

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**RAYMOND MASON,**

*Appellant*

v.

**DEPARTMENT OF CORRECTION,**

*Respondent*

**Docket Nos: D-13-281 (One Day Suspension)  
G2-14-35 (Promotional Bypass)  
D-14-36 (Three-Day Suspension)**

Appearance for Appellant:

Raymond Mason, Pro Se

Appearance for Respondent:

Andrew McAleer, Esq  
Joseph Santoro, Labor Relations Advisor  
Department of Correction  
1 Industries Drive, P.O.Box 946  
Norfolk, MA 02056

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Raymond Mason, brought these appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b) & §§41-43, from decisions of the Department of Correction (DOC), imposing a one-day and a three-day suspension from his position as a DOC Correction Officer and from his bypass for promotion to Correction Officer II based, in part, on the suspensions. At the pre-hearing conference on February 25, 2014, the three appeals were consolidated for hearing. A full hearing was held by the Commission on March 11, 2014. At the Appellant's request, the hearing was declared public. The DOC called two witnesses and the Appellant testified on his own behalf. The hearing was digitally recorded and the parties were provided copies of the digital recording. The Appellant and the DOC submitted proposed decisions on April 9, 2014 and April 11, 2014, respectively. For the reasons stated below, the appeals are dismissed.

## **FINDING OF FACT**

Based on the testimony of the witnesses (Juan Colon, DOC Internal Affairs Investigator; Brian McDonald, Director of Security, DOC Souza-Baranowski Correctional Center (SBCC); and the Appellant) and the following Exhibits:

One-Day Suspension : (Exhibits O-1 through O-17)  
Three Day Suspension (Exhibits T-1 through T-14)  
Bypass (Exhibits B1 through B-12)

and taking administrative notice of all pertinent statutes, regulations and policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

### **The Appellant's Background**

1. The Appellant, Raymond Mason, is a tenured civil service employee of the DOC employed since July 28, 2001 as a Correction Officer I (CO) and assigned to the SBCC. (*Exhs O-5; T-10; Undisputed Facts*)
  2. At the inception of his employment with DOC, CO Mason received, in hand, a copy of the DOC's "Department of Correction Rules and Regulations Governing All Employees of the Massachusetts Department of Correction" (the "Blue Book"). (*Exhs. O-15 & O-16; T-9 & T-10; B-10 & B-12*)
  3. In addition to the two suspensions that are the subject of these appeals, CO Mason has been disciplined on two other occasions:
    - August 13, 2008 - 1 Day Suspension – Observed On-Duty Watching Movie On Laptop Computer on or about June 3, 2008
    - December 13, 2012 – 5 Day Suspension – Failure to Conduct Strip Searches & Inappropriate Comments to Inmates on or about August 29, 2010/ Inappropriate Use of Computer on or about October 21, 2011/ Inappropriate Actions as "IPS" Team Member in July 2011/ Inappropriate Comments to Co-worker on or about January 22, 2012/ Untruthfulness During Investigation
- CO Mason did not appeal either of these disciplines to the Commission. (*Exhs O-5, O-12 & O-13; T-10 & T-13, pp.47-60; B-12; Administrative Notice; Testimony of Appellant*)

*The 2013 Discipline – One Day Suspension*

4. On March 1, 2013, CO A prepared a Confidential Incident Report (CIR) concerning a conversation he had with CO Mason at SBCC that day while transporting him at the change of shifts from the facility vehicle trap to his (CO Mason's) vehicle. CO A reported that CO Mason had complained that he had been wrongfully disciplined and denied his Sergeant promotion, stating: "That f---ing [CO V] and [CO T] they f---ed me hard. V lied and said I was stealing computer files. . . . I swear every time I see him he hides. I want to knock his head off. This is eating me alive." (*Exhs. O-10 & T-13, pp. 7-8, 42*)

5. CO A informed CO V of his conversation with CO Mason, and, thereafter, CO V reported to his own shift commander that he had a possible conflict with CO Mason and requested that his upcoming training be rescheduled so that he would not be attending the same week as CO Mason. This request was granted. (*Exh. T-13, pp. 9, 43*)

6. On March 6, 2013, after CO T learned of the alleged threats against him by CO Mason, CO T also wrote a CIR. In addition to commenting on conversations with CO Mason in which CO Mason let it be known he held COs V & T responsible for his recent 5-day suspension, CO T related a prior incident in which he claimed CO Mason followed him in his truck, pulled up behind him at a high rate of speed on Interstate 190, and tailgated him. (*Exh. T-13, pp. 9-10, 44*)

7. On March 6, 2013, DOC's Internal Affairs Unit (IAU) opened an investigation into the matters raised by the CIRs submitted by COs A, V & T. The investigation was initially assigned to IAU Sergeant David Shaw. (*Exh. T-13, pp. 2-3; Testimony of Colon*)

8. Sgt. Shaw interviewed CO A on March 25, 2013 and interviewed CO V on March 27, 2013. He also interviewed CO T on April 2, 2013, who recounted the incident on the highway and also recounted a conversation around Christmas 2012 during which CO Mason blamed CO T and CO V for getting CO Mason suspended. Sgt. Shaw, who was promoted to Lieutenant and

reassigned out of the IAU, discontinued his investigation of the matter in order to complete other investigation reports prior to his reassignment. (*Exhs.B-4, T-3, T-14; Testimony of Colon*)

9. On or about July 29, 2013, the investigation was reassigned to CO Colon who scheduled an interview with CO Mason for September 5, 2013. (*Exh. T-13, pp.2-3; Testimony of Colon*)

10. Based on CO Colon's written report of the September 5, 2013 interview, as corroborated by the audio recording in evidence and his testimony before the Commission, CO Mason had discussed the interview with his private attorney in advance, but the attorney was not present. CO Mason was represented at the interview by his union (MCOFU). CO Colon asked CO Mason if he had been picked up by CO A on March 1, 2013 at the end of shift and CO Mason replied he had "no remembrance whatsoever" of CO A picking him up. CO Mason refused to answer nearly all of the follow-up questions asked, including whether he was a current or former "IPS [Inner Perimeter Security] officer", whether he and CO A were "friends", and whether he had made certain statements about COs V and A as they alleged, claiming that he had "litigation" pending against them and would "need his attorney to represent him" in order to answer the question. When asked about the alleged interaction with CO T on the highway, CO Mason admitted that he drove a blue Dodge Dakota and resided in Worcester, but declined to answer any other questions without his attorney present due to the "pending lawsuit." CO Colon, who had no prior knowledge of any such litigation, then ended the interview. (*Exhs. T-13, pp. 24-26, T-14; O-11; Testimony of Colon*)

11. On or about September 18, 2013, DOC Deputy Commissioner DiPaolo, issued a one-day suspension to CO Mason for violating Blue Book Rules 19(c), for failing to "respond fully and promptly to any questions" asked in connection with any investigation being conducted by the DOC, and Internal Affairs Police 103 DOC 522.09)c) for "failure to cooperate" in the

investigation at the September 5, 2013 interview. This suspension was served on September 24, 2013. (*Exhs. B-9, B-10, O-9, O-14, O-16, O-17, T-8, T-11, T-12: Testimony of Colon*)

12. CO Mason's collective bargaining agent, MCOFU, appealed the one-day suspension and a grievance hearing was held on October 18, 2013 before Joseph Santoro, DOC Labor Relations Advisor, who recommended that the suspension be upheld. Mr. Santoro also noted that CO Mason had entered the hearing room with a tape recording device which he placed on the table and requested that the hearing be recorded. Mr. Santoro denied this request, but he later learned that CO Mason had turned on the recording device. He was ordered to turn it off. He refused, stating he had the right to record the hearing and Mr. Santoro terminated the hearing. Mr. Santoro made no finding that CO Mason's actions with regard to the recording of the hearing were a violation of DOC rules, as that was outside the scope of the hearing he was delegated to conduct, but he did recommend that the matter be "looked into closer". (*Exhs. O-4, O-6 through O-8, T-5 through T-7; T-13, p.31; Testimony of Colon*)

13. The DOC Commissioner upheld the one-day suspension by letter dated November 27, 2013. Upon receipt of the letter, CO Mason duly appealed the one-day suspension to the Commission. (*Exhs. O-2, O-3; Claim of Appeal [Docket No. D-13-281]*)

#### *The 2014 Bypass*

14. In December 2011, CO Mason brought an appeal to the Commission concerning his non-selection for promotion to Correction Officer II (CO-II). By Decision dated May 16, 2013, the Commission allowed his appeal and ordered that CO Mason's name be placed at the top of the then current and any future certifications for CO-II until he had been appointed or bypassed. (*Administrative Notice, Mason v. Department of Correction, CSC No. G2-12-6*)

15. By Certification #01429 dated November 20, 2013, the DOC processed applications for a new class of 81 CO-IIs. In accordance with the Commission's May 16, 2013 Decision, CO Mason was ranked # 3 on that Certification. (*Undisputed Facts*)

16. On or about December 5, 2013, CO Mason executed a Background Information Request and Waiver indicating his interest in promotion to CO-II and he was processed for consideration. (*Exh. B-11*)

17. On January 27, 2014, DOC informed CO Mason that, pursuant to its standing policy, due to his pending discipline, he was bypassed for promotion to CO-II due to "Poor work history/discipline: Pending Discipline/Investigation". CO Mason duly appealed his bypass to the Commission. (*Administrative Notice of DOC Policy; Exh. B-2; Testimony of Colon; Claim of Appeal [Docket No. G2-14-35]*)

*The 2014 Discipline – Three Day Suspension*

18. Meanwhile, CO Colon continued his investigation into the underlying allegations against CO Mason and conducted a second interview of CO Mason on October 15, 2013. CO Mason was again represented by MCOFU, but did not have an attorney present. He repeatedly declined to answer questions by asking CO Colon to define a word in the question. He stated that he is sometimes picked up to be transported to the SBCC Lobby at the end of a shift, but still said "I don't remember [CO A] picking me up at all" and since he wasn't "able to remember the exact details" he "can't say if it was possible" that he was picked up by CO A on March 1, 2013. Again, he refused to answer whether he was a former IPS officer, stating "I'm under orders not to discuss that" by the SBCC Superintendent. CO Mason denied ever making any threats toward CO A or CO V and denied making other statements attributed to him by CO A or CO V to them or any other DOC officer. (*T-13, pp. 27-31; T-14:Testimony of Colon*)

19. On November 7, 2013, CO Colon submitted a report with his findings that included the conclusion that CO Mason had violated DOC Blue Book rules and DOC Internal Affairs Policy by his failure to cooperate at the September 5, 2013 and October 15, 2013 interviews. CO Colon also found that CO Mason had threatened CO V. (*T-13; Testimony of Colon*)

20. CO Colon found that CO Mason's refusal to state whether he was or had been an IPS officer because he was under a Superintendent's orders not to answer those question was less than truthful, based on CO Colon's own personal knowledge and experience as an IPS officer, that such information was not in any way considered confidential. Brian McDonald, a 24-year DOC veteran, with 14 years as an IPS officer, and currently the SBCC's Director of Security corroborated CO Colon's understanding in his testimony at the Commission hearing that IPS units are not a "secret police", operate from clearly marked IPS unit offices, and members wear "IPS" insignia on their uniforms and are clearly known to staff, inmates and visitors. (*T-13, p. 35-36; Testimony of Colon & McDonald*)

21. CO Colon found that CO Mason's highway encounter with CO T did not violate any DOC rules and, specifically, allegations that CO Mason pulled within a car length and followed CO T at a high rate of speed were "Not Sustained." (*T-13, pp. 31-32; Testimony of Colon*)

22. After review by CO Colon's IAU supervisors and DOC Deputy Commissioner DiPaolo, DOC Commissioner Spencer scheduled a Commissioner's hearing on the violations alleged in CO Colon's report. The hearing was held on January 7, 2014 before Kieran M Sullivan, a hearing officer designated by the DOC Commissioner. CO Mason was represented by MCOFU. He did not have an attorney present and did not testify. (*Exhs. B-4 through B-7; T-3, T-4: Testimony of Appellant & Colon*)

23. On January 13, 2014, Hearing Officer Sullivan issued her report to DOC Commissioner Spencer that concluded CO Mason had violated DOC Blue Book Rules, General Policy I, Rule 6(a), Rule 6(b) and Rule 19 (c). She found:

- The allegations that CO Mason had threatened CO V were not sustained. The conversation between CO A and CO Mason “took on a life of its own, exaggerated as it was passed from person to person.” There was no threat made or intent to harm. CO V “had no issue” with CO Mason and “repeatedly stated he was not in fear for his safety.”
- CO Mason did violate Blue Book Rules 6(a) and 6(b) by his derogatory statements about CO V and CO T, blaming them for lying and causing him to be suspended.
- CO Mason did violate Blue Book Rule 19(c) by being uncooperative, evasive and less than truthful during his October 15, 2013 interview, which impeded CO Colon’s investigation.
- CO Mason’s allegation that the discipline was an act of retaliation against him for his recent successful pursuit of an appeal to this Commission was rejected, noting that the Commission decision was handed down in May 2013, months after the CIRs.
- CO Mason’s September 2103 interview conduct and prior discipline for his conduct in that interview was not considered by the hearing officer in making these findings.
- The hearing officer drew an adverse inference from CO Mason’s decision not to testify on his own behalf.

*(Exhs. B-4, T-3; Testimony of Appellant & Colon)*

24. On January 30, 2014, DOC Commissioner Spencer adopted Hearing Officer Sullivan’s recommendations. He imposed a three (3) day suspension, with two (2) days held in abeyance for one year. CO Mason’s third appeal duly ensued. *(Exhs. B-5, T-4; Claim of Appeal [Docket No. D-14-36])*

#### Standard of Review – Discipline Appeals

Under G.L.c.31,§43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission. The Commission has the duty to determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417

(2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

“Just cause” for discipline means "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) An action is "justified" if "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." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)

It is the purview of the hearing officer to determine the credibility of the testimony presented through the witnesses who appear before the Commission. See, e.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988)

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify a penalty imposed by the appointing authority, albeit “not without bounds”. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited; Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification). The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.’ ” Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) quoting

Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, 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". See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited; Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982); School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983)

#### Standard of Review – Bypass Appeals

The authority to bypass a candidate for permanent appointment to a civil service position derives from G.L.c.31, Section 27, which provides:

"If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest."

An appointing authority's discretion to pick among qualified candidates for civil service appointments who have qualified for the position by taking and passing a civil service competitive examination is not absolute and is subject to review by the Commission. The appointing authority's reasons for "bypassing" a candidate higher on the list in favor of hiring a lower ranked candidate must be "reasonably justified", based on a "thorough review" and supported by a preponderance of evidence, when weighed by an unprejudiced mind, guided by common sense, and correct rules of law. See, e.g., Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006) and cases cited; Beverly v. Civil Service Comm'n 78 Mass.App.Ct. 182 (2010);

Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991) (“discretionary acts of public officials . . . must yield to the statutory command that [they] produce ‘sound and sufficient’ reasons” consistent with basic merit principles and free from arbitrary and capricious actions).

In reviewing a bypass decision, “[t]he commission’s primary concern is to ensure that the appointing authority’s action comports with ‘basic merit principles,’ as defined in G.L.c.31,§1.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688 (2012) *citing* Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001). In conducting this inquiry, the Commission “finds the facts afresh”, and is not limited to the evidence that was before the appointing authority. *E.g.*, Beverly v. Civil Service Comm’n 78 Mass.App.Ct. 182 (2010); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003) Tuohey v. Massachusetts Bay Transp. Auth., 19 MCSR 53 (2006) (appointing authority must proffer “objectively legitimate reasons” for the bypass); Borelli v. MBTA, 1 MCSR 6 (1988) (bypass improper if “the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons”) *See also* MacHenry v. Civil Service Comm’n, 40 Mass.App.Ct. 632, 635 (1995), *rev.den.*, 423 Mass. 1106 (1996); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, *rev.den.*, 428 Mass. 1102 (1997)

### Analysis

By a preponderance of the evidence, I find that just cause exists to support the two decisions made by the Appointing Authority to suspend CO Mason and, based on that discipline, as of January 27, 2014, there was reasonable justification to bypass him for promotion to CO-II.

### One Day Suspension

The DOC had just cause to impose a one day suspension on CO Mason for his conduct at his initial investigatory interview with CO Colon on September 5, 2013. After carefully listening to the interview tape, there can be no doubt that CO Mason had every intention to be, and was, a reluctant and unwilling witness. While that alone would not necessarily justify discipline, I agree with CO Colon and Mr. Santoro that Mr. Mason clearly crossed the line and violated the Blue Book Rule that required his full and prompt response to questions when he refused to answer almost every question that was asked. His excuse was the same – he had a lawsuit pending that related to this issue and would not answer further questions with his private attorney present. I find that excuse disingenuous.

CO Colon was fully authorized to seek answers to the questions he was asking, which were intended solely to seek relevant information about the charges against CO Mason that he was obligated to investigate. The DOC has every right to demand that a DOC officer provide such information. The DOC's inquiry was not a criminal investigation and Mr. Mason had no "Constitutional" right to refuse to answer questions in a civil service proceeding because they might prejudice him in his civil lawsuit. Indeed, his refusal to answer, alone, would not only implicate a violation of the Blue Book Rule on cooperation, but would warrant the DOC drawing an adverse inference that his refusal to answer meant that a truthful answer would, indeed, implicate his liability as charged. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 826-27 (2006)

I also reject CO Mason's contention that the pendency of his civil litigation against the DOC entitled him to refuse to answer the questions he was asked on September 5, 2013 without his private civil litigation attorney present. I agree with the DOC that, as a matter of law, it may

have been correct that CO Mason did not have a right under the collective bargaining agreement between MCOFU and DOC to have such an attorney present, as opposed to his union representative, as a condition to answering questions in a DOC investigation. See Nat'l Labor Relations Board v. Weingarten, 420 U.S. 251 (1975). More importantly, CO Mason certainly knew the gist of the subject matter about which he would likely be asked, if not at the first interview, then surely at the second one in October, and he made no request to DOC or arrangement for his attorney to attend either one.

In sum, the DOC is fully justified to have imposed a one-day suspension for CO Mason's unacceptable behavior on September 5, 2013.<sup>1</sup>

#### Three Day Suspension

Despite having been suspended in September 2013 for failing to cooperate in CO Colon's investigation, CO Mason's conduct at his second interview on October 15, 2013 was not much of an improvement. The evidence clearly shows that, although CO Colon, an experienced investigator, remained courteous and focused throughout the interview, CO Mason repeatedly avoided giving a straight answer, making repeated requests to define words, chastising CO Colon for asking multi-part and "irrelevant" questions, professing limited memory, and directly answering questions of his own choosing only sporadically. I am not persuaded by CO Mason's explanation that his demeanor was simply being "defensive" due to his "loss of faith" and mistrust of the DOC. Since CO Mason provided few direct answers, he did mostly manage to

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<sup>1</sup> DOC argued at the Commission hearing that CO Mason's appeal was untimely because he failed to request an "appointing authority" hearing at the DOC within 48 hours of being notified of his one-day suspension, as required by G.L.c.31,§41. MCOFU did file a grievance request within that timeframe and it appears that DOC treated that request to also serve as a request for a Section 41 civil service hearing as well, as the final notice from DOC Commissioner Spencer references CO Mason's right to appeal that notice to the Commission within 10 days, which CO Mason did in a timely fashion. As CO Mason's one-day suspension appeal must fail on the merits, the Commission need not address this alleged procedural deficiency.

avoid being “untruthful”. His failure to cooperate “fully and promptly”, however, was still a violation of his duty under the Blue Book.

Without percipient testimony from either CO A, CO V or CO T, and the DOC’s own findings that CO Mason did not “threaten” CO V or intimidate CO T on the highway, I do not find the evidence sufficient to conclude that CO Mason’s denials of what he allegedly said to CO A in March 2013 or to CO T in December 2012 were untruthful, but that does not get CO Mason off the hook. The evidence is sufficient to conclude, and I do conclude, that the evidence proves, in one clear respect, CO Mason was less than truthful with CO Colon. His claim (at both interviews) that he could not discuss, or even disclose his involvement as an IPS officer is just not credible. I have no doubt that CO Mason was not then under a Superintendent’s orders to withhold information from CO Colon and CO Mason knew his answers were less than truthful. While status as an IPS officer is not, in itself, a big deal – it could easily be independently verified through DOC records – CO Mason’s fabrication (or at least mischaracterization) of having received a Superintendent’s order is most troubling. As CO Mason presented no evidence to the contrary and chose not to testify at the DOC Appointing Authority Hearing in January 2014, DOC was fully justified to draw an adverse inference against him that he had no excuse for his untruthful and uncooperative conduct. See Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 826-27 (2006)<sup>2</sup>

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<sup>2</sup> The DOC Hearing Officer was probably also entitled to conclude that CO Mason did say something disparaging, although not threatening, about CO V and CO T, in December 2012 and/or March 2013 and, even if the exact nature of the remarks did not rise to the level of a threat of workplace violence, they did violate Blue Book rules, and indeed common decency, requiring civility and professionalism in the workplace. I have considerable doubt that CO A, CO V and CO T would all submit substantially consistent confidential CIRs that fabricated these conversations and confirm their reports at recorded interviews and at the appointing authority hearing without them being substantially true. Unfortunately, CO T, the DOC witness to the December 2012 statements, was unavailable to testify, and the DOC did not call CO A, the only witness to the March 2013 statements. In the absence of percipient testimony to these alleged statements, I do not find that the DOC established those facts by a preponderance of credible evidence.

In sum, DOC has proved by a preponderance of evidence that CO Mason engaged in misconduct, including untruthfulness that warranted appropriate discipline. I find no reason to justify modification of the three-day suspension for this misconduct (which is actually only one day loss of pay, with the other two held in abeyance), especially coming as it did on the heels of his September 2013 one-day suspension for uncooperative behavior.

#### Bypass for Promotion

The foregoing analysis which establishes that DOC was justified to impose the one-day suspension for failure to cooperate and another three-day suspension for misconduct as described above, also disposes of CO Mason's bypass appeal. At the time of the bypass, the second disciplinary matter was pending, and included charges that CO Mason had threatened his co-workers, as well as other misconduct involving disrespect of colleagues and continuing failure to cooperation with a DOC investigation. The DOC was diligently pursuing the investigation, so the issues that had arisen in CO Mason's prior bypass appeal – in which the unusual delay in bringing closure to a prior investigation was held problematic – is not in play here. See Mason v. Department of Correction, 26 MCSR 195 (2013). The record here shows that DOC made a diligent, fair and prompt investigation. The delay, if any, was due simply to wholly unrelated administrative issues, i.e., the promotion and reassignment of the initial investigator, as well as CO Mason's own lack of cooperation. Given the nature of the pending charges, especially the alleged disrespect for coworkers, untruthfulness, and refusal to cooperate in an investigation, coming on the heels of his prior discipline for similar misconduct, demonstrates a reasonable justification for bypassing CO Mason for promotion to a supervisory position of Sergeant (CO II) based on the pendency of that investigation. The fact that not all of these charges were

ultimately sustained, or proved here, does not change the conclusion that they properly served as grounds for bypass so long as they were being appropriately and diligently investigated.

#### Retaliation Claim

I have carefully considered CO Mason's contention that the recent discipline he received, and the bypass for promotion that resulted, is all a product of the DOC's retaliation against him for having prevailed in the appeal of his last bypass. See Mason v. Department of Correction, 26 MCSR 195 (2013). I do not find sufficient evidence to establish any nexus between these events. The investigation that produced the recent discipline and bypass was initiated as a result of CIRs filed in March 2013, months before the Commission's decision. Id. Also, as noted above, the DOC's handling of the investigation reveals no sign of pre-disposition or bias. I find CO Colon's handling of his investigation was professional and respectful of CO Mason. Had CO Mason been fully and promptly cooperative in the investigation, there may have been no need for a second interview, the investigation would have concluded probably a month sooner, and the outcome of the Commissioner's hearing on the second set of charges made BEFORE the bypass decision. I also find persuasive the fact that both the DOC IAU investigator (CO Colon) and the DOC Commissioner's Hearing Officer (Sullivan) each exonerated CO Mason from the most serious charges of threatening and intimidating misconduct. DOC may have erroneously relied on the wiretap law in refusing CO Mason's request to record his interviews and the October 2013 disciplinary hearing but I find that the refusal to allow a recording and termination of the October disciplinary hearing, whether procedurally appropriate or not, does not infer that DOC's investigators or its' hearing officer did so out of animus, or that such actions are reason to change the Commission's conclusions as to the merits of the case.

For all of the above reasons, CO Mason's appeals under Docket Nos. D-13-281, D-14-35 and G2-14-36 are hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on March 19, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Raymond Mason (Appellant)  
Andrew McAleer, Esq. (For Respondent)  
Joseph Santoro (For Respondent)  
John Marra, Esq. (HRD)