


COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 11/5/10
Civil Service Commission 

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JOHN LYNCH,
Appellant

v.

D1-09-22

DEPARTMENT OF CORRECTION,
Respondent

Attorney for the Appellant:

John Lynch (*Pro Se*)

Attorney for the Respondent:

Heidi D. Handler, Atty.
Massachusetts Department of Correction
Division of Human Resources
One Industries Drive
P.O. Box. 946
Norfolk, MA 02056

Commissioner:

Daniel M. Henderson¹

DECISION

The Appellant, John Lynch, (hereinafter "Appellant" or "Lynch") filed an appeal with the Civil Service Commission (hereinafter "Commission") claiming that the Department of Correction (hereinafter ("DOC" or "Appointing Authority") did not have just cause to terminate his employment because of an incident at a rest stop on January 14, 2008.

DOC terminated the Appellant on January 2, 2009 for (1) not following his obligation as a DOC employee to render good judgment, full and prompt obedience to all provisions of law in violation of General Policy 1 of the *Rules and Regulations Governing All*

Employees of the Massachusetts Department of Correction ("Blue Book"); (2) not giving

¹ The Commission acknowledges the assistance of Legal Intern Jeannette Sedgwick in the drafting of this decision.

dignity to his position and being circumspect in his personal relationships regarding the places he frequents in violation of Rule 1 of the Blue Book; (3) for his failure to report his involvement with law-enforcement officials in violation of Rule 2(b) of the Blue Book; and (4) for failure to fully respond to the DOC investigator's questions in violation of Rule 19(c) of the Blue Book. The Appellant filed a timely appeal at the Commission.

A hearing was held at the Commission on June 4, 2009. Two (2) audio tapes were made of the hearing and are retained by the Commission.

FINDINGS OF FACT

Nineteen (19) Exhibits² were entered into evidence at the hearing. The witnesses were ordered sequestered on the allowed motion of the DOC.

Based on the exhibits and testimony of the following witnesses:

For the Appointing Authority:

- Sergeant Donald Perry, Department of Correction, Office of Investigative Services;
- Trooper Gerald Donovan, Massachusetts State Police then, currently a Falmouth Police Officer;

For the Appellant:

- Appellant John Lynch;
- Karen Lynch, wife of Appellant;

I make the following findings of fact:

² The Appellant offered medical records, a letter. That letter was marked as Exhibit 19 for identification purposes only. That letter stated a medical opinion and the author did not testify. The stated subject matter is beyond the knowledge and experience of this hearing officer and would require expert evidence or testimony to support the stated medical opinion, for it to be admitted into evidence. In addition, the hearing officer requested that the DOC provide a certified copy of the conviction within ten (10) days of the hearing. The DOC provided this certified copy on June 15, 2009, and it is combined and marked with Exhibit 16.

1. The Appellant was a tenured civil service employee serving in the position of Correction Officer I. He had been employed by DOC for approximately eighteen (18) years. (Exhibit 14).
2. Prior to his termination the Appellant, John Lynch, served in the position of Correction Officer I at the Massachusetts Correctional Institution at Cedar Junction ("MCI-CJ") in Walpole, Massachusetts. He had been employed by the Department since June 18, 1989 before he was terminated on January 2, 2009, for an outside arrest incident which occurred during his regular shift for which he called in sick, and which involved road rage, a felony conviction for open and gross/ lewdness, misuse of sick time, and being less than truthful in the course of an investigation. (Exhibit 2, Termination Letter; Testimony of Appellant).
3. The Appellant had no prior disciplinary history. (Exhibit 17).
4. On January 14, 2008, the Appellant called in sick at the DOC. He left the house in uniform, but did not tell his wife he was not going to work, He visited his father's grave in Bourne. (Exhibit 7; Testimony of Appellant).
5. Between 2:30 p.m. and 3:00 p.m. that day, the Appellant stopped in a rest stop off Route 495 in Wareham. (Exhibit 10).
6. At the rest stop, a man ("victim") pulled his pick-up alongside the Appellant's van. (Exhibit 10). The victim looked into the Appellant's van, saw the Appellant masturbating, and drove away. (Exhibits 7, 13).
7. The Appellant followed him for several miles, tailgating, flashing his lights and yelling obscenities. The Appellant followed the victim to a 7-Eleven in Wareham. (Exhibits 10 and 12, Testimony of Trooper Donovan).

8. When the victim approached Appellant's van at the 7-Eleven to ask him to stop following him, the Appellant exposed his penis to the victim. (Exhibits 10 and 12, Testimony of Trooper Donovan).
9. The victim left first. After the victim left the 7-Eleven, the Appellant followed the victim further down the highway. (Exhibits 10 and 12, Testimony of Trooper Donovan).
10. The victim called 911 and drove to the State Police barracks in Bourne in order to file a report. He filed a report and provided the police with the Appellant's license plate number. (Exhibits 10 and 12, Testimony of Trooper Donovan).
11. The State Police (SP) searched Route 495 but could not find the Appellant's vehicle. The SP then contacted the Taunton Police, on January 14, 2008 to locate the van at the Appellant's home and ask him to come in to file a statement concerning the incident. The Taunton Police did contact the Appellant at about 5:30 p.m. (Exhibit 12, Testimony of Trooper Donovan).
12. The Appellant gave a statement to the State Police at 5:45 p.m. on January 14, 2008. The Appellant told Trooper Donovan the following information:
 - He did not tell his wife about visiting his family members' graves because it was against his religion, Christianity. (Testimony of Trooper Donovan, Testimony of Sgt. Perry, Testimony of Appellant).
 - He had been visiting the graves of his father and brother. In Bourne and Provincetown and stopped in a rest stop to nap on the way back. (Exhibit 7, Testimony of Appellant). He had initially stopped at rest stop on the southbound side, but because the sound of a large engine disturbed him, he

went a quieter rest stop on the other side of the highway where the incident occurred. (Exhibit 7).

- When the Appellant saw the victim look inside his car, he knew what the victim's "intentions" were. (Exhibits 7 and 14).
- The victim followed the Appellant out of the rest stop to a gas station. However, the Appellant also repeatedly told Trooper Donovan that he followed the victim to the gas station to "give him a dose of his own medicine." (Exhibits 7 and 12).
- At the gas station, the Appellant told the victim to "knock it off" and "go find someone else who's interested." (Exhibit 7).
- The Appellant left the gas station before the victim. (Exhibit 7).

13. The Appellant denied masturbating or exposing himself in his interviews with the police, the DOC, at trial, and to the Commission (Exhibits 11, 12, 14 and 16; Testimony of Appellant).

14. The surveillance tapes from the 7-Eleven in Wareham show the Appellant following the victim into the gas station, backing into a parking spot until the victim left the gas station, and further following the victim out of the parking lot. The video contradicts the Appellant's statements about being followed by the victim. (Exhibits 7 and 14).

15. On January 18, 2008, a complaint was applied for against the appellant. The Appellant was charged with the offense of Open and Gross Lewdness and Lascivious Behavior in violation of G.L. c. 272 § 16, a felony, on January 24, 2008 . (Exhibits 12).

16. On January 21, 2008, the Appellant reported the incident and his criminal charge to the DOC. At that time, DOC created Intake Number #9574. (Exhibits 9, 10 and 14; Testimony of Sgt. Perry).
17. In the intake report, filed on January 21, 2008, the Appellant stated that when he stopped at a rest area on Route 495, he **“got into a confrontation with another person”** who followed him out of the rest area. The Appellant stated he followed that person into a gas station and onto the highway where he later lost him.(Emphasis added) (Exhibit 10).
18. Both the Appellant and Trooper Donovan testified that it was snowing and sleeting on the day of the incident, January 14, 2008. The Appellant did not call the police during the entire long running incident that day. The Appellant had a cell phone with him that day. (Testimony of Appellant and Donovan)

Administrative Actions by the DOC

DOC Investigation

19. On January 23, 2008 John McLaughlin, Chief of the Office of Investigative Services, began an investigation after receiving Intake #9574. Sergeant Donald Perry, one of the investigators, interviewed the Appellant on February 7, 2008. During this interview, the Appellant admitted to calling in sick on January 14, 2008 and following the victim for several miles on Route 495 due to road rage. (Exhibits 7 and 14).
20. In his February 7, 2008 interview, the Appellant told DOC officials that he had been brought up as a Catholic and was raised to pay respects to the grave. As an adult, he stated that he was a Christian and knew “it was wrong” to go visit the gravesites. He

stated he found his brother's grave in Provincetown but did not find his father's grave in the veteran's cemetery in Bourne. After returning from the cemetery in Bourne, he stated that he had stopped at the rest area to take a nap. When a man had looked in his truck, he "knew what the man wanted." The man followed him from the rest stop. The Appellant also stated he followed the man after he left the gas station, that the victim then followed him, and that he was able to lose him by taking some lefts and rights after the rotary at the Bourne Bridge. The Appellant said that though he did not initiate the incident, he had "finished it." He further stated, "I accomplished what I wanted to do, scare the guy ... I wanted to shake him up." (Exhibit 14). The Appellant admitted to acting out of road rage and stated that had the victim been younger, he might have physically assaulted him. (Exhibit 14).

21. The DOC also interviewed Sergeant Gerald Donovan (hereinafter "Trooper Donovan") on January 23, 2008. Trooper Donovan stated that after talking to both the victim and the Appellant, he did not believe the Appellant. He based his opinion on the fact that he admitted lying to his wife and employer that day and the other stated inconsistencies and omissions in the Appellant's version of events. He found the victim to be "very credible", based in part on: the fact that he was very upset that day, his version was verified by the 7-11 video tape and he contacted the State Police immediately. Trooper Donovan repeated this opinion of the Appellant and the victim at Commission full hearing. (Exhibit 7, Testimony of Trooper Donovan).
22. The Appellant was found guilty on June 17, 2008, of Open and Gross Lewdness and Lascivious Behavior at Wrentham District Court. He received a six (6) -month suspended sentence and one (1) year of probation. (Exhibits 7, 15 and 16).

23. On June 18, 2008, the DOC suspended the Appellant with pay. (Exhibit 7).
24. In the June 26, 2008 Investigative Report, Sergeant Perry concluded the following:
- The Appellant called in sick to work but was not sick in violation of the Rules and Regulations Governing All Employees of the Department of Correction, Section 18(b) Attendance and Absences. (Exhibit 7).
 - The Appellant confessed to having an incident of road rage in violation of the Department General Policy and Section 1 Standards of Correctional Service. (Exhibit 7).
 - The Appellant was convicted of Open and Gross Lewdness and Lascivious Behavior. (Exhibit 7).

Post Investigation and Commissioner's Hearing

25. On August 7, 2008, Commissioner Harold Clarke sent the Appellant notice for a Commissioner's Hearing for September 4, 2008 to answer charges that the Appellant had utilized sick time when not sick, was convicted of a felony violation of G.L. c. 272 § 16, was late in reporting contact with outside law enforcement, and was untruthful during a DOC investigation. (Exhibit 1).
26. On January 2, 2009, in accordance with G.L. 125 § 9 granting the DOC Commissioner the right to terminate a corrections officer in accordance with the conditions the commissioner prescribes, (Exhibit 4), Commissioner Harold Clarke found substantial evidence the Appellant had violated DOC rules and regulations. Commissioner Clarke terminated the Appellant's employment with the DOC for violating the following DOC Rules and Regulations: 1. General Policy 1 and Rules 1, 2(b), 18(b), and 19(c). (Exhibit 2)

General Policy 1 – Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment, full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents, or by their authority. All persons employed by the Department of Correction are subject to the provisions of these rules and regulations. Improper conduct affecting or reflecting upon any correctional institution or the Department of Corrections in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations. Your acceptance of appointment to the Massachusetts Department of Correction shall be acknowledged as your acceptance to abide by these rules and regulations.

Rule 1, Standards of Correctional Service – Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent.

Rule 2(b), General Requirements – Report promptly in writing to your Superintendent, DOC Department Head, or their designee, any change of events regarding your residential address, home telephone number, marital status, and any involvement with law-enforcement officials pertaining to any investigation, arrest, or court appearance.

Rule 18 (b), Attendance and Absences – Employees who abuse sick leave . . . or use sick leave for personal matters not related to illness, will be denied said sick leave, and may be subject to disciplinary action up to and including discharge.

Rule 19 (c), Administrative Procedures - Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. (Exhibit 3).

Commission hearing

27. The Appellant admitted to following the victim that day. He admitted to calling in sick to the DOC when he was not actually sick. He admitted lying to Trooper Donovan. He denied tailgating to Donovan when he actually did tailgated. He admitted leaving the gas station after the victim when previously he claimed he left before. He admitted to lying to his wife about visiting the graves that day and in the

past and not wanting her to discover his lies. He admitted to committing acts of “road rage” that day and many times in the past. (Testimony of Appellant and Donovan)

28. The Appellant’s testimony did contradict some of his past statements and were otherwise implausible or inconsistent. He testified that he knew what the victim wanted; then shortly thereafter testified that he didn’t know what the victim wanted. His testimony vacillated back and forth on this issue. Asked why he took such a long trip to the graves in such bad weather, rather than go to work? He answered that he had an “urge” to go. His answers were confused, that he was enraged and “exhausted” simultaneously and needed to stop for a nap. Asked why he didn’t go home for a nap? He answered-“I don’t know”. He admitted to wearing his DOC uniform that entire day. The Appellant’s voice changed when he was caught in a contradiction or inconsistency; his voice tone and cadence changed and he smiled. His mood and demeanor fluctuated widely. He was loud, and demonstrative when describing the victim as a “dirty old man” yet conciliatory and quieter when admitting a previous lie. He was loud, challenging and confrontational at times when being cross-examined. I find the Appellant not to be a credible witness.(Testimony and demeanor of Appellant)

29. State Trooper Gerald Donovan and DOC Sergeant Donald Perry are similar in demeanor and presentation. They both have short dark hair are neat and have a professional appearance. They both wore a suit and tie. They are straight forward and unhesitant in their answers. They did not give extraneous, embellished or unsubstantiated answers. Their answers rang true. I did not detect any bias or other unpermitted motive in their testimony. Sergeant Perry testified that he had worked

with the Appellant in the past and thought that the Appellant had a good reputation at work then. I find that Trooper Donovan and Sergeant Perry are credible witnesses.

(Testimony and demeanor of Donovan and Perry)

30. The Appellant and his wife, Karen Lynch, both testified that the Appellant had a serious anger management problem, and a specific problem with road rage. The Appellant's wife testified at the hearing before the Civil Service Commission that in the last few years she has seen a change in her husband, and suggested that "maybe he has been working for the Department for too long." His anger exhibits itself the most on the road, and it is so out of control that she will not let him drive her car. In fact the Appellant admitted to investigator Perry that he has serious problems with road rage that need to be addressed, acknowledging that he has had physical confrontations in the past and that this confrontation might have gotten physical if the victim had been younger. (Testimony of the Appellant, Testimony of Karen Lynch, Exhibit 14).
31. The Appellant testified that his road rage incident had nothing to do with anything of a sexual nature. (Testimony of Appellant).
32. The Appellant also testified that in order to conceal his road rage, he had not been forthcoming with Trooper Donovan the day of the incident. He further stated he had told the truth to the DOC during their investigations. (Exhibit 14, Testimony of Appellant).

33. On November 19, 2009, the Appeals Court affirmed the Appellant's conviction of Open and Gross Lewdness and Lascivious Behavior in violation of G.L. c. 272 § 16. *Commonwealth v. John Lynch*, 75 Mass. App. Ct 1113 (2009)³.

CONCLUSION

The issue before the Commission is whether the Department of Corrections had just cause to terminate the Appellant's employment. I conclude that the DOC demonstrated by a preponderance of the credible evidence that it had just cause to terminate the Appellant's employment.

The Civil Service Commission must decide whether "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." *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (Mass. App. Ct. 2003) (citing *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (Mass. App. Ct. 1983)). Reasonable justification indicates the Appointing Authority's action was taken "upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 241 (Mass. 2006) (citing *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427 (1928)). 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*,

³ Notice of this Appeals Court decision affirming the Judgment of the trial court was filed at the Commission by the DOC, on May 25, 2010, with notice to the Appellant.

389 Mass. 508, 514 (1983); *see School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488 (1997).

Under G.L. c. 31, § 43, the Commission must affirm the Appointing Authority's decision if the Commission decides, using a preponderance of evidence standard, if there was a just cause for the Appointing Authority's action. Mass. Gen. Laws ch. 31, § 43. The preponderance of evidence standard is satisfied when "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 (Mass. 1956).

First, the Appellant has failed to fulfill his obligation to render good judgment and has clearly engaged in improper conduct. In General Policy 1, the DOC maintains it will not exculpate improper conduct which reflects upon any correctional institution or the DOC in any way. In the present case, the Appellant engaged in improper conduct: he was masturbating in a rest stop on the highway at a time when he called in sick from work. After the victim witnessed him, the Appellant followed him down Route 495, flashing his lights for several miles. The Appellant followed the victim into a gas station, then pulled in to wait for the victim. He exposed himself to the victim while at the gas station, waited for the man to leave the gas station, and followed him again for several miles until the victim went to the police station in Bourne.

The Appellant's admitted intention in following the victim was to scare and intimidate him, and the victim became sufficiently shocked and alarmed that he filed a police report listing the Appellant's license plate number. Actions such as deliberately following a man for miles, then lying in wait for him at a gas station with the intention of

“shaking” him up, constitute improper conduct in itself. Moreover, the lascivious conduct for which the Appellant was convicted demonstrates the Appellant did not fulfill his “full and prompt obedience to all provisions of law” as required by General Policy 1 of the Blue Book. While wearing his uniform, the Appellant engaged in improper conduct in a public place. His behavior reflected poorly upon the DOC and did not give dignity to his position as a DOC employee. Simply, the Appellant did not use the circumspection required of DOC employees.

Under 19(c) of the Blue Book, the Appellant should have responded fully to the DOC inquiry into his behavior. The Appellant’s initial interactions with the DOC show untruthfulness. On his intake form, he wrote, “I left the area only to be followed by the individual. After taking an exit and proceeding back on 495 South I realized the individual was still following my vehicle.” However, the video from the 7-Eleven shows the Appellant followed the victim into the gas station, then followed him out of it again. The Appellant was therefore less than truthful in DOC administrative procedures, violating Rule 19 (c) of the Blue Book.

I find that the Appellant’s testimony before the Commission was not credible. He asserted that the victim may have lied when, in fact, the record shows the Appellant lied to his wife, to the State Police, and to the DOC. The Appellant admitted to many of these lies in his testimony at this Commission hearing.

The Appellant was called into the State Police Bourne Barracks on the day of the incident, January 14, 2008. He did not report his interaction with law enforcement until a week after the incident, on January 21st. The Appellant also abused sick leave: he admits

he called in sick on January 14, 2008 when he was not ill, violating DOC's Blue Book Rule 18 (b).

Having determined that it was appropriate to discipline the Appellant for violating DOC rules and regulations, the Commission must determine if DOC was justified in the level of discipline imposed, here, the Appellant's termination.

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "the 'underlying purpose of the civil service system, 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" *Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 826 (2006). Unless the Commission's findings of fact differ significantly from those of the appointing authority or substantially differ in interpreting relevant law, the Commission is not free to "substitute its judgment" for that of the appointing authority and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." *Id.* at 823.

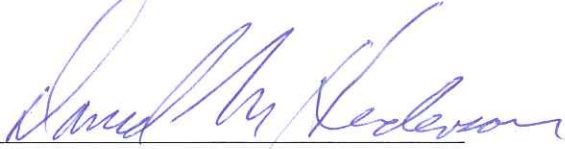
Terminating the Appellant's employment with the DOC was an appropriate disciplinary action given his substantial misconduct. The Appellant engaged in conduct unbefitting a Corrections Officer and violated several DOC rules. He was in uniform the entire time and on his assigned work time. His highly inappropriate conduct in a public place ranged from following an elderly driver for miles on a highway, tailgating, flashing his lights, yelling obscenities, a verbal confrontation and finally to Open and Gross Lewdness and Lascivious Behavior, all while wearing his uniform. He has been convicted of a felony under G.L. c. 272 § 16 and lied to DOC officials during an

investigation. He therefore is an unacceptable security risk to the Massachusetts Department of Corrections and its employees. He was found guilty and sentenced for violation of G.L. c. 272 § 16, open and gross lewdness and lascivious behavior, on June 17, 2008. This offense is a felony punishable by imprisonment in the state prison for not more than three years. (Exhibits 15, 16, Certified Conviction, Testimony of Trooper Donovan and Testimony of Sgt. Perry). This conviction was later affirmed by the Appeals Court. G.L. c. 31 § 50 further precludes the Appellant from employment in a civil service position: "... nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime..." The Appellant's conviction of a felony may also preclude employment by the DOC pursuant to G. L. c. 125 § 9, "no person who has been convicted of a felony . . . shall be appointed to any position in the department of correction unless the commissioner certifies that such appointment will contribute substantially to the work of the department; provided, however that no such person shall be appointed to the position of correction officer, superintendent, deputy superintendent, assistant superintendent, or any position involving the regulation of state or county correctional facilities."

The DOC has proven, by a preponderance of the credible evidence in the record, that it had just cause for terminating the Appellant from his position as a correction officer. There is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him.

For the foregoing reasons, the Appellant's appeal under Docket No. D1-09-22 is hereby *dismissed*.

Civil Service Commission,



Daniel M. Henderson
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on November 4, 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:

John Lynch (Appellant)

Heidi D. Handler, Atty. (for Appointing Authority)