtis with all of the details including the threats and attempted extortion. The Appellant also provided Curtis with the information that some of the 3-11 shift staff had been talking openly about him being gay in the presence of inmates and stated that an inmate made comments to him that could only have come from staff. (Testimony of Curtis, Appellant, Exhibits 10 and 13)

16. The Appellant testified that he called Curtis because he believed that he could trust Captain Curtis and he specifically reported all of the details of the inmate threats and extortion, he reported that he was sick, and foremost he informed Curtis that **“It’s starting again”** a reference to all of the past sexual harassment he had suffered at the DOC. (Testimony of Appellant)
17. Curtis instructed the Appellant over the phone to contact the Superintendent the next day in order to report the incident and to submit a written report. (Testimony of Curtis, Exhibit 2).
18. Curtis checked the inmate roster and positively identified the accusing inmate. (Testimony of Curtis, Exhibit 13).
19. On February 23, 2004, Curtis filed a confidential incident report concerning his conversation with the Appellant about the inmate’s threat. (Testimony of Curtis, Exhibit 13).
20. The Appellant neither contacted the Superintendent nor filed a report. (Testimony of Curtis, Testimony of Appellant)

21. On February 24, 2004 the DOC initiated an investigation into an allegation by the accusing inmate that the Appellant sexually assaulted the accusing inmate while the Appellant was on duty at NCCI on February 6, 2004. Thereupon, Lt. Kenneth Arsenault (hereinafter "Arsenault") and Lt. Thomas Bonci (hereinafter "Bonci") began an investigation into the incident or "problem" with an inmate, as reported by the Appellant, as occurred on February 12, 2004. (Testimony of Lt. Arsenault, Exhibits 10 and 11)
22. On February 24, 2004 Bonci interviewed the inmate and learned for the first time of the letter. (Testimony of Bonci, Exhibit 11)
23. On February 25, 2004 the State Police was contacted by the DOC and advised of the allegations of sexual assault committed by the Appellant, a Correction Officer on an inmate. State Police Sgt. Kelly was assigned to assist with the investigation. (Exhibit 10)
24. Lt. Arsenault testified that the accusing inmate in this matter as having a long criminal record and that he "lied repeatedly" about the facts and circumstances of the alleged incident. (Testimony of Lt. Arsenault)
25. One of the alleged facts the accusing inmate lied about was that he had mailed a pair of boxer shorts on February 13, 2004, to a certain named person, which he claimed was evidence to prove his story. He claimed that he mailed a letter along with the boxer shorts. He claimed that the boxer shorts had the Appellant's DNA on it. This mailed package was to be sent along to a named attorney who was representing the accusing inmate. On February 24, 2004, Lt. Arsenault contacted that certain named person, who assured him that the mailed package had been received by him and sent on by him to the named attorney, as directed by the accusing inmate. The named



person and the named attorney were repeatedly contacted, by the DOC and the State Police, in an attempt to retrieve the alleged mailed package as evidence for the State Police. On April 7, 2004, the accusing inmate was again interviewed regarding the allegedly mailed boxer shorts evidence. The accusing inmate was adamant that he had mailed the evidence but could not explain why the "boxer shorts never turned up during the course of the investigation." (Testimony of Lt. Arsenault, Exhibit 10)

26. The letter which was given to the Appellant by the accusing inmate on February 12, 2004 also refers to the alleged boxer shorts containing his supposed DNA. This letter however, refers to the boxer shorts already being mailed out to the accusing inmate's "uncle" and a threat to go to the DA in addition to DOC authorities. This is a threatening letter with alleged details and alleged corroborating evidence in a clear attempt to frighten and intimidate the Appellant. However, it contains several obvious contradictions on its face. The package was claimed by the accusing inmate to be mailed on February 13<sup>th</sup> not prior to February 12<sup>th</sup>, as claimed in the letter. The addressee was not his "uncle but later determined to be his friend or "lover". The package was never actually mailed to and never received by that named person. (Exhibits 10 and 12, Testimony of Lt. Arsenault)

27. In March, 2004, the Appellant was placed on paid administrative leave by the DOC pending the result of their investigation and awaiting the criminal trial results of the accusing inmate's allegations of sexual relations with the Appellant. (Testimony of Appellant, Exhibit 10)

28. On April 9, 2004, the Appellant appeared for an interview by the DOC and the State Police. State Police Sgt. Kelly read the Appellant his Miranda rights. At that time the

Appellant opted to postpone the interview until he could retain legal counsel.

(Testimony of Lt. Arsenault, Exhibit 10)

29. On May 7, 2004, the Appellant in the company of his Attorney Mary Notaris appeared for a scheduled interview with the DOC investigators and the State Police Investigators. It was approximately 2.25 hours into the interview when Attorney Notaris terminated the interview. At the outset of the interview, Attorney Notaris had turned over the letter the Appellant had received from the accusing inmate on February 12, 2004. The Appellant and his attorney signed the statement comprising the interview at that point. (Testimony of Lt. Arsenault, Exhibit 10)
30. During the course of the DOC investigation, Lts. Arsenault and Bonci also interviewed correction officers Jose Robles and Jessica Veira, Attorney Douglas Rowe, a witness inmate, and the Appellant. (Exhibit 10)
31. As a result, the Appellant was suspended with pay by Superintendent Steven O'Brien (hereinafter "O'Brien") on March 8, 2004 the investigation was stayed, as criminal proceedings were initiated against him in Fitchburg District Court. The Appellant was prosecuted for allegedly having sexual relations with an inmate (the same inmate in the February 12, 2004 incident), pursuant to G.L. c. 268 §21A. (Testimony of Appellant, Exhibit 10).
32. Violation of G.L. c. 268 §21A, sexual relations between an inmate and a correctional officer is a felony with a maximum sentence of five years in state prison or by a fine of \$10,000 or both. An inmate is deemed incapable of consent to sexual relations with such correctional officer. (Administrative Notice)
33. The DOC investigation was stayed awaiting the outcome of the criminal prosecution against the Appellant. (Testimony of the Appellant)

34. The criminal trial of the Appellant was concluded in November, 2005. The Appellant testified at this trial. He was found Not Guilty. (Testimony of the Appellant, Exhibit 10)
35. After the prosecution of the Appellant resulted in a finding of not guilty; a DOC hearing was held in order to consider appropriate disciplinary action against the Appellant for his alleged violations of Rule 8(c) and 10(b). (Exhibit 3)
36. The Appellant was straight forward and direct in his responses. He exhibited a good memory and seems intelligent and responsible. He did not invite the unpleasant experiences he suffered while employed at the DOC, including this incident. He seemed honestly confused and hurt at becoming a target of sexual harassment at the DOC. He did not exaggerate or dramatize his answers to improve his position. If anything he tried to remain accurate and matter-of-fact in his answers. A few times he became very emotional at recalling past unpleasant events but the emotion was natural and not conjured up. He answered every question honestly to the best of his ability. For example, he was asked about taking time off in 1993 to attend a gay-pride parade and he answered that he was not sure whether he took personal time or sick time to attend the parade. I find the Appellant to be honest, credible and reliable. (Exhibits, testimony and demeanor of Appellant)
37. The Appellant received and signed for a copy of the Rules and Regulations on June 21, 1990 and February 5, 1991. (Testimony of Appellant, Exhibits 4 and 5)
38. Rule 8(c) of the Rules and Regulations states:
- “You must not associate with, accompany, correspond or consort with any inmate or former inmate except for a chance meeting without specific approval of your Superintendent, DOC Department Head or the Commissioner of Correction. Any other outside inmate contact must be reported to your Superintendent, DOC Department head or Commissioner of Correction. Treat all inmates impartially, do not grant special privileges to any inmate. Your relations with inmates, their relatives

or friends shall be such that you should willingly have them known to employees authorized to make inquiries. Conversation with inmates' visitors shall be limited only to that which is necessary to fulfill your official duties. After an inmate has received an official work assignment, you should not approach said inmate relative to another position under your supervision, without first having consulted the inmate's work instructor or other concerned employee(s), and having ascertained that the Superintendent or his/her designee would agree to the inmate job change. Inmates should not be allowed to frequent or linger in or about employees' rooms or official work areas." (Exhibit 6)

39. Rule 10(b) of the Rules and Regulations states:

"When suspicious behavior is noted you should take steps to satisfy yourself that nothing is being done to jeopardize the good order or safety of the institution. The fact that an inmate has been detailed to another employee or department does not relieve you from such inquiry. Nothing in these rules prevents you from discussing any given situation with your direct supervisor before writing a formal disciplinary report against an inmate. Disciplinary reports must be factual, impartial, complete and impersonal, and processed in compliance with institution and Department of Correction policy. A disciplinary report must be completed and submitted to the Superintendent's designee prior to the end of your tour of duty on a given work shift. Supervising employees shall not suppress you from writing a disciplinary report, however, it is generally acknowledged that the employee who succeeds in maintaining good discipline with a minimum number of formal reports deserves the highest commendation." (Exhibit 6)

40. Under the Rules and Regulations, Correction Officers are required to report any unusual occurrences during their shift and if a Correction Officer is given anything by an inmate, they are to return it and report it immediately. These reports are to be submitted prior to the end of the shift. (Testimony of Bonci, Exhibit 6).

41. On February 6, 2006 the DOC sent a Notice of Hearing to the Appellant for February 22, 2006. (Exhibit 3)

42. At the DOC hearing it was determined that the Appellant violated Rules 8(c) and 10(b) of the Rules and Regulations. (Exhibit 3, Exhibit 1 and Exhibit 6)

On March 27, 2006, the DOC issued a thirty (30) day suspension without pay. (Exhibit 1)

43. The Appellant testified that he suffered from depression and stress in the past as a result of the sexual harassment at work. He testified that he had received Worker's Compensation for several different periods of time due to that stress and depression. (Testimony of Appellant).
44. The Appellant applied for disability retirement benefits to the Commonwealth's Public Employee Retirement Administration Commission (PERAC). A medical examination and evaluation was conducted on January 8, 2008, by three designated MD Psychiatrists, pursuant to G.L. c. 32 §6 on his application. The Appellant's application was initially approved. It was initially determined that the Appellant was permanently incapable of performing the essential duties of the position of correction officer. It was determined that his incapacity was a natural and proximate result of the sexual harassment that he sustained at work from fellow officers, superior officers and inmates. The harassment, mistreatment and related work conflicts caused him stress depression and emotional problems. The Appellant reported that he is involved in civil litigation with the DOC. The financial and emotional stress of those legal proceedings has adversely affected his mental health. The Appellant was waiting for final approval of his application for disability retirement at the time of this hearing. (Testimony of Appellant, Exhibit 16)
45. The Appellant was subsequently awarded Worker's Comp retroactively back to the date of the incident here, February 12, 2004. (Testimony of Appellant)
46. The Appellant's only previous DOC discipline history consists of a letter of reprimand for unprofessional behavior and a one (1) day suspension for receiving a hair cut from an inmate while on duty. (Exhibits 7, 8 and 9)

**CONCLUSION OF THE MAJORITY (BOWMAN, STEIN, MARQUIS, MCDOWELL)**

DOC has shown by a preponderance of the evidence that it had just cause to suspend the Appellant from employment for a period of thirty (30) days without pay for violations of Rules and Regulations 8(c) and 10(b).

On February 12, 2004 an inmate approached the Appellant and told him that he had to bring cigarettes into the correctional facility for him or he would “tell people” that the Appellant was having sex with him at night. The inmate also handed the Appellant a note which documented his verbal threats.

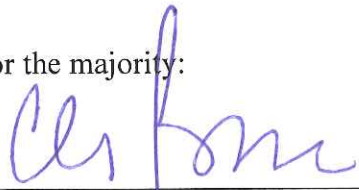
Rule 8(c) is specific: “You must not associate with, accompany, correspond or consort with any inmate or former inmate except for a chance meeting without specific approval of your Superintendent, DOC Department Head or the Commissioner of Correction. Any other outside inmate contact must be reported to your Superintendent, DOC Department head or Commissioner of Correction.” Rule 10 (b) further states, “When suspicious behavior is noted you should take steps to satisfy yourself that nothing is being done to jeopardize the good order or safety of the institution. The fact that an inmate has been detailed to another employee or department does not relieve you from such inquiry. Nothing in these rules prevents you from discussing any given situation with your direct supervisor before writing a formal disciplinary report against an inmate. Disciplinary reports must be factual, impartial, complete and impersonal, and processed in compliance with institution and Department of Correction policy. A disciplinary report must be completed and submitted to the Superintendent’s designee prior to the end of your tour of duty on a given work shift.” The Department of Correction is a paramilitary organization, and the Rules and Regulations are there to maintain order, and to protect the inmates, correction officers, and superior officers.

The facts are undisputed: (1) the Appellant was threatened by an inmate; (2) said inmate simultaneously gave him a note further documenting the threats; (3) the Appellant left the correctional facility without informing the DOC or writing a report about the incident; (4) he waited ten (10) days before verbally informing the DOC about the incident, but did not mention the note; and (5) he did not turn over the note to the DOC until months later. It is undisputed that these actions amounted to violations of Rules and Regulations 8(c) and 10 (b).

Given the prior history, the Appellant's fears of harassment are understandable. His own predicament, however, does not relieve him of his obligation to follow DOC Rules and Regulations. For the safety and well being of everyone in the correctional facility, the DOC Rules and Regulations apply to each and every employee in this paramilitary organization.

For all these reasons, DOC was justified in suspending the Appellant for a period of thirty (30) days without pay. Moreover, there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him.

For the majority:

---

Christopher C. Bowman  
Chairman

## **MINORITY CONCLUSION (HENDERSON, HEARING OFFICER)**

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. Civil 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. Mun. 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 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 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). 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. Civil 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 appointing authority is afforded some clear guidance in successfully completing its task of properly investigating and disciplining an employee for misconduct, by reference to basic merit principles defined in the civil service law. **G. L. Chapter 31: Section 1. Definitions** "Basic merit principles", shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

Furthermore, it is the function of the adjudicatory agency hearing the matter to determine what degree of credibility should be attached to a witness's testimony. School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978). Doherty v. Retirement Bd of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995). In this present matter, the Appellant is found to be a very credible witness. The accusing inmate was found by the DOC investigators to have a long criminal record and lied repeatedly about the circumstances of the substantive charge of sexual relations. The DOC decided to believe a convicted and incarcerated inmate, who blatantly and admittedly attempted to intimidate, threaten and extort from a DOC officer. The accusing inmate and the Appellant each stated opposing and contradictory versions; so one of them was lying. The Appellant denied all of the inmate's substantive allegations, yet he was found by the DOC to be in technical violation of some DOC reporting rules. The Appellant was tried and found not guilty of the substantive criminal charge forming the basis of the initial DOC administrative allegations. Choosing to believe this incarcerated inmate, a disreputable and discredited source over the explanation of a fifteen year DOC officer, with only a minor prior discipline is bizarre. This choice alone, absent some very strong substantiating or corroborating evidence is suspect. There is no such evidence here; all of the so called evidence was derived from these two very unreliable sources. It would seem that this choice by the DOC adversely affects the public interest by impairing the efficiency of public service. Should a DOC officer be worried about the barest of allegations, from the least reliable of sources, convicted and incarcerated inmates? It also

does not seem that the DOC employed honesty and good faith in its investigation process of and the charging of the Appellant.

The Appellant had the right to reasonably seek legal advice and to follow it under the daunting and intimidating circumstances of this case. He was threatened and intimidated by an inmate. He had long-standing sexual harassment problems with DOC employees and inmates. He was under the very real threat of criminal prosecution regarding this alleged incident and indeed he was prosecuted for a felony and was eventually found not guilty, after a trial. The formidable circumstances and threat of job loss and potential incarceration weighed heavily on him. He suffered from physical as well as psychological ailments, including stress and depression, at the time of this incident and the investigation of it. This was born out by his award of Worker's Comp retroactively back to the date of this incident and his initial approval for disability retirement due to the sexual harassment he suffered at the DOC. He rightfully believed that this was another in a long line of false allegations and/or sexual harassment. He relied in good faith on his attorney's advice and followed that advice. The DOC was in the process of compiling evidence of employment related misconduct while the State Police was simultaneously compiling evidence for criminal prosecution of that same alleged misconduct. The circumstances were confusing and worrisome for the Appellant. He was faced with simultaneous administrative and criminal investigations by the DOC in participation with the State Police. The DOC should have recognized the difficulty and uniqueness of the Appellant's circumstances, especially given the past history of sexual harassment by DOC staff and inmates. The DOC should have and attempted to address and resolve any issues with his attorney. The DOC did not give the Appellant a clear written order, with clearly stated consequences for disobedience which he clearly disobeyed. On balance, the

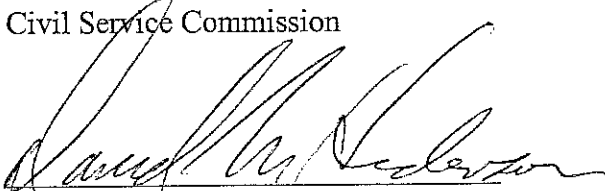
Appellant had the right to exercise all of his statutory and constitutional rights and privileges foremost against the impending criminal prosecution. The letter from the inmate had been delivered by the Appellant to his attorney and then produced by the attorney at an appropriate time to the DOC.

The Department has failed to show by a preponderance of the credible evidence in the record that it had just cause to suspend the Appellant from employment for a period of thirty (30) days without pay. The Appellant gave credible testimony about the persistent, long term sexual harassment he was subjected to because of his sexual orientation, by employees and inmates of the Department. The Appellant suffered depression and stress as a result of the harassment, and was on Worker's Compensation for several different periods and eventually was awarded it retroactively back to the date of this incident, February 12, 2004. When the Appellant was approached by an inmate and told that he had to bring cigarettes to the inmate or the inmate would "tell people" the Appellant was having sex with him, the Appellant was in a vulnerable position and understandably cautious in his handling of the incident, due to extensive history of suffering sexual harassment from DOC staff and inmates and the prospect of facing criminal prosecution for the allegation. He reasonably chose to seek the advice of an attorney before reporting this incident to his superiors and once he had been counseled by an attorney, he did in fact report the incident to Captain Curtis. The Department states that the Appellant failed to promptly disclose the existence of the extortion letter that the inmate gave to the Appellant. Yet under these circumstances, that delay seems almost incidental, since the substantively identical verbal threat and all the surrounding circumstances had been reported while the subject letter had been delivered to his attorney. There is no indication that the Appellant intended this oversight or delay to be misleading, deceitful or

obstructionary in any way. There is also no apparent prejudice to the DOC either shown or alleged by this delay. That delay does not amount to a deliberate decision to hide the existence of the letter. The DOC started an investigation of the substantive allegation by the accusing inmate regarding sexual relations. The DOC unilaterally decided to stay its own investigation pending the results of the Appellant's criminal prosecution. When the Appellant was found not guilty of the felony charge, the DOC then focused its investigation on minor rules violation and so charged the Appellant. I feel that the Appellant acted reasonably, under the totality of the circumstances in reporting the incident after his consultation with an attorney, and the Department was unjustified in issuing a thirty (30) day suspension without pay merely for an untimely reporting of the incident.

For the minority:

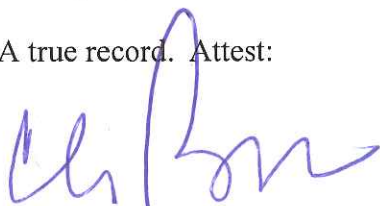
Civil Service Commission

A handwritten signature in dark ink, appearing to read "Daniel M. Henderson", written over a horizontal line.

Daniel M. Henderson  
Commissioner

For all the reasons stated in the Conclusion of the majority, the Commission, by a 4-1 vote, (Bowman, Chairman - Yes, Henderson -No, Marquis - Yes, McDowell – Yes; and Stein - Yes, Commissioners) dismissed the Appellant's appeal under Docket No. D-06-85 on July 29, 2010.

A true record. Attest:



---

Commissioner

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:

Mary Notaris, Esq.  
45 Stiles Road, Suite 104  
Salem, NH 03079

Jeffrey S. Bolger  
Director of Employee Relations  
P.O. Box 946  
Norfolk, MA 02056