

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503  
Boston, MA 02108  
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Decision mailed: 6/13/08  
Civil Service Commission  
CB

**BENJAMIN MCGUINNESS  
and RICHARD MULLEN,**  
*Appellants*

v.

**DEPARTMENT OF  
CORRECTION,**  
*Respondent*

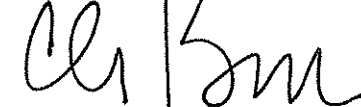
**Case Numbers:** D-05-53 and  
D-05-54

**DECISION**

After careful review and consideration, the Civil Service Commission, at an executive session on June 12, 2008, acknowledged receipt of the recommended decision of the Administrative Law Magistrate dated April 14, 2008, in which the Magistrate recommended dismissing the Appellants' appeals. The Commission also acknowledged the comments of the Appellant received by the Commission on May 15, 2008. After careful review and consideration of the Magistrate's recommended decision and the comments of the Appellant, the Commission vote to adopt the findings of fact and the recommended decision of the Magistrate was a 2-2 tie vote with 1 Commissioner not voting on this decision, per court order. As a result, the Appellants' appeals are hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman- Yes; Marquis, Commissioner – Yes; Stein, Commissioner – No; Taylor, Commissioner - No; [Henderson, not voting per court order]), on June 12, 2008.

A true record. Attest.



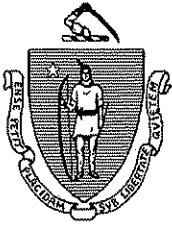
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Stephen Pfaff, Esq. (for Appellant)  
Amy Hughes, Esq. (for Appointing Authority)  
Joan Freiman-Fink, Esq. (DALA)



COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

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April 14, 2008

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Stephen Pfaff, Esq.  
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67 Batterymarch Street  
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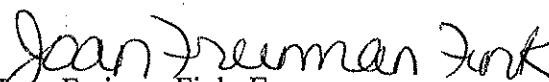
Amy Hughes, Esq.  
Department of Correction  
P.O. Box 946, Industries Drive  
Norfolk, MA. 01545

RE: *Benjamin McGuinness and Richard Mullen v. Department of Correction*, D-05-53, D-05- 54, CS-08-148

Dear Chairman Bowman, Attorneys Pfaff and Hughes:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that pursuant to 801 CMR 1.01(11)(c), they have thirty (30) days to file written objections to the decision to the Civil Service Commission which may be accompanied by supporting briefs.

Very truly yours,

  
Joan Freiman Fink, Esq.  
Administrative Magistrate

Encl.

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CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Benjamin McGuinness and  
Richard Mullen,  
Appellants

Docket No. D-05-53, D-05-54  
DALA No. CS-08-148

v.

Department of Correction,  
Appointing Authority

Appearance for Appellants:

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Appearance for Appointing  
Authority:

Amy Hughes, Esq.  
Department of Correction  
P.O. Box 946, Industries Drive  
Norfolk, MA. 021056

Administrative Magistrate:

Joan Freiman Fink, Esq.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31 §43, the Appellants, Benjamin McGuinness and Richard Mullen<sup>1</sup>, are appealing the January 14, 2005 decision of the Appointing Authority, the Department of Correction (DOC), discharging them from their positions as Lieutenant and Sergeant respectively (Exhibits 2A & 2B). The Appellants filed timely appeals of this decision with the Civil Service Commission (Exhibits 3A & 3B).

<sup>1</sup> By agreement of the parties, the appeals filed by Benjamin McGuinness and Richard Mullen were consolidated for hearing.

COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

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A hearing in this matter was held on August 3, 2005 before the Civil Service Commissioner Daniel Henderson. A decision was subsequently issued by Civil Service Commission reversing the action taken by the Appointing Authority and reinstating the Appellants to their positions with the DOC. The matter was appealed by the Appointing Authority to the Superior Court. On August 21, 2007, Justice Paul Troy of the Suffolk Superior Court issued a decision remanding the case to the Civil Service Commission for a full hearing with specific instructions that the matter not be heard by Commissioner Henderson. See *Massachusetts Department of Correction v. Massachusetts Civil Service Commission, et al.*, Suffolk Superior Court Docket No. 06-2915. In early November of 2007, pursuant to the provisions of G.L. c. 32 §4H, the matter was referred to the Division of Administrative Law Appeals for a de novo hearing on the merits of the appeal. A hearing was held on November 17, 2007 at the offices of the Division of Administrative Law Appeals, 98 N. Washington Street, Boston, Ma. Subsequent days of hearing were held on December 3, 2007 and January 15, 2008. As no written request was received from either party, the hearing was declared to be private. Various documents were entered into evidence at the hearing (Exhibits 1 – 28).

The following employees of the Department of Correction testified on behalf of the Appointing Authority: Superintendent James Walsh, Sergeant Scott Nedley, former Deputy Director of Employee Relations Dennis Cullen, Lieutenant Robert McGuiness<sup>2</sup> and Sergeant Stephen Kennedy. The two Appellants testified in their own behalf.

The record in this case was left open until March 18, 2008 for the filing of written closing memoranda.

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<sup>2</sup> Lieutenant Robert McGuiness testified that he is not related to Appellant Benjamin McGuiness.

The Appointing Authority maintains that just cause exists to terminate the Appellants in that they violated Rule 8(a)<sup>3</sup>, Rule 10(a)<sup>4</sup> and Rule 19(c)<sup>5</sup> of the DOC's Rules and Regulations Governing All Employees and further that they violated the Use of Force Policy, 103 CMR 505<sup>6</sup>. Specifically, the Appointing Authority contends that on November 1, 2003, the Appellants used excessive force on an inmate by assaulting him after he was secured in restraints. The Appointing Authority further maintains that the Appellants then left the inmate in question in a holding cell, secured in restraints, without direct monitoring and with no medical attention for a prolonged period. Finally, the Appointing Authority asserts that the Appellants lied to the DOC employee assigned to investigate these allegations.

### **FINDINGS OF FACT**

Based on the documents entered into evidence (Exhibits 1 - 28) and the testimony of Superintendent James Walsh, Sergeant Scott Nedley, Deputy Dennis Cullen, and Sergeant Stephen Kennedy, I make the following findings of fact:

1. Appellant Benjamin McGuiness had been employed by the Department of Correction for the past twenty-one years, the last three of which, he served in the capacity of Lieutenant (testimony of Appellant McGuiness).

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<sup>3</sup> Rule 8 (a) provides in part that: "Relations with inmates may be twofold, that of counselor and disciplinarian simultaneously, which will require your utmost tact and diplomacy. For those employees having job responsibilities which require inmate contact, your attitude toward inmates should be friendly not familiar, firm not harsh, vigilant not unduly suspicious, strict not unjust...." (Exhibit 4).

<sup>4</sup> Rule 10 (a) states in part: "Department of Correction regulations shall only permit an employee to use force against an inmate which is reasonable. Under no circumstances shall an employee use or permit the use of excessive force or use of force as punishment..." (Exhibit 4).

<sup>5</sup> Rule 19 (c) provides in part that: "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 4).

<sup>6</sup> 103 CMR 505.08 provides that: "An employee shall not use or permit the use of excessive force...An employee shall not use or permit the use of forces as punishment or discipline."

2. Appellant Richard Mullen had been employed by the Department of Correction for twelve years, having served as a Sergeant for the past five years (testimony of Appellant Mullen).
3. Prior to the incident in question, neither Appellant McGuinness nor Appellant Mullen had been the subject of any disciplinary action (testimony of Appellant McGuinness).
4. In the fall of 2003, both Appellants were assigned to work at the Massachusetts Alcohol and Substance Abuse Center (MASAC) in Bridgewater, Ma. MASAC has two populations: convicted inmates with known substance abuse issues and individuals who have been civilly committed pursuant to G.L. c. 123 §35 for thirty days on the grounds that they are a danger to themselves or others due to substance abuse (testimony of Superintendent Walsh).
5. The Department of Correction has a written policy regarding the use of force against inmates. This policy includes the following provision: "if, when removed from population, it becomes necessary to secure the inmate in a temporary holding cell the inmate will remain in restraints under constant visual observation (eyeball) by staff. The continued use of restraints for temporarily holding an inmate shall not exceed two hours unless approved by the superintendent" (Exhibit 5, p. 19).
6. In October of 2003, inmate SD<sup>7</sup> was held in custody at MASAC. Inmate SD was prone to violence and on November 1, 2003, SD was transported to the Alpha Housing Unit where he could be watched more closely (testimony of Sergeant Nedley).

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<sup>7</sup> The inmates in question in this case were identified by their initials only.

7. On November 1, 2003, Sergeant Nedley and the two Appellants were assigned to work the 3 p.m. to 11 p.m. shift at MASAC in the Alpha Housing Unit (testimony of the Appellants).
8. Appellant McGuinness was the Shift Commander, the highest ranking officer on that shift (testimony of Sergeant Nedley).
9. At approximately 5:45 p.m., a fight broke out between inmate SD and inmate CM. After this fight both inmates were moved from the Alpha Unit to the Intake Building (testimony of Sergeant Nedley).
10. Inmate SD was placed in a holding cell and inmate CM was placed in a holding cage (Exhibit 26).
11. Later that same evening, Sergeant Nedley was in the administration building when he heard someone yelling "help, help" from the Intake Building (testimony of Sergeant Nedley).
12. Sergeant Nedley immediately left the Administration Building and headed for the holding cell in the Intake Building where he witnessed the Appellants struggling with inmate SD in the holding cell (testimony of Sergeant Nedley).
13. Inmate SD was also yelling "You're killing me. You're hurting me. Get off" (testimony of Appellant McGuinness).
14. Sergeant Nedley said to the Appellants "if you needed help, you should have called," to which Appellant Mullen replied "we don't need help" (testimony of Sergeant Nedley).
15. Sergeant Nedley assisted the Appellants in placing inmate SD on the floor. Appellant Mullen applied wrist restraints to the inmate. Inmate SD was then

lying prone on the floor in the holding cell with handcuffs binding his wrists  
(testimony of Sergeant Nedley).

16. At this point, Sergeant Nedley heard several thuds that sounded like punches. He also heard inmate SD say to Appellant Mullen, "Mullen, you are a fucking asshole," to which Appellant Mullen replied that "it hurts to get hit in the kidney" (testimony of Sergeant Nedley).
17. Sergeant Nedley next observed Appellant McGuinness walk back and forth on the inmate SD's legs multiple times (testimony of Sergeant Nedley).
18. Sergeant Nedley said "no, stop," to Appellant McGuinness but McGuinness did not listen to him (testimony of Sergeant Nedley).
19. As Sergeant Nedley got up to leave the room, Appellant McGuinness motioned to him to be the "peek man" to be sure that no one else enters the holding cell (testimony of Sergeant Nedley).
20. However, Sergeant Nedley ignored Appellant McGuinness's request and left the holding cell to get another staff member to help (testimony of Sergeant Nedley).
21. Sergeant Nedley walked over to the intake area where he observed Correction Officer Kristina Ellis standing outside the holding cage where inmate CM was being held (testimony of Sergeant Nedley).
22. Sergeant Nedley asked Correction Officer Ellis to call Appellant Mullen to retrieve the keys to the holding cell where inmate SD was being detained in order to remove the Appellants from the scene (testimony of Sergeant Nedley).
23. Correction Officer Ellis responded "why don't you call Mullen yourself?" and noted that she did not want to get involved (testimony of Sergeant Nedley).



24. At this point in time, inmate CM remarked to Sergeant Nedley and Officer Ellis that he (referring to inmate SD) was really "getting his ass kicked" (testimony of Sergeant Nedley).
25. Although he knew that he should report the incident, Sergeant Nedley was in a quandary as to what action to take as Appellant McGuiness was his commanding officer during that shift. Sergeant Nedley took no action at that time (testimony of Sergeant Nedley).
26. As a method of noting the time of the abuse of inmate SD, Sergeant Nedley did a walk around the perimeter of the facility. As soon as he left the building, he performed a fence check that he documented as 6:50 p.m. in the appropriate record book (testimony of Sergeant Nedley, Exhibit 13, p. 2).
27. While performing the fence check, Sergeant Nedley thought about the events that had transpired and realized that the Appellants could not have been preparing inmate SD for transport when he observed them in the holding cell with SD because they did not have a vehicle to transport the inmate at that time (testimony of Sergeant Nedley).
28. The transportation vehicle which had been on a trip to Brockton Hospital did not return to MASAC until approximately 8:45 p.m., approximately two hours after the Appellants had entered the holding cell with inmate SD (Exhibit 20)
29. Sergeant Nedley's next encounter with Appellant Mullen occurred after he (Nedley) received a call over the radio asking him to meet Mullen in the walkway between the intake building and the administration building (testimony of Sergeant Nedley).

30. At this juncture, Appellant Mullen said to Sergeant Nedley "I want to make sure you are okay with this. Benny (Appellant McGuiness) told me to talk to you. You were not supposed to be there" (testimony of Sergeant Nedley).
31. Sergeant Nedley felt that he was being threatened and replied that he was not okay and that he was upset (testimony of Sergeant Nedley).
32. Later that evening, Sergeant Nedley went to the holding cell with Appellant Mullen to assist in getting inmate SD ready to be transported to the Massachusetts Treatment Center (MTC). Upon arriving at the holding cell, Sergeant Nedley observed inmate SD who was alone in the cell was still in restraints (testimony of Sergeant Nedley, Exhibit 26, p. 30).
33. Neither of the Appellants kept inmate SD in constant visual or "eyeball" observation nor did they arrange for inmate SD to be examined by medical personnel after he was placed in restraints (testimony of Sergeant Nedley).
34. Sergeant Nedley accompanied Appellant Mullen as the two men walked inmate SD from the intake building towards the pedestrian trap. Although inmate SD did not resist, Appellant Mullen placed him in a pressure hold and twisted his restrained wrists. Appellant Mullen then taunted inmate SD by stating "if you ever come back, I am going to do it again. If you ever come back, I'm going to punch you in the kidneys. You are a fucking pussy" (testimony of Sergeant Nedley).
35. Sergeant Nedley told Appellant Mullen to "knock it off, you are on camera" (testimony of Sergeant Nedley).

36. At this point in time, inmate SD was placed in the vehicle and transported to the MTC (testimony of Sergeant Nedley).
37. Appellant McGuinness as shift commander on the evening in question was required to complete a "Use of Force Package" prior to the completion of any shift in which restraints are used (Exhibit 21).
38. At no time did Appellant McGuinness complete a "Use of Force Package" relating to the restraint of inmate SD on the evening in question (testimony of Sergeant Kennedy).
39. As shift commander, Appellant McGuinness was responsible for ensuring that inmate SD, after having been placed in restraints, was under an "eyeball watch." However, at no time while he was in restraints was inmate SD placed under an "eyeball watch" during the shift in question (stipulation of the parties).
40. Sergeant Nedley did not report the use of force by the Appellants as he felt threatened by Appellant Mullen and further felt that any report would be either thrown away or altered. Sergeant Nedley felt very confused in that the responsibility for filing a use of force report fell with Appellant McGuinness, the commanding officer of the shift, and it was Appellant McGuinness who himself was one of the abusers (testimony of Sergeant Nedley).
41. The next four days were scheduled days off for Sergeant Nedley. When he returned to work on November 6, 2003, Sergeant Nedley reported to Inner Perimeter Security Officer (IPS) Brett Barros that an incident had occurred over the previous week that Barros should investigate (testimony of Sergeant Nedley, Exhibit 26).

42. Sergeant Nedley approached IPS Officer Barros the following day and emphasized the need for the IPS Officer to investigate the incident as he (Nedley) indicated that if inmate SD were to return to the facility, the abuse would be repeated (testimony of Sergeant Nedley).
43. Sergeant Nedley also informed Director of Security Paul Cruz of the incident involving inmate SD and the two Appellants (testimony of Sergeant Nedley).
44. Sergeant Nedley subsequently received a thirty (30) day suspension for permitting excessive use of force to occur, five days of the suspension to be served with twenty-five days held in abeyance (testimony of Sergeant Nedley).
45. In or about November of 2003, Sergeant Stephen Kennedy was assigned by Chief Mark Reilly of the Internal Affairs Unit to conduct an investigation of the allegation of abuse of inmate SD (testimony of Sergeant Kennedy).
46. Sergeant Kennedy brought it to the attention of Chief Reilly that he (Kennedy) considered Appellant Mullen to be a friend and had been a guest at his (Mullen's) wedding in 1999. Chief Reilly then expressed his confidence that Sergeant Kennedy could conduct a fair and impartial investigation (testimony of Sergeant Kennedy).
47. As part of his investigation, Sergeant Kennedy conducted interviews with over fifteen people including the two Appellants, Sergeant Nedley, and inmates SD and CM (testimony of Sergeant Kennedy).
48. Lieutenant Robert McGuinness was present during the interviews that Sergeant Kennedy conducted with the Appellants (testimony of Lieutenant Robert McGuinness).

49. The two Appellants gave inconsistent and contradictory statements to Sergeant Kennedy concerning their interaction with inmate SD (testimony of Sergeant Kennedy).
50. Appellant McGuiness claimed that he and Appellant Mullen had entered the holding cell twice prior to the time that they placed restraints on inmate SD. Appellant Mullen, on the other hand, informed Sergeant Kennedy that he (Mullen) had not entered the cell at any time prior to the placement of restraints on inmate SD (testimony of Sergeant Kennedy).
51. During the course of his interview with Sergeant Kennedy, Appellant McGuiness referred to inmate SD as a "fruitcake." Appellant McGuiness acknowledged to Sergeant Kennedy that he had told inmate SD to stop being "an asshole" (testimony of Sergeant Kennedy).
52. Appellant Mullen, during his interview with Sergeant Kennedy, referred to inmate SD as a "punk" (testimony of Sergeant Kennedy).
53. Appellant Mullen was vague and imprecise when answering Sergeant Kennedy's questions (testimony of Lieutenant Robert McGuiness).
54. Sergeant Kennedy also interviewed inmate CM as well as several other inmates from the Old Colony Correctional Center who were present at MASAC on the evening in question. All of these inmates reported that they overheard the interaction between the Appellants and inmate SD (testimony of Sergeant Kennedy).
55. Inmate CM and the Old Colony Correctional Center inmates corroborated Sergeant Nedley's account that inmate SD was screaming that he was being hurt.

They also recalled hearing Appellant Mullen verbally taunt and threaten inmate SD. However, these inmates acknowledged that while they heard the statements that were made, they did not actually observe what actually transpired inside the holding cell (testimony of Sergeant Kennedy).

56. After he completed his report, Sergeant Kennedy gave it to Lieutenant Robert McGuinness for review. Lieutenant Robert McGuinness found the report to be true and accurate. Sergeant Kennedy then submitted his comprehensive ninety-two page report to DOC Commissioner Kathleen Dennehy (testimony of Sergeant Kennedy, testimony of Lieutenant Robert McGuinness, Exhibit 26).
57. On October 12, 2004, the Appointing Authority sent the Appellants written notice that they were being charged with violations of the Rules and Regulations of the DOC as well as the Department's Use of Force Regulation, 103 CMR 5.05 (Exhibits 1A & 1B).
58. A hearing was held before the Commissioner of DOC on November 19, 2004 and on January 14, 2005, Commissioner Dennehy sent the Appellants a letter informing them that they were being terminated from their respective positions with the DOC (Exhibits 2A & 2B).
59. On January 31, 2005, the Appellants filed timely appeals of this decision with the Civil Service Commission (Exhibit 3A & 3B).

**CONCLUSION AND RECOMMENDATION**

After reviewing all the testimony and evidence in this case, I conclude that the Appointing Authority has demonstrated by a preponderance of the evidence that just cause exists to terminate the Appellants from their positions with the DOC based on all the charges as set forth by the Appointing Authority in its January 14, 2005 notice of discharge. The Civil Service Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects by the public interest by impairing the efficiency of public service." *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983); *School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct. 486, 488 (1997). In reviewing an appeal brought pursuant to G.L. c. 31 §43, if the Civil Service Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004).

With respect to the charges relating to the abuse of inmate SD, the basis of my conclusion rests with my finding that the testimony of Sergeant Nedley was extremely credible. Sergeant Nedley testified that Appellant Mullen punched inmate SD while he was in restraints and that Appellant McGuiness, having observed this abuse, failed to stop it and further failed to report it. In addition, Sergeant Nedley testified that while SD was on the ground in restraints, Appellant McGuiness walked on the inmate's legs. Sergeant Nedley noted that he saw Appellant Mullen twist SD's wrists while they were in restraints.

By punching inmate SD, walking on his legs, and twisting his wrists, the Appellants violated the DOC Rules and Regulations Sections 8(a) and 10(a). In addition, by failing to keep inmate SD, once restrained, under constant visual observation, by failing to have inmate SD examined by medical personnel while he was restrained, and by allowing inmate SD to remain in restraints for over two hours without seeking the approval of the Superintendent of the facility, the Appellants violated the Use of Force Policy, 103 CMR 505.

I found the testimony of Sergeant Nedley to be very persuasive and credited his testimony relating to the events that transpired on the shift in question. See *Connor v. Connor*, 77 A.2d 697 (Pa. 1951) where the court held that "opportunity to observe demeanor and appearance of witnesses in many instances becomes the very touchstone of credibility." See *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112, 120 (1978); *New England Canteen Service, Inc. v. Ashley*, 372 Mass. 671 (1977).

Sergeant Nedley had no discernible reason to fabricate his testimony relative to the Appellants' conduct towards inmate SD. Sergeant Nedley noted that he had known Appellant Mullen since 2000 and that the two co-workers enjoyed a "friendly relationship" and further that he (Nedley) had never seen inmate SD prior to the evening in question. In addition, Sergeant Nedley testified that he himself received a thirty day suspension for allowing the abuse of inmate SD to occur without taking affirmative action to prevent or stop it. Thus, Sergeant Nedley clearly had no incentive to dissemble as his allegation of inmate abuse by the Appellants directly resulted in disciplinary action being imposed against him by the Appointing Authority.



Counsel for the Appellants argued that the fact that Sergeant Nedley did not report this incident for five days casts serious doubt on his credibility. Notwithstanding Counsel's argument, I fully credit Sergeant Nedley's explanation for his failure to make a timely report of the incident. Sergeant Nedley gave convincing and compelling testimony to the effect that he was perplexed and confused on the evening in question as Appellant McGuinness, as his (Nedley's) commanding officer, was the person to whom he should report the abuse. I further credit Sergeant Nedley's testimony that he was very reluctant to report not only his commanding officer but his fellow sergeant for serious rule infractions and that he was extremely distraught over the entire incident.

I did not credit the Appellants' testimony to the effect they did not use excessive force on the evening in question. I also did not credit their testimony to the effect that that no one else was in the holding cell with inmate SD when he was screaming for help as well as "You're hurting me. Get off me." Although inmates frequently voice complaints concerning their treatment, it does not seem logical that inmate SD would be yelling and screaming concerning physical abuse if he were alone in the holding cell. Moreover, inmate SD's screams were heard by inmate CM and inmate workers from Old Colony Correctional Center.

As abuse of inmate SD did occur on the night in question, I conclude that Appellant McGuinness violated his responsibility as shift commander by failing to file a Use of Force Packet as required by 103 CMR 505. Even assuming, for argument's sake, that no excessive force was used by the Appellants, there is no dispute that at some point, inmate SD was placed in restraints. In accordance with 103 CMR 505 whenever an inmate is placed in restraints, he/she must be constantly monitored by visual or "eyeball"

observation and that arrangements are to be made as soon as possible for a medical examination of that inmate. In addition, whenever an inmate is in restraints for more than two hours, approval to continue the restraints is needed from the Superintendent of the facility. Neither Appellant monitored inmate SD by visual observation while he was in restraints nor did they arrange for a medical examination of the inmate. In addition, neither Appellant sought approval from the Superintendent despite the fact that inmate SD was in restraints in excess of two hours.

I fully credited Sergeant Kennedy's testimony. Sergeant Kennedy also had no reason to fabricate a version of the events that transpired or to alter the truth. Rather, at the hearing, Sergeant Kennedy admitted that prior to being assigned the responsibility of conducting an investigation of alleged inmate abuse by the Appellants, he had considered Appellant Mullen to be a friend and that he had attended Mullen's wedding in 1999. Sergeant Kennedy acknowledged this friendly relationship to his commanding officer who then expressed confidence in Kennedy's ability to be fair and impartial. The record reflects that Sergeant Kennedy performed a comprehensive and thorough investigation of the incident, interviewing over fifteen people and then issuing a ninety-two page report in which he concluded that inmate SD had in fact been abused by both Appellants and that their conduct violated the Rules and Regulations of the DOC.

Sergeant Kennedy testified that during their investigatory interviews with him, the Appellants gave inconsistent versions of the events that transpired and that they dissembled. Appellant McGuiness claimed that he and Appellant Mullen had entered the holding cell twice prior to the time that they placed restraints on inmate SD. Appellant Mullen, on the other hand, informed Sergeant Kennedy, that he (Mullen) had not entered

the cell at any time prior to the placement of restraints on inmate SD (testimony of Sergeant Kennedy). During the course of his interview with Sergeant Kennedy, Appellant McGuiness referred to inmate SD as a "fruitcake." Appellant McGuiness acknowledged to Sergeant Kennedy that he had told inmate SD to stop being "an asshole."

Lieutenant Robert McGuiness who was present during Sergeant Kennedy's interviews with the Appellants verified that Appellant Mullen was not forthcoming and at times was unduly vague in his recollection of the events that transpired.

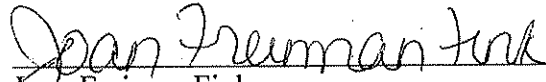
With respect to their conduct during the investigatory interviews with Sergeant Kennedy, I conclude that the Appellants violated Rule 19 (c) of the DOC regulations by failing to respond promptly and fully to the questions posed by the officer in charge of the official investigation of the incident in question.

In conclusion, the Appointing Authority has demonstrated by a preponderance of the evidence that the Appellants used excessive force on an inmate by assaulting him after he was secured in restraints. The Appellants then left the inmate in question in a holding cell, secured in restraints, without direct monitoring and with no medical attention for a prolonged period. Finally, the Appellants lied to the Departmental employee assigned to investigate these allegations.

In determining the appropriateness of the discipline to be imposed, I reviewed the entire record in this extensive case. In addition, I carefully considered the Appellants' actions towards inmate SD on the evening of November 3, 2003. Based on the egregious nature of both Appellants' conduct, I conclude that termination from employment with the DOC was fully warranted by the facts and circumstances of this case.

Accordingly, I recommend that the Civil Service Commission affirm the action of the Appointing Authority discharging Richard Mullen and Benjamin McGuiness from their positions as Sergeant and Lieutenant respectively with the DOC.

## DIVISION OF ADMINISTRATIVE LAW APPEALS



Joan Freiman Fink  
Administrative Magistrate

Dated:

7/14/08