

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

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

**DANIEL McINTYRE,**  
*Appellant*

v.

**DEPARTMENT OF  
CORRECTION,**  
*Respondent*


**Case No.:** D-11-249

DECISION

The Civil Service Commission voted at an executive session on April 5, 2012 to acknowledge receipt of the report of the Administrative Law Magistrate dated February 7, 2012, the written objections of the Appellant dated March 6, 2012 and the response of the Respondent dated March 26, 2012. After careful review and consideration, the Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on April 5, 2012.

A true record. Attest.



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Christopher C. Bowman  
Chairman

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)(I), 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 to:

Bradford Louison, Esq. (for Appellant)

Amy Hughes, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

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February 7, 2012

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

**Re: Daniel McIntyre v. Department of Correction**  
**DALA Docket No. CS-11-723**  
**CSC Docket No. D-11-249**

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Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

  
Richard C. Heidlage  
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Amy Hughes, Esq.  
Bradford Louison, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Daniel McIntyre,**  
Appellant

v.

Docket No. D-11-249  
DALA No. CS-11-723

**Department of Correction,**  
Respondent

**Appearance for Appellant:**

Bradford N. Louison, Esq.  
Louison, Costello, Condon & Pfaff, LLP  
101 Summer Street, #4  
Boston, MA 02110

**Appearance for Respondent:**

Amy Hughes, Esq.  
Department of Correction  
One Industries Drive  
P.O. Box 946  
Norfolk, MA 02056

**Administrative Magistrate:**

**Maria A. Imparato, Esq.**

**SUMMARY OF RECOMMENDED DECISION**

The Department of Correction had reasonable justification for imposing a five day suspension on the Appellant for using threatening language and profanity towards a hospital housekeeper, for inappropriately interfering with the physical therapy treatment of an inmate, acting in an intimidating manner towards a physical therapist and her student, and being untruthful with investigators who were investigating these incidents.

**RECOMMENDED DECISION**

Daniel McIntyre filed a timely appeal under M.G.L. c. 31, §43 of the July 29, 2011 decision of the Commissioner of the Department of Correction (DOC) to suspend him for five days for using threatening language and profanity towards a Lemuel Shattuck Hospital (LSH)

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employee on November 16, 2010; being untruthful with investigators during an investigation of the incident; inappropriately interfering with the physical therapy treatment of an inmate; walking between a physical therapist and her student who were treating the inmate, rather than walking around them, in February 2011; and telling a physical therapy student, "Girl, you need to put on some weight," in violation of General Policy I and Rules 1, 6(a), 6(b), 19(c) and 103 DOC 237, the Prevention and Elimination of Workplace Violence policy.

I held a hearing on November 14, 2011 at the office of the Division of Administrative Law Appeals, 98 North Washington Street, Boston, MA. I declared the hearing private because neither party made a written request to make the hearing public.

I admitted documents into evidence. (Exs. 1 – 8.) Daniel McIntyre testified on his own behalf. The DOC offered the testimony of Captain Paul Craven, shift commander of the DOC unit at LSH; Benito Meca, a Department of Public Health (DPH) employee assigned to the LSH housekeeping department; Correction Officer (CO) Michael R. Watt, a DOC transportation officer; Lieutenant Harold Wilkes of DOC Internal Affairs; and Patricia Ballou, a DPH physical therapist.

The record closed on December 16, 2011 with the filing of post-hearing briefs.

#### **FINDINGS OF FACT**

1. Daniel McIntyre has worked as a Correction Officer (CO) for the DOC since October 1989. (Testimony, McIntyre.)

#### **November 16, 2010 incident**

2. On November 16, 2010, Mr. McIntyre worked on the 9 – 5 shift at the DOC unit of Lemuel Shattuck Hospital (LSH). At about 5:05 p.m., he was working overtime in the outpatient department until all of the inmates who had been transported to the

hospital for treatment had left to be transported back to their respective institutions.

(Testimony, McIntyre.)

3. The DOC LSH outpatient department has ten holding cells where DOC prisoners are held before and after receiving medical treatment. There is a cell for county inmates, cells for treatment center inmates, cells for protective custody, cells for those in a state hospital, and a cell for women. (Testimony, McIntyre.)
4. When the housekeeping staff came to clean the holding cells, Mr. McIntyre would move prisoners out of the dirty cells into the clean cells so the housekeepers could clean the dirty cells. (Testimony, McIntyre.)
5. Benito Meca is an employee of the DPH, assigned to the housekeeping department at LSH. (Testimony, Meca.)
6. On November 16, 2010, shortly after 5 p.m., Mr. Meca went to the outpatient department and cleaned one cell. He asked Mr. McIntyre to move prisoners into the clean cell so that he could clean the dirty cell. Mr. McIntyre told Mr. Meca to clean a cell that Mr. Meca had already cleaned. Mr. McIntyre said, "Who has the key? I have the key." (Testimony, Meca.)
7. Mr. McIntyre said to Mr. Meca, "Who runs this place, me or you?" Mr. Meca said, "Why are you giving me such a hard time?" Mr. McIntyre said, "Who the fuck do you think you are?" and "One of these days you'll get yours." Mr. McIntyre and Mr. Meca were a body width apart during this exchange. (Testimony, Watts; Ex. 5, p. 29.)
8. Captain Craven, the shift commander, was in the control room behind a glass panel. CO Henderson who was on the front desk alerted Captain Craven that there was a

disturbance. Captain Craven got up and looked out the control room window and saw Mr. McIntyre pointing his finger in Mr. Meca's face and yelling at him. Mr. Meca was backed up against a corner, and Mr. McIntyre was about 18 inches away from him. Captain Craven heard Mr. McIntyre "throw the f-bomb." (Testimony, Craven.)

9. Captain Craven came out of the control room with Lieutenant Reardon. Mr. Meca said "He threatened me and said you're going to get yours." Mr. Meca indicated that CO Watt was a witness to the confrontation, and when Captain Craven looked at CO Watt, CO Watt nodded in agreement. Captain Craven sent Mr. McIntyre home with instructions to complete an incident report the next day.

(Testimony, Craven; Ex. 5, p. 30.)

10. Lieutenant Wilkes of DOC Internal Affairs was assigned to investigate the confrontation between Mr. McIntyre and Mr. Meca. Lt. Wilkes interviewed Mr. McIntyre, Mr. Meca, Captain Craven, and CO Watt, among others. (Exs. 5, 6.)
11. During his interview with Lt. Wilkes the next day, November 17, 2010, Mr. McIntyre repeatedly said the he could not remember saying, "You'll get yours," to Mr. Meca. Ultimately, Mr. McIntyre denied making the statement. (Ex. 6; Ex. 5, pp. 17-18.)
12. During his interview with Lt. Wilkes, Mr. McIntyre said that the closest he ever got to Mr. Meca during the confrontation was ten feet. (Ex. 6; Ex. 5, p. 16.)

#### **February 2011 incident**

13. Patricia Ballou is a physical therapist who provides direct patient care in the orthopedic clinic at LSH. (Testimony, Ballou.)
14. In February 2011, Ms. Ballou and a physical therapy student were working in the prison unit, instructing a patient in the use of crutches. The patient was going to be

discharged that day. Mr. McIntyre came into the room and said, "You're done here."

Ms. Ballou said that she was not finished providing verbal instructions to the patient.

Mr. McIntyre said, "You can do it in the hallway." (Testimony, Ballou; Ex. 5, pp. 48-51.)

15. Mr. McIntyre did not tell Ms. Ballou why he wanted her to leave the patient's room.

There was no emergency on the floor. (Testimony, Ballou.)

16. Ms. Ballou and her student stood in the doorway and continued to give verbal instruction to the patient. Ms. Ballou thought she might be in violation of HIPPA in doing so. Ms. Ballou and the student were standing in the hallway after finishing their instructions to the patient when Mr. McIntyre walked briskly between them, rather than walking around them. Ms. Ballou was startled and intimidated.

(Testimony, Ballou; Ex. 5, pp. 48-51.)

17. The next day, Mr. Ballou's student reported to her that when she entered the institution that morning, Mr. McIntyre was in the trap. He questioned the student about the gait belt she had in her pocket, and then said, "Girl, you have got to gain some weight." Ms. Ballou's student was upset by Mr. McIntyre's remark.

(Testimony, Ballou; Ex. 5, pp. 48-51.)

18. Ms. Ballou reported her concerns to Captain Driscoll who asked Ms. Ballou to write a formal complaint. Ms. Ballou was fearful of retaliation. Ms. Ballou met again with Captain Driscoll and Captain Craven and decided to put her complaint in writing.

(Testimony, Ballou; Ex. 5, pp. 50-51; 44.)

19. Ms. Ballou had observed Mr. McIntyre's erratic behavior, had heard him get upset and use profanity, and she feared for her personal safety. Ms. Ballou's supervisor assured Ms. Ballou that she would be kept safe. (Testimony, Ballou; Ex. 5, 50-51.)
20. Captain Craven and Captain Driscoll had Mr. McIntyre come in for an interview with a union representative on March 1, 2011. Mr. McIntyre answered almost every question with "I don't recall." When asked whether he has said to the physical therapy student, "Girl, you need to put on some weight," Mr. McIntyre responded, "I don't recall but if I did it would have been a compliment." (Testimony, Craven; Ex. 5, pp. 40-43.)

#### **Previous Discipline**

21. By letter of March 21, 2000, Mr. McIntyre was issued a formal letter of reprimand for exhibiting "unprofessional and inappropriate behavior toward hospital staff, when informed and asked not to use the bathroom in the inmates (sic) room. Further your perceived threats to nursing staff following this incident is contrary to what is expected of you and will not be tolerated." Mr. McIntyre was no longer assigned to an outside hospital post at the New England Medical Center as a result. (Ex. 7.)
22. By letter of May 21, 2002, Mr. McIntyre received a five day suspension for prematurely closing the West Wing Gate on the arm of a female CO, resulting in contusions to her lower left arm and a three-week industrial accident leave. Additionally, Mr. McIntyre was found to be less than truthful in his investigative interview. (Ex. 8.)

#### **CONCLUSION AND RECOMMENDATION**



The Department of Correction has demonstrated reasonable justification for imposing a five day suspension on CO Daniel McIntyre. I recommend that the Civil Service Commission affirm the decision of the DOC.

The role of the Civil Service Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). An action is “justified” when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rule of law. *Id.*, at 304, quoting *Selectmen of Wakefield v. Judge of First District Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928); *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” *Murray v. Second District Ct. of E. Middlesex*, 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof is one of a preponderance of the evidence, which is established “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” *Tucker v. Pearlstein*, 334 Mass. 33, 35-36 (1956). If the Commission finds by a preponderance of the evidence that there was just cause for an action against the Appellant, the Commission shall affirm the action of the Appointing Authority. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

**General Policy I** in the *Rules and Regulations Governing All Employees of the Massachusetts Department of Correction* provides in pertinent part: “Nothing in any part of these rules and regulations shall be construed to relieve an employee ... from his/her constant obligation to render good judgment, full and prompt obedience to all provisions of law... Improper conduct affecting or reflecting upon any correctional institution of the Department of Correction in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations.”

The Appellant failed to use good judgment when he swore at and threatened Mr. Meca, the housekeeper, who sought to have the Appellant move prisoners into clean cells in order to clean the dirty cells. He did not use good judgment when he ordered Ms. Ballou out of a patient’s room without explanation. He did not use good judgment when he cut between Ms. Ballou and her student in an intimidating way, and he did not use good judgment when he made an unsolicited remark to the physical therapy student about her weight.

**Rule 1** provides in pertinent part that “Employees should give dignity to their position[.]”

The Appellant did not give dignity to his position when he swore at and threatened Mr. Meca, or when he treated Ms. Ballou and her student in a rude and

intimidating way. Furthermore, the Appellant did not give dignity to his position when he denied threatening Mr. Meca and insisted that they were ten feet apart during their confrontation, despite information from eye and ear witnesses who heard him threaten Mr. Meca and placed him within inches of Mr. Meca at the time.

**Rule 6(a)** provides in part: “In your working relationships with coworkers you should treat each other with mutual respect, kindness and civility, as become correctional professionals. You should control your temper, exercise the utmost patience and discretion, and avoid ... controversies in your relationships with co-workers.”

**Rule 6(b)** provides: “Do not foster discontent or otherwise tend to lower the morale of any employee[.]”

The Appellant did not treat Mr. Meca, Ms. Ballou and her student with respect, kindness or civility, and he did foster discontent and lower their morale with his rude and intimidating behavior.

**Rule 19(c)** provides in part: “[Y]ou must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, visitor, another employee or yourself.”

The Appellant did not respond fully and promptly to questions by Internal Affairs the day after the incident with Mr. Meca, or during his interview concerning his treatment of Ms. Ballou. He said repeatedly that he did not recall incidents from the day before.

**103 DOC 237**, the DOC policy for the Prevention and Elimination of Workplace Violence, indicates that workplace violence includes “any behavior that communicates ... a direct or indirect threat of physical harm, violence, harassment, or intimidation; or

[a]ny behavior that causes a reasonable person to be in fear of their own safety or that of another.” (Ex. 4, 237.02.)

The Appellant threatened Mr. Meca by telling him that someday he would get his. He intimidated Ms. Ballou and her student by removing them from a patient’s room without explanation and then cutting between them while they were conversing in the hallway.

The DOC has demonstrated by a preponderance of the evidence that the Appellant violated General Policy I, and Rules 1, 6(a), 6(b), 19(c) and the DOC policy against violence in the workplace by his behavior towards Mr. Meca, Ms. Ballou and her student, and in failing to be forthcoming in his interviews with Internal Affairs.

I recommend that the Civil Service Commission affirm the five day suspension imposed on the Appellant.

DIVISION OF ADMINISTRATIVE LAW APPEALS



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Maria A. Imperato  
Administrative Magistrate

DATED: **FEB -7 2012**