

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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FILIFE MONTEIRO,
JOHN SULLIVAN, and
LAURA CHRISTIE,
Appellants

Docket Nos.: D-05-116
D-05-117
D-05-121

v.

DEPARTMENT OF CORRECTION,
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L c. 31, s. 43, the Appellants Filipe Monteiro (hereinafter, "Monteiro"), John Sullivan (hereinafter, "Sullivan") and Laura Christie (hereinafter, "Christie") filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that Department of Correction (hereinafter "DOC," "Department" or "Appointing Authority") did not have just cause for taking disciplinary action against them. Sullivan was

demoted and reassigned for failing to report that an unauthorized civilian was in the control room, and for failure to report staff smoking and staff personal cellular phone use. Monteiro was suspended for using a cellular phone while on duty, for failing to report incidences of misconduct by other employees, and for being less than truthful to DOC investigators.

Christie was demoted and reassigned for using a cellular phone while on duty, for accompanying an unauthorized civilian on the grounds of the facility, for failing to report incidents of misconduct, and for being less than truthful during the ensuing DOC investigation.

The Appellants filed timely appeals at the Commission. The full hearing was held on September 12, 2007, August 11, 2008, and September 10, 2008 at the offices of the Commission. Some of the delay in scheduling subsequent hearing dates was attributed to the change in counsel representing the DOC. Five (5) audio tapes were made of the hearing and are retained by the Commission. Upon the Appellants' request, the hearing was made public. The Appellant's oral motion for sequestration of witnesses was allowed and the witnesses so instructed. The witnesses were sequestered.

FINDINGS OF FACT

Seventeen (17) joint exhibits were entered into evidence. Based on these exhibits and the testimony of:

For the Appointing Authority:

- Dean Gray, Inner Perimeter Security Officer
- James Saba, Superintendent
- Mark McCaw, Lieutenant, Office of Investigative Services
- James Bender, Deputy Superintendent

For the Appellant:

- Appellant, Sergeant Filipe Monteiro, Correction Officer I
- Appellant, Sergeant Laura Christie, Correction Officer II
- Appellant, Sergeant John Sullivan, Correction Officer II
- Lieutenant William Scanlan
- Dean Canada, Correction Officer
- Ellen Flaminio, Director of Treatment and Classification
- Ronald Tello, Correction Officer

I make the following findings of fact:

1. The three Appellants are tenured civil service employees of the DOC. Monteiro and Christie have been employed by the DOC since 1992. Sullivan has been employed by the DOC since 1989. (Testimony of Appellants)
2. Monteiro received a copy of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (hereinafter “Blue Book”) on June 4, 1992, at the beginning of his employment. (Joint Exhibit 1.E)
3. Sullivan received a copy of the Blue Book on February 17, 1987, at the beginning of his employment. (Joint Exhibit 3.E)
4. Christie received a copy of the Blue Book on February 5, 1992, at the beginning of her employment. (Joint Exhibit 2.F)
5. The Department hired Appellant Laura Christie in 1992, and she held the rank of Correction Officer-II (sergeant) in 2004. She submitted her employment evaluations and letters of commendation into evidence. (Exhibits 10 & 11)
6. The Department hired Appellant John Sullivan in February 1987, and he held the rank of Correction Officer-II (sergeant) in 2004. When no lieutenant was on duty during his shift, Sullivan would serve as the Shift Commander. Sullivan also worked as a Steward and a Chief Steward for the Massachusetts Correction Officers Federated Union

("MCOFU" or "Union"). He submitted his employment evaluations and letters of commendation into evidence. (Exhibits 13 & 14)

7. In 2004, all three Appellants were assigned to the 3:00-11:00 p.m. shift at the Northeastern Correctional Center (hereinafter "NECC"), a minimum-security, pre-release facility located in W. Concord, MA. (Joint Exhibit J.4)
8. Lieutenant James Silvia (hereinafter "Silvia") served as the Appellants' Shift Commander on the 3:00-11:00 p.m. shift. The Shift Commander is in charge of NECC when the superintendent or other administration is absent. (Joint Exhibit J.4; *See, e.g.*, Rule 4(d) of the DOC Blue Book)
9. On or about July 15, 2004, an NECC inmate (hereinafter "Inmate Doe") told Inner Perimeter Security Commander Dean Gray (hereinafter "IPS" and "Gray") that Monteiro had threatened him. Inmate Doe further reported that there was other misconduct, including smoking and unauthorized visitors occurring among staff on the 3:00-11:00 p.m. shift, pointedly referring mainly to a complaint regarding a threat to Inmate Doe from Monteiro, the inmate also claimed that other officers and Lt. Silvia were present and witnessed the threat, and the other misconduct which occurred in the area of the control room in Galton Hall, a building on the NECC grounds. (Exhibit 4)
10. NECC-IPS Commander Gray together with Director of Security Matthew McLaughlin interviewed Inmate Doe and filed a written report on it to NECC Superintendent James Saba on July 16, 2004. (Exhibit 4)
11. Inmate Doe subsequently provided written statements containing these allegations to Gray. There upon, Gray made a report to James A. Saba, the Superintendent of NECC. Due to the nature of the inmate's allegations, the of a threat to an inmate, smoking, cell

phone use and unauthorized visitors to the control room; Superintendent Saba turned the matter over to the DOC's Office of Investigative Services (hereinafter "OIS"), for further investigation. (Testimony of Saba, Exhibit 4)

12. This investigation was unusual for the DOC, as it involved two levels of investigative authority, level one is a facility level investigation by Gray and level two is a more serious investigation by the DOC's Office of Investigative Services (hereinafter "OIS") (McCaw). (Testimony of Saba, McCaw and Gray, Exhibit 4)

13. However, Superintendent Saba was aware of the allegations or "concerns" that Silva was smoking at the NECC facility since he took over as Superintendent in October of 2003. The previous Superintendent informed him of this situation at the time of his debriefing in October, 2003. However, Saba decided not to issue a warning to Silva or a general notice to the facility staff regarding smoking at that time. Instead, he waited until July, 2004, and the inmate complaint to initiate any action. It is noted that Ellen Flaminio testified that Saba had at some time after the smoking policy change, cautioned Silvia regarding smoking on the property. However, Saba testified that he did not recall even hearing any rumors from any source, regarding Silvia's smoking. (Exhibits, testimony and testimony of Saba)

14. Superintendent Saba stated that every DOC employee was obligated to report any misconduct. The reports could be either verbal or written, including confidential incident reports. All reports for the past 8-9 years have been entered into the computer IMS system and prior to that they were secured in a sealed and "secured mail box". He had not received any reports of misconduct regarding Silvia from any DOC employee. (Testimony of Saba)

15. Saba admitted that he like the entire NECC staff and administration move in and out of the facility through the inner control area, at least twice daily. However, he claimed that he never noticed: smoke smell, cigarette butts, ashes or any other evidence of smoking while in that area. (Testimony of Saba)
16. Saba testified that his memory is that sometime in 2004 the DOC instituted a policy change regarding the use of cell phones. He was shown a document to refresh his memory. He identified the document as 103 DOC 501 which prohibited cell phone use dated 4/06/04 and effective 5/06/04. However, the document was not admitted as evidence. He was asked about the same policy 103 DOC 501, (Exhibit 9) which was effective on 2/16/2006, prohibiting cell phone possession or use without special waiver or permission. He explained that there is an annual review of all DOC policies and they are all republished and given a new effective date, even if there are no changes from the prior year. It therefore would require production of a copy of the policy in effect for the relevant time period here to determine the then effective relevant policy.(Testimony of Saba, reasonable inference)
17. On July 20, 2004, the DOC assigned Sergeant Mark McCaw of OIS (hereinafter “McCaw”) to investigate the allegations. OIS is a DOC office from outside of the NECC facility.(Exhibit 4, testimony of McCaw)
18. It is important to note that McCaw’s investigative report states that inmate [Doe] was released from NECC on July 19, 2004 on a General Certificate of Discharge and that on July 22, 2004, when McCaw spoke with him by telephone; “He was uncooperative and refused to answer any questions regarding the alleged incident.” (Exhibit 4, page 4)

19. McCaw states in his report, summaries of various inmates allegations against various Correction Officers and other inmates. However, it is difficult if not impossible to identify and distinguish among the various accusing and accused inmates, due to the redacted identifying information. There is even reference in the report to specific information received from a “**confidential inmate informant**”. (Exhibit 4)
20. On December 8 and 9, 2004 McCaw interviewed the 16 inmate residents of Gralton Hall regarding any observations of these specific allegations against the Appellants and any other observations of staff misconduct. Ten of the 16 interviewed inmates had not made any past observations of the alleged past staff misconduct. Three had observed cell phone use, at some time in the past but could not distinguish whether they were personal or the institution issued cell phones. Three had observed KN visit Silvia in the control room approximately 2-3 times; including one inmate who had also observed some kind of cell phone use. One had heard unidentified staff use profanity over the intercom system; this inmate had also observed some kind of cell phone use. One inmate stated that he disliked Silvia, since he first met him while incarcerated at the DOC Warwick Forestry Camp, back in 1980. (Exhibit 4)
21. McCaw received a large volume of information and allegations from the original complaining inmates interviewed, against almost exclusively, these Appellants, plus Lt. Silvia. The time period referenced in these allegations was broad or indefinite; e.g. “for the past six months”, “last summer”, “approximately 5 weeks ago”, etc. Many of these allegations seem petty and inconsequential to the complaining inmates. For instance Monteiro allegedly allowing his wife and family dog on the property and driving them on a tour in a “state cruiser”, and another complaint of talking on a cell phone. It is

difficult to believe that the inmate has suddenly become a concerned citizen trying to enforce all the rules for the betterment of the Commonwealth. Self-interest or working an angle is a more likely motivation; possibly to even a score, pressure staff for leniency, stirring things up or just trying to exert an administrative advantage or leverage for a future favor. The efficacy of soliciting or relying on inmates as a reliable source for rule enforcement against their immediate custodians seems to invite potential abuse and manipulation by the inmates, undermining the position and authority of the DOC staff. (Exhibits, testimony, Exhibit 4, reasonable inferences)

22. McCaw did not interview Appellants Sgts. Monteiro and Christie until October, 12, 2004. McCaw interviewed Lt. William Scanlan, Lisa Amaral and Dean Canada on November, 4, 2004 and did not interview Appellant Sgt. Sullivan until November 19, 2004. McCaw and Gray did not audio or video record any of their interviews. (Exhibits and testimony, Exhibit 4)
23. McCaw had the benefit of having reviewed the surveillance videotapes prior to his interviews of the Appellants. He asked specific questions based on details that he believed was evidenced by the videotapes. However, McCaw framed some of his interview questions broadly as to include all past actions or observations. The Appellants, on the other hand, had not had the same opportunity to review the videotapes. The attorney representing the Appellant was denied the opportunity to review the videotapes. The interviews were months after the dates of taping. The very odd circumstance is that McCaw's interviews of the Appellants were not audio or video taped and McCaw had to rely on his memory and note taking as to what transpired at

these interviews. (Exhibits and testimony, Exhibit 5 and testimony of McCaw, reasonable inferences)

24. After initially interviewing Inmate Doe and consulting with other staff, including Gray and McLaughlin, McCaw decided to conduct video surveillance of the control room in Gralton Hall. (Testimony of McCaw)

25. On July 29, 2004, McCaw and Gray set up a surveillance camera in Director Ellen Flaminio's office, located in the administration building, and with a prime view of the front of Gralton Hall, including its foyer and lobby. Later, McCaw and Gray decided to reposition the camera to the Inner Perimeter Security Office in order to obtain a better view of the control room, the location of the alleged misconduct. Video surveillance from that location began on Thursday, September 9 2004 and continued through Friday, September 10, 2004 and Saturday, September 11, 2004. (Joint Exhibit 4)

26. In addition to the investigative and administrative effort involved in this surveillance investigation, the DOC actually **cut down a tree** between the camera position and Gralton Hall for a better visual line for the video. (Testimony of Gray)

27. Before leaving at the end of his shift, Gray would turn the camera on. The camera would record until the tape ran out or the battery died. Gray turned over the tapes to McCaw. (Testimony of Gray and McCaw)

28. The total surveillance consisted of approximately sixteen (16) to seventeen (17) hours of videotape. From those tapes he compiled a 47 minute tape by fast-forwarding until he saw the misconduct. (Testimony of McCaw; Exhibit 5)

29. Gray did review some of the tape in the OSI office and could identify some of the people. However, he had to rely on Deputy Superintendent Alvin Notice to identify most of the people on the tapes. He did not see the entire tapes.(Testimony of Gray)
30. Gray testified that there was a recent change in the DOC rule on smoking. He did not know the date. Smoking was previously allowed for staff, inmates and visitors, until the prohibition. However, the substantial evidence of smoking continued after the prohibition. Cigarette butts, ashes and smoke smell were “all over the place”. The Inmates continued to possess cigarettes and smoke illegally after the ban on smoking. Some inmates complained about their cellmates having cigarettes. Cigarettes are contraband and inmates would be disciplined for possession of or smoking. However, smoking by inmates remained prevalent at NECC. (Testimony of Gray)
31. No evidence was offered as to the effective date of the DOC policy change to a prohibition of or use of smoking materials, by employees, inmates and visitors. Ellen Flaminio testified to a grace period being in effect for some unstated time-period and verbal warnings being used. (Exhibits and testimony)
32. Possession of cigarettes and cell phones by inmates at NECC continued to be a big problem according to Gray, and they were confiscated as contraband when found. However, he had to prioritize his efforts regarding contraband and focus instead on drugs and weapons. He did not spend much time on inmates’ use of cell phones or cigarettes. He usually did not investigate employees’ use of cell phones or smoking. He had never previously investigated employee use of cell phones or smoking during his twelve (12) years at IPS. Since NECC is a minimum security facility, there are no

surveillance cameras installed there. The inmates at NECC are in pre-release status and went out in to the community to work on a daily basis.(Testimony of Gray)

33. Since McCaw was unfamiliar with the staff at NECC, he had to rely on other people to identify the persons appearing in the videotapes. He relied on Alvin Notice, Superintendent Saba and Dean Gray for identification purposes. (Testimony of McCaw)

34. It is clear that Lt. James Silvia was the target of this investigation and the surveillance videotaping. McCaw conducted the investigation as directed by his superiors in the DOC administration. **McCaw was “briefed” early on, by his superior Mark Reilly, then he “brain stormed” with other DOC administration. He caught the “woman coming and going” and “that is what he wanted to catch on tape”. He testified that he “was trying to corroborate the inmates’ allegations”.** The shift and the control room from which Lt. Silvia worked as shift commander was targeted in the surveillance video. The Appellants in this present appeal were caught in the videotape, since they worked on the same shift with Lt. Silvia. (Exhibits and testimony, Testimony of McCaw, reasonable inferences)

35. After viewing the video footage McCaw believed that he observed and reported the following:

1. On September 9, 2004 Silvia was smoking and speaking on a cell phone outside the rear door of the control room.
2. On September 9, 2004 Silvia was smoking at the rear of the control room with the door open while speaking to Monteiro and while Sullivan is present.
3. On September 9, 2004 Silvia was smoking and speaking on a cell phone while Sullivan is present.

4. On September 9, 2004 Silvia was smoking and speaking on a cell phone and Monteiro smoking, both while Sullivan is present in the control room.
 5. On September 9, 2004 Monteiro was speaking while outside the rear door to the control room while no one else is present outside.
 6. On September 10, 2004 Silvia was smoking in the presence of Monteiro.
 7. On September 10, 2004 a female civilian, identified as KN, visiting and smoking with Silvia and sitting on his knee, in the presence of Christie. The tape confirmed KN remained at NECC for approximately two hours and nineteen minutes.
 8. On September 11, 2004 Christie was sitting outside the rear door of the control room, speaking on a cell phone for approximately seventeen minutes.
 9. On September 11, 2004 the tape confirmed KN's presence at NECC for at least approximately two and one-half hours.
 10. Officers Canada and Amaral and Scanlan also witnessed Silvia's alleged misconduct, but failed to report the instances. (Exhibit 4, testimony of McCaw)
36. This hearing officer viewed part of the videotape, (Exhibit 5) at the August 11, 2008 hearing and found the visual quality to be poor. Only the doorway had sufficient light to provide some quality for viewing detail with any degree of accuracy. (administrative notice)
37. McCaw provided a narrative, on his first day of testimony 9/12/07, of what he thought he observed as the videotape was shown during this hearing. Almost immediately; there are two people appearing in the control room in a window and one sitting in a chair although McCaw could not identify them. Thereafter an unidentified inmate appeared in a window. A person McCaw identified as Christie appeared in a window; yet this hearing officer could not identify the person as the Appellant, Christie. McCaw was not sure of the date of this section of the video, (Sept. 9 or 10, 2004). Then 3-4 unidentified inmates appeared in a window. Thereafter an unidentified man is standing in the doorway and an unidentified man is sitting in a chair. Then another two unidentified

inmates appear and another unidentified man is in the window. McCaw believed the videotape showed Monteiro talking on a cell phone with the use of an ear piece. However, this hearing officer pointed out that it appeared as if Monteiro was listening to music or speaking out loud with someone nearby. McCaw admitted that there is usually a radio in the control room. This hearing officer asked McCaw if there were any officers who appeared in the video tape observing the alleged misconduct, who were not disciplined initially? He answered that yes Officers Canada and Amaral appeared in the videotape and were not disciplined despite his findings in his report that they should also be disciplined. He attributed this oversight in discipline to an “administrative flaw”, due to the fact that his investigative unit was newly formed. (Exhibits 4, 5 and testimony of McCaw)

38. Correction Officer Dean Canada testified while part of the 47 minute videotape (Exhibit5) played. Although, he was familiar with the Appellants, having worked with them he still had trouble identifying them at points in the videotape. Despite having previously viewed this video, he had trouble even identifying himself and was not sure and only guessed regarding Silvia and Monteiro, at certain points. However, he specifically remembered that Monteiro did not use a cell phone on that shift of 9/09/04, as alleged. He is a friend of Monteiro and he specifically remembered talking with Monteiro at that point in the videotape about Monteiro’s crazy ex-girlfriend and laughing about it with him. (Testimony of Canada)
39. Monteiro denied using a personal cell phone on the videotapes and denied ever having one in his possession, always leaving it in his car. He claimed he used the institutional cell phone as a walkie-talkie as was his practice. He also had trouble identifying the

people appearing in the videotape He confirmed that he and Canada were high school friends and that they were “ragging on each other” in the video when he is thought to be talking on a cell phone. He denied threatening or harassing the complaining inmate. He said the complaining inmate was angry with him because he had to shake down the inmate’s cell due to suspected contraband. He did not know that KN, the “blood girl” was no longer an authorized vendor or visitor at that time. (Testimony of Monteiro)

40. McCaw admitted that he could not tell from viewing the videotapes whether the persons identified are using personal or properly issued institutional cell phones. (Testimony of McCaw)

41. McCaw formed an erroneous conclusion very damaging to the Appellants’ claim of not using personal cell phones in the videotape and then lying about it to the investigators. McCaw stated in his report (page35-36) that he reviewed the call detail records of the Department issued cellular telephones assigned to NECC and they “revealed that no calls were made on any of the institution’s cellular telephones at the same dates and times that Lt. Silvia, Sgt. Christie and Officer Monteiro were videotaped using a cellular telephone.” This statement by McCaw creates the strong if not irrefutable inference that if they had been using properly issued cell phones it would have appeared in the call detail records and therefore they were lying to him during their interviews. Mc Caw also testified to this supposedly conclusive evidence on the first day of his testimony, September 12, 2007. However, McCaw voluntary admitted in his testimony on the second day of this hearing, August 11, 2008, that he had conducted a subsequent investigation and learned after filing his report and testifying the first day, that NECC cellular records did not list NEXTEL walkie-talkie usage detail at all.

Therefore, the Appellants could have been using the properly issues cell phones as expected, as walkie-talkies without any records showing their use. McCaw also admitted that he had not requested to look at any of the Appellants' personal cell phone records. (Exhibit 4, testimony of McCaw, reasonable inferences)

42. Christie reported to McCaw in her interview and testified at this hearing that the institutional issued NEXTEL cell phones were used regularly by staff to communicate with work crew supervisors off the premises and for other staff communication. (Exhibit 4, testimony of Christie)

43. Christie testified that she had Lt. Silvia's permission to have her cell phone with her on 9/11/04 to call her mother regarding her grandmother's death anniversary. She used her personal cell phone since it was a long distance call. However, she made the call from the parking lot near her car. She produced her personal cell phone records to corroborate this fact. (Exhibit 8) She knew KN as a frequent almost daily authorized visitor who picked up blood samples outside the control room and regularly used the telephone to call other DOC facilities. Christie assumed she continued to be authorized. In any event, Silvia as shift commander had the power to authorize her as a visitor to the facility including the control room. (Exhibit 4, testimony of Christie)

44. McCaw's investigation further revealed through a hearsay source, without documentation, that although KN had been privately contracted by Eastern Connections to pick up blood and urine samples from various DOC facilities, including NECC, she had not worked for Eastern Connections since August 2004. There is no indication of any notice from the DOC that KN had her authorization to be on the NECC premises revoked. (Exhibit 4)

45. The Appellants and the other staff interviewed here by the investigators were familiar with KN as a vendor who regularly picked up the urine or blood samples. She was known generally as the “blood lady”. The staff, including the Appellants assumed that she had authorization or permission to be at the facility and in the control room and had no reason to believe otherwise. McCaw checked the records and found that KN had received authorization as a visitor from NECC administrator Ellen Flaminio on June 18, 2004. There is no indication in the records of any expiration of that authorization. The DOC administration did not give the staff any notification of the expiration of KN’s authorization to be on the NECC property including the control room. It was reasonable for the staff to assume that she continued to be an authorized visitor during the time period of the investigation. Lt. James Silvia as shift commander had the apparent and recognized authority to permit visitors to the facility on that shift. (Exhibits and testimony, testimony of McCaw, reasonable inferences)

46. Although the surveillance camera had the capability of time and date stamping the video tape, for some reason McCaw, McLaughlin and Gray did not activate it. This required McCaw to spend extra time reviewing the tapes and somehow correlate to get or guess the time of events. One method he used was to watch the tapes in real time and make notes then he would fast forward and determined that every 10 minutes = 1 Hour. He edited all of the tapes down to 47 minutes. He did not remember the date(s) he did the editing. He admitted he had problems with the tapes, as Dean Gray had set-up the camera, starting and stopping the camera and retrieving the video tapes. However, sometimes the battery went dead and the taping stopped. Other times he taped over some tapes, if he had no new tape available. The original mini-VCS tapes were copied

by him on to regular sized VCS tapes and he still has the originals. (Testimony of McCaw)

47. McCaw admitted that NECC administrator Ellen Flaminio did appear in the control room in one of the tapes. (Testimony of McCaw)

48. McCaw admitted that he also subsequently prepared a two (2) page addendum to his report regarding Monteiro, but that he has not seen that report since he filed it. It went missing. (Testimony of McCaw)

49. McCaw admitted that he interviewed Sullivan two months after the incidents, at a time when Sullivan's memory of the events might have been stale. He was not aware of the reason for this delayed interview other than due to his caseload. (Testimony of McCaw)

50. McCaw was cross-examined on whether other DOC officers had also appeared on the video surveillance, witnessing the alleged misconduct yet went unreported, uncharged with lying to investigators and undisciplined. He admitted that he was ordered to do a re-investigation or an administrative review, after Sullivan and Christie had filed complaints against the DOC for discriminatory or disparate treatment at MCAD. He was asked regarding approximately ten named other CO's. He remembered some of those named CO's appearing on the tape, others he could not remember but most had not been disciplined. (Testimony of McCaw)

51. Deputy Commissioner James Bender testified that had reviewed McCaw's re-investigation report but only some of the videotape. He was only familiar with Silvia on the tape. He said that the supervisors were not doing their job by allowing the practice to continue. He recommended that four of the CO's who appeared in the videotapes be

administratively referred back to NECC for discipline due to the reinvestigation prompted by the MCAD complaint. (Testimony of Bender)

52. In October, 2005, as a result of the MCAD complaints, the Department reopened its original investigation. McCaw then conducted a reinvestigation, including other interviews, a review of the videotapes and filed a re-investigation report dated March 31, 2006. As a result of that investigation, it was determined that Amaral and Canada should have been referred for disciplinary action, because McCaw had made specific findings of misconduct by them in his original investigation. (Exhibit 15.A.).

However, in light of the passage of time, Deputy Superintendent Bender referred Amaral and Canada to Superintendent Saba for disciplinary action. Both employees subsequently received a one-day suspension for failure to report violation of Departmental rules and lying during the course of the original investigation. (Exhibits 15.B., 15.C.). It is noted that another Correction Officer asserted that Ellen Flaminio had observed Silvia smoking at the same time he did and he assumed that it was her administrative duty to report it, which she did not report. That officer was not disciplined. Also as a result of the reopened investigation, it was determined that CO II (Sergeant) Richard Aylward and CO II (Sergeant) Donald Griffiths had witnessed Silvia smoking but had failed to report same, in violation of Departmental rules and regulations. **Superintendent Saba issued letters of reprimand to Aylward and Griffiths.** (Exhibits 15.D., 15.E.).

53. McCaw also concluded in both his original investigative report (Exhibit 4) and his reinvestigation report (Exhibit 15A) that **Correction Officer Thomas Murray** had: knowledge about the female KN's presence in the control room, having an

inappropriate relationship with Silvia and Silvia's smoking on the premises and lied to investigators about it. **However, after a DOC Commissioner's hearing it was determined that there was insufficient evidence to support McCaw's conclusions and Murray was not disciplined as a result.** (Exhibit 15A)

54. Ellen Flaminio testified that she is currently the Director of Treatment at NECC. She has been with the DOC for 23 years and in this position since 1996. She is the duty officer and is the substitute for the Superintendent when he is not present. She works the day shift. She is very familiar with Lt. Silvia and her daily routine includes going to Knowlton Hall. She has been aware of Silvia smoking both before and after the smoking ban. The new smoking policy came into effect and had a grace period. She was not sure of the date of the change but believes the "grace period" for enforcement was for less than a year. During the grace period only a warning was given as punishment. She saw Silvia smoking both before and after the grace period. One of her volunteers filed a written complaint regarding Silvia's smoking, later withdrawing it at Flaminio's request and other volunteers had mentioned Silvia's smoking to her. Superintendent Saba had been informed about Silvia's smoking and had cautioned him on it. Silvia had discussed his smoking problem with her and she could regularly smell smoke in the control room when Silvia worked there. She was well aware of Silvia's continued smoking after the ban. (Testimony of Flaminio, reasonable inferences)

55. Lt. James Silvia's regular and long term habit of smoking openly while on duty was well known to all of the NECC staff and administration. Silvia made no attempt to hide this habit and talked about it freely with Ellen Flaminio and others. His continued smoking problem was regularly addressed at the monthly "Labor-Management

meetings”. Lt. William Scanlan identified command staff by name, including Saba who regularly commented on it at these meetings. Even Deputy Superintendent Bender, although claiming a lack of specific memory, conceded that it was the type of issue discussed at the monthly “Labor-Management meetings”. Lt. William Scanlan described Silvia’s smoking as institution wide common knowledge. The control room “smelled like an ashtray” when Silvia worked and everyone talked about it. Claimed ignorance of Silvia’s habit of smoking while on duty, by any NECC administration or same shift staff is willful and disingenuous. Scanlan testified credibly that it was common knowledge of everyone at NECC that Silvia smoked regularly while on duty. Scanlan also testified credibly that it was commonly known and understood by all NECC staff that the shift commander could authorize anyone to go in to the control room. (Exhibits and testimony, Testimony of Lt. Scanlan, reasonable inference)

56. Lt. William Scanlan described his unfair discipline by the DOC for similar charges of observing smoking, failing to report it and lying to investigators when asked; which resulted from this same videotape surveillance investigation. His discipline was being demoted and transferred from NECC to MCI Gardner in April, 2005. He appealed that discipline to the Civil Service commission and won his appeal in late 2007. In sum Scanlan was disciplined for lying to the investigator McCaw about seeing Silvia smoking on duty, based on the videotape. The specific findings in that decision shows that Scanlan did not lie to Investigator McCaw, as McCaw claimed he did. It is noted in that decision that Scanlan had also suffered a hardship due to his transfer and shift change, rendering him unable to provide child care and care for his disabled mother.

See William Scanlan v DOC, No. D-05-115, decision: *allowed* November 30, 2007, 20 MCSR 659. (Testimony of Scanlan, administrative notice)

57. Scanlan offered an explanation for the inmates at NECC not liking Silvia and complaining about him. The inmates viewed Silvia's being tough, since he had previously worked at Walpole. Since most of the inmates, being pre-release, worked out in the community, there was frequent inmate traffic in and out of the control room area. Silvia was strict with the inmates and challenged them on their movement authorization, in the "pass" system. Silvia had a good record, with no "escapes or walk-aways" when he was on duty. However, within 8-10 days of Silvia being placed administrative leave, there were two escapes.

58. McCaw concluded that only some of Inmate Doe's numerous allegations were accurate. He found that Inmate Doe's allegations in regard to staff smoking, staff cell phone use, and the frequent presence of an unauthorized female civilian in the control room were corroborated by the videotape. (Joint Exhibit 4)

59. Following his review of McCaw's report, Deputy Superintendent Bender (hereinafter "Bender") recommended that disciplinary hearings be conducted pursuant to M.G.L. c. 31, Section 41. (Testimony of McCaw)

60. Dennis Cullen (hereinafter "Cullen"), the Deputy Director of Employee Relations, presided over the disciplinary hearing on February 4, 2005 and February 25, 2005. The issue was whether the Appellants violated the DOC's rules, regulations or policies as alleged by Inmate Doe. (Joint Exhibit 3.C)

61. The DOC Rules claimed to have been violated are as follows:

Rule 4(d) Personal telephone calls shall not be made or received during the course of your duties without the specific approval of your superintendent or DOC Department Head, or their designees. Urgent messages may be received and forwarded with a record kept identifying the caller.

Rule 7(d) Employees should not read, write or engage in any distracting amusement or occupation during their required work hours, except to consult rules or other materials necessary for the proper performance of their duties.

Rule 16(a) Employees must not bring personal property other than personal effects and car, on or within the precincts and dependencies of the institution without the prior approval of the Superintendent or his/her immediate subordinate.

Rule 19(c) 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.

62. However, the Personal Cell Phone Use Charges in violation of DOC Rules 4(d), 7(d) & 16(a) do not appear to be violations at the time of these alleged offenses. The Department policy did not ban possession of personal cell phones at any time in 2004. The Department changed its security policy as evidenced by witness testimony that the Department changed its security procedures to ban personal cell phones on March 28, 2006, in 103 DOC 501 (Exhibit 9, testimony of Christie, Monteiro).
63. On March 16, 2005, Cullen issued a report to Commissioner Dennehy (hereinafter “Dennehy”), recommending that disciplinary action against the Appellants. (Joint Exhibit 1.C; Joint Exhibit 2.C; Joint Exhibit 3.C)
64. Dennehy accepted Cullen’s recommendation. Dennehy informed the Appellants of the Department’s decision in a letter dated March 29, 2005. Sullivan was demoted to the position of Correction Officer and reassigned to NCCI-Gardner because he had observed an unauthorized civilian in the control room, staff smoking and staff personal cellular phone use, but failed to report this behavior, a violation of Rule 19(c). The Commissioner also found that he had been less than truthful when questioned about the unauthorized behavior. (Joint Exhibit B.3)

65. Monteiro was suspended for thirty (30) working days because he had used a cellular phone while on duty, was less than truthful when questioned by the investigators and failed to report incidents of misconduct that he observed, which was in violation of Rule 4(d), Rule 7(d), Rule 16(a) and Rule 19(c). (Joint Exhibit 1.B)
66. Christie was demoted to the position of Correction Officer and reassigned to MCI-Framingham because she had used a cellular phone while on duty, was less than truthful when questioned by the investigators, accompanied an unauthorized civilian on the grounds of the facility, and failed to report incidents of misconduct that she observed, which was in violation of Rule 4(d), Rule 7(d), Rule 16(a) and Rule 19(c). (Joint Exhibit 2.C)
67. The Appellants and Scanlan filed claims at the Massachusetts Commission Against Discrimination (hereinafter "MCAD") alleging that those individuals were the victims of discrimination on the basis of age or gender. In part, the claims were premised upon the allegation that other staff had participated in or witnessed violations of Departmental rules but had not been disciplined. (Joint Exhibit 15.A)
68. In October, 2005, during the course of the MCAD complaints, the Department reopened its original investigation to include three (3) other employees. As a result of that investigation, it was determined that Amaral and Canada should have been referred for disciplinary action, because McCaw had made specific findings of misconduct by them in his original investigation. (Joint Exhibit 15.A; Joint Exhibit 15.B; Joint Exhibit 15.C; Joint Exhibit 15.D; Joint Exhibit 15.E)
69. Due to the passage of time, Bender referred Amaral and Canada to Superintendent Saba for disciplinary action. Both employees subsequently received a one (1)-day

suspension for failure to report violation of Departmental rules and lying during the course of the original investigation. Also as a result of the reopened investigation, it was determined that Sergeant Richard Aylward (hereinafter “Aylward”) and Sergeant Donald Griffiths (hereinafter “Griffiths”) had witnessed Silvia smoking but had failed to report the misconduct, in violation of Departmental rules and regulations. (Joint Exhibit 15.A; Joint Exhibit 15.B; Joint Exhibit 15.C; Joint Exhibit 15.D; Joint Exhibit 15.E)

70. Superintendent Saba issued letters of reprimand to Aylward and Griffiths. The MCAD complaints filed by the Appellants and Scanlan were ultimately dismissed. (Joint Exhibit 15.A; Joint Exhibit 15.B; Joint Exhibit 15.C; Joint Exhibit 15.D; Joint Exhibit 15.E)

71. Neither Superintendent Saba nor Deputy Superintendent Bender provided an adequate explanation for their failure to initially charge and discipline the other named DOC staff. The other named staff that were subsequently charged and disciplined after the MCAD complaints were filed, based on substantially the same charges, based on the same or similar investigatory information and evidence as these Appellants. Amaral, Canada, Aylward and Griffiths were subsequently disciplined for similar offenses, yet received substantially less discipline of one (1) day suspensions or letters of reprimand, allegedly due to the lapse of time. Deputy Superintendent Bender’s explanation that he simply missed McCaw’s original findings regarding Canada and Amaral also being guilty of misconduct stretches credulity to the breaking point. (Exhibits and testimony of Saba, McCaw, Gray and Bender. Reasonable inferences)

72. Both parties made repeated reference to Fox 25 News running a TV series showing videotape of KN sitting on Silvia lap and interacting while he was on duty. The thrust of the Fox 25 coverage was to show an animal house type of on duty activity and a lack of proper supervision focused on Silvia. This news coverage was of an embarrassing nature to Silvia. The Appellants claimed that the leaked video was evidence of bias or malice on the part of the DOC in this investigation and prosecution against them. (Exhibits and testimony of Saba, McCaw, Gray and Bender. Reasonable inferences)
73. McCaw was questioned about the sections of his surveillance videotape appearing on TV, on dates preceding his completed investigation. He answered that he did not know who had leaked or released the videotape to Fox 25 News but that his DOC superior Mark Reilly asked him to turn in the videotape before his investigation was completed. He named 4-5 people in the DOC administration who knew about the videotape and had access to it. (Testimony of McCaw)
74. This TV news coverage was precipitated by an official leak of the surveillance video to Fox 25 News by someone at the DOC. The glaring failure of the DOC administration and investigators to even attempt to address or determine who leaked the embarrassing and inflammatory surveillance video evidence of Silvia and KN to Fox 25 News is another glaring omission on the part of the DOC. (Exhibits and testimony of Saba, McCaw, Gray and Bender. Reasonable inferences)
75. It is apparent that Shift Commander James Silvia was the target of this investigation for his alleged misconduct, including smoking on the facility property. However, it was common knowledge to the DOC facility administration that Silvia smoked regularly while on duty and had done so continually. Silvia was open and notorious about his

smoking. He made no attempt to hide it from staff, administration, inmates or visitors. Evidence of staff and inmates' smoking at the facility was everywhere. These inmates were in a minimum security, pre-release status, going out into the community daily for work assignments. The inmates regularly smoked and used cell phones while at the facility. However, Dean Gray testified that it was not a priority to prevent the inmates from possessing cell phones or cigarettes or smoking as other contraband such as weapons and drugs were a top priority. Gray had never before investigated DOC employees for smoking or using personal cell phones on facility property. Gray and McCaw conducted this two leveled, time consuming investigation as ordered by the DOC administration. The DOC administration had other alternatives to this style of targeted surveillance videotaping followed by delayed interviews of the Appellants. The Appellants here were caught up in the administration's effort to target and collect evidence on Silvia. The leak of the videotape of Silvia and NK to Fox 25 News without a follow-up investigation of that leak is strong evidence of the administration's motive to get Silvia and embarrass him in the process. (Exhibits and testimony and reasonable inferences)

76. Superintendent Saba is the Chief Administrative Officer at NECC. He testified that his office at NECC is on the first floor with the same view of the control room as Flaminio's office which is just above his on the second floor. He also has an institutional issued Nextel cell phone. He testified 9/12/07 that there are no record details of walkie-talkie use of the Nextel phones. However, Saba never corrected the erroneous, contrary and damaging statement in the investigative report regarding these records. He was also aware of "concerns" regarding Silvia's smoking from the time he

was officially briefed in October, 2003. However, he later testified that he was not aware and had not even heard any “rumors” that Silvia was smoking on duty. Ellen Flaminio also testified that Saba had cautioned Silvia about his smoking. Saba claimed not to have noticed any cigarette butts, ashes, smoke smell or any other evidence of smoking in the control room area, despite being in and out of that area routinely during the day, like all of the NECC staff and administration. Other witnesses clearly and convincingly testified that the control room area smelled like an ash tray. He testified that he referred the initial inmate complaint and Gray’s report to Deputy Superintendent James Bender, who in turn referred it to Mark Reilly. He was told by Matt McLaughlin early on in the investigation that Silvia was videotaped smoking. However Saba ordered him to file a report and take no action, due to the ongoing investigation. Deputy Superintendent Bender testified that he did not become aware of this investigation until Late December, 2004. Silvia was clearly the target of this investigation, yet the investigation was unnecessary and overdone, since it was already common knowledge that Silvia smoked on duty. Obtaining the embarrassing videotape of Silvia with the woman sitting on his lap seems to have been the real objective of this investigation. This was a conjured up media event used by the DOC administration for publicity purposes. Saba did not know or seek to find out who leaked the surveillance video evidence to Fox 25 News, a serious offense. The inconsistencies, contradictions, implausibilities and claimed ignorance stated here and elsewhere in these findings render Saba’s testimony to lack credibility, probity and weight regarding the DOC policy decisions, enforcement and purposes in this matter. I find his testimony to lack

credibility. (Exhibits, testimony, testimony and demeanor of Saba, reasonable inferences)

77. Deputy Superintendent Bender became aware of this investigation in late December, 2004. He then reviewed McCaw's report and some of the videotape. He was only familiar with Silvia on the videotape. He explained why the investigation was reopened due to the MCAD complaints. He believed that despite McCaw's findings against CO Murray that there was insufficient evidence to discipline Murray. He named the other four Officers who were not initially disciplined but were subsequently disciplined after the re-investigation. He described the policy change on smoking, its implementation over time and DOC programs offered then for quitting smoking. However, he gave no dates for the change in smoking policy or the implantation time table. He stated that the smoking problem and the smoking programs were discussed in advance at the monthly Labor-Management meetings. Bender gave straight forward answers to the best of his knowledge and memory. He became involved in this matter, late, almost after the fact. He had the demeanor of a credible and reliable witness. He appears to be a credible and reliable witness. (Exhibits, testimony, testimony and demeanor of Bender)

78. Investigator Sgt. Mark McCaw testified that he was assigned this investigation on July 20, 2004 by his Chief at OIS, Mark Reilly. McCaw's first day of testimony at this hearing was 9/12/07. His testimony has been described elsewhere in these findings as being indefinite when describing the videotape events. However, the glaring error in his report regarding no record details on the Nextel phone records corresponding in time with the videotaped phone calls, therefore conclusively implying that the Appellants had lied about using their institutional cell phones usage as permitted. McCaw also

testified on 9/12/07 regarding this alleged fact and conclusive implication. The determination of the accurate date and time of videotaped events was a significant problem, since McCaw failed to employ the time and date-stamp capacity of the video camera. However, on his second day of testimony, 8/11/08 he admitted that he had subsequently reinvestigated this issue and found that no record detail was generated for the walkie-talkie usage of the Nextel phones. The Appellants had claimed this type of Nextel usage when questioned. McCaw appeared much more forthcoming on his second day of testimony, where he had appeared resistant or reluctant to admit to facts or circumstances advantageous to the Appellants on his first day of testimony. The anomalies, flaws and omissions of McCaw's investigation and results have been described elsewhere in these findings. I do not find McCaw's report and testimony to be reliable or accurate and recognize that it involved substantial subjective assessment, especially in the compilation of the 47 minute videotape. I give little weight to his report and testimony where it conflicts with the Appellants' testimony and statements. I am not attributing this assessment to a lack of credibility. I make no determination on his credibility. (Exhibits, testimony, testimony and demeanor of McCaw)

79. The Appellants: Monteiro, Sullivan and Christie testified straight forwardly to the best of their knowledge and memory. They gave their answers to McCaw's questions, to the best of their memories, especially given the long interval. They were first interviewed approximately a month after the last videotaped date of September 11, 2004. Sullivan was interviewed two months after that date. None of their interviews were audio or video recorded. They corroborated each others testimony on the overall circumstances. Silvia, the Shift Commander was an open and notorious on-duty smoker and continued

after any change in the DOC smoking policy. This fact was well known to all NECC staff and administration. KN was known to them as an authorized vendor-visitor whom they routinely encountered in or around the control room as she picked up blood and urine samples and sometimes made telephone calls. None of the Appellants had received any verbal or written notice that KN's authorization as a vendor-visitor had been revoked at NECC. In any event, Sylvia, as the Shift Commander was the highest ranking uniformed officer and administrative authority at NECC for that shift. He could authorize any person, including vendor-visitors to enter the control room and other areas. The Appellants assumed that since Silvia's smoking and other long term behavior was well known to the NECC administration that the administration had acquiesced to and allowed such behavior. Therefore, the open and apparently allowed behavior of a Shift Commander precluded and negated any reporting obligation of a subordinate, and reporting it could have other negative consequences. CO Murray specifically asserted this defense and was not disciplined for his failure to report. All of the Appellants denied seeing or using of personal cell phones in the video. McCaw admitted he could not distinguish whether permitted Nextel phones were shown in the videotape. The circumstances of this minimum security facility with pre-release and community interacting inmates did not as a practical manner, mandate toward severe enforcement of these particular policy rules. The Appellants appeared neatly dressed, made good eye contact and showed appropriate body language when testifying. Their testimony substantially corroborated each other. They were consistent and did not contradict their prior statements. They answered promptly and without hesitation. They did not volunteer extraneous or advantageous material to their answers. Their answers

were corroborated by or in conformity with other credible and reliable evidence. Their answers rang true. They held up well under cross-examination. I find them to be credible and reliable witnesses. (Exhibits, testimony, testimony and demeanor of Monteiro, Sullivan and Christie)

CONCLUSION OF THE HEARING OFFICER (HENDERSON)

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).

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). 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." 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) 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 “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the “merit principle” which governs Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31,§1.

The Appointing Authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v.

Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, “the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘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.’ ” Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s evidence of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority’s justification unreasonable); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant’s perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North

Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission’s action, a court cannot “substitute [its] judgment for that of the commission” but is “limited to determining whether the commission’s decision was supported by substantial evidence” and is required to ‘give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . . This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 241-42 (2006) and cases cited.

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

“It is well to remember that the *power to modify is at its core the authority* to review and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.*”

Id., 39 Mass.App.Ct. at 600. (emphasis added). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission’s task “is not to be accomplished on a wholly blank slate. After making its

de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. [Citation] Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether if “the circumstances found by the commission” vary from those upon which the appointing authority relied, there is still reasonable justification for the penalty selected by the appointing authority. “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). Thus, when it comes to its review of the penalty, 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.”). Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm’n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm’n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension

upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Monteiro received a thirty (30)-day suspension for using a cell phone while on duty, for failure to report certain incidents of misconduct, and for subsequently lying to investigators. The Department failed to produce reliable evidence of what DOC policy was in effect regarding cell phone and smoking material possession and usage at the time of the alleged violations. All of the testimony was vague regarding the time that any policy change occurred and no documentary evidence was admitted to clarify this issue. This is especially significant since the DOC employs the practice of annually reviewing all policy and republishing it as a whole, even if there is no change to specific areas. The new policy specifically cancels all previous policy statements, bulletins, directives or orders etc. (Exhibit 9)

There was insufficient and/or unreliable evidence produced to show any of the alleged misconduct against Monteiro. Shift Commander Lt. Silvia's smoking while on duty was a long standing habit, which he engaged in routinely. He was open and notorious about it. No NECC administrator or staff could credibly claim ignorance of this fact. To expect subordinates of the Shift Commander to report his smoking while the command staff and administrators avoided acknowledging it would be the apex of hypocrisy and disparate treatment. To only discipline some of the employees, while actively avoiding the discipline of the higher ranking staff and administrators is blatant selective enforcement. The higher the rank of authority, the higher the responsibility and expectation. Feigning ignorance

while targeting, investigating and prosecuting only some subordinates for a commonly known fact is arbitrary and capricious action by the DOC. It is unreasonable that Monteiro would be expected to report his superior, and that he would be unconcerned about retaliation. It is also unreasonable to expect him to report an open and notorious fact that is common knowledge at NECC. The Commission can find no reason for the discipline imposed on this Appellant, who was subordinate to Silvia.

In regard to cell phone usage, the video footage does not show Monteiro in possession of a telephone, not even one attached to an earpiece. Monteiro testified that he did not use a personal cell phone while on duty and that, as seen in the footage, he was having an animated conversation with Officer Dean Canada, which Canada confirmed. The DOC's findings are unwarranted; the DOC fails to show by a preponderance of the credible and reliable evidence that Monteiro made an unauthorized phone call while on duty.

The flawed investigation with its tangible motive to collect embarrassing evidence on Silvia so that it could be "leaked" to the media is in itself, enough to fatally undermine the DOC's entire case against these Appellants. The Appellants were caught up in this targeted media event only because they worked on the same shift with Shift Commander Silvia. The DOC utterly failed to address this issue of leaked videotape evidence, which appeared on television, Fox 25 News. This was a significant breach of security which the DOC administration completely in preference of zealously pursuing relatively minor rules violation or catching an admitted smoking addict who practiced his addiction open and notoriously.

The selective enforcement is even more obvious due to the fact that other NECC Officers identified by McCaw in his report as having committing similar misconduct were

not similarly punished. It took MCAD complaints to be filed before the DOC re-investigated and disciplined those four other officers. McCaw attributed this initial oversight, unconvincingly to an “administrative flaw”. The DOC investigators and administrators were entirely unconvincing as witnesses, in their repeated claims of ignorance, omissions, flaws and mistakes.

Sullivan was demoted and reassigned for failing to report staff smoking, staff cell phone use and the presence of an unauthorized civilian in the control room, and for lying to investigators when questioned about his alleged misconduct. The Department had sufficient evidence to support its conclusion that Sullivan engaged in the conduct alleged. He is visible on the videotape in the control room while Silvia is smoking and talking on a cell phone while KN is present. With respect to Silvia’s smoking, Sullivan is in the same position as Monteiro. Although the smoking took place in his presence; it is unreasonable that Sullivan or any of the Appellants would be expected to report their superior, and that they would be unconcerned about retaliation from a superior. It defies the definition of superior and subordinate for the lower position to be expected to discipline a superior. The top tier of the chain of Command, the top DOC administrators, with the greatest supervisory responsibility, completely escaped investigation and prosecution. This is the epitome of disparate treatment and selective enforcement.

Christie was demoted and reassigned for using a cell phone while on duty, for failure to report smoking by staff and a civilian, for accompanying an unauthorized civilian on the grounds, and for subsequently lying to investigators when questioned about her alleged misconduct. The Department lacked sufficient evidence to support its conclusion that Christie engaged in the this alleged misconduct. The DOC failed to show any policy in

effect at that time prohibiting personal cell phone possession or use. It was shown that it was not until 2006 that the policy of prohibition of personal cell phone usage, took effect. The videotape of Christie on the phone for approximately seventeen (17) consecutive minutes on September 11, 2004 was probably permitted use of the institutional issued Nextel phones. Christie may have been using the permitted Nextel walkie-talkie feature at this time. None of the Appellants could reasonably be expected to remember much detail of routine events when questioned about them months afterwards.

Christie asserts that she had made a call was about an anniversary of a death in her family. She produced cell phone records showing three calls, totaling six minutes to a family member. Christie testified that she made those calls at or near her vehicle and that she had the permission from Shift Commander Silvia to have and use her cell phone to make the call. Christie testified as she reported to McCaw that she used the NEXTEL NECC issued cell phone regularly as a walkie-talkie to communicate with work crews and for other communication as is permitted. The walkie-talkie use may have been what appeared on the videotape.

Several witnesses testified that the correction officers use Nextel phones for work use. Nextel phones can both be used as a walkie-talkie using the direct connect function, or as a cell phone. The direct connect function only requires the pressing of a button.

With respect to staff and civilian smoking, the surveillance videotape does show Christie present when both Silvia and KN are smoking. However, the solution suggested by the DOC that Christie was required to report her superior, Silvia's unauthorized behavior, is improper for the reasons set forth above in the above discussion with respect to Monteiro and Sullivan.

It appears that there was an unfair investigation by the DOC. Instead of admitting the obvious, open and notorious circumstances of Shift Commander Silvia, the DOC chose to investigate the Appellants and summarily impose disciplinary action against them. The DOC never looked into the leaked video of the alleged misconduct which was released to the local Fox 25 TV affiliate news channel. The DOC failed to investigate this leak, but only went through the less pressing matter of sanctioning the Appellants. This shows that there was disparate treatment, selective enforcement and that the Appellants were treated unfairly.

The total amount of resources in time, effort and cost, including cutting down a tree just to capture on videotape the known acts of Silvia fraternizing or smoking is entirely disproportionate to any reasonably expected positive results. This amounted to a staged media event. The entire process of protracted investigation and resulting selective disciplinary charges was nothing more than cover for the targeted media videotaping of Silvia.

The overall if unintended result is that inmates in this minimum security, residential- and community interacting facility would become embolden to make more complaints regarding the facility staff. The DOC administration initiated this elaborate investigative process, solely as a result of inmates' complaints, many of which were found to be unsubstantiated. The administration has affirmed this type of approach to discipline. The fact that personal cell phone possession and use and smoking on the premises was allowed by the DOC at certain recent past periods; augers against the relative seriousness of these alleged violations. The DOC does not have the absolute authority to initiate any type of investigation, against any designated employee without proper consideration, on balance of

the costs, the expected results, both positive and negative and without the consideration of other more efficient and effective alternatives.

Under the totality of the circumstances, it is unfair to drag other officers into the issue when the DOC was really after Silvia for open and commonly known behavior. The DOC has not met its burden of production of credible and reliable evidence on the record to justify the discipline of these Appellants for the charges against them. The overall investigation was seriously tainted, flawed and specifically targeted at Silvia. There is more than an overtone of bias against the Appellants and Silvia and favoritism toward the originally uncharged officers and higher administration officials in this matter.

Daniel M. Henderson
Commissioner

CONCLUSION OF THE FULL COMMISSION

The full Commission reviewed the findings and recommended conclusion of the hearing officer in regard to these three appeals and, by votes on September 23, 2010, as summarized below, decided as follows:

Monteiro v. Department of Correction, D-05-116

By a 3-2 vote of the Commission (Bowman, Chairman, Henderson, Stein, Commissioners), the majority of Commissioners concurred with the hearing officer's conclusion that the Appellant's appeal should be *allowed* and his 30-day suspension overturned.

Christie v. Department of Correction, D-05-121

By a 4-1 vote of the Commission (Bowman, Chairman, Stein, McDowell and Marquis, Commissioners), the majority of Commissioners did not concur with the hearing officer's conclusion to rescind Ms. Christie's suspension and demotion. Rather, the majority concluded that, by a preponderance of the evidence, DOC has proven that there was reasonable justification to discipline the Appellant and that the Commission's intervention in the form of a reduced penalty is not warranted. This was based in part on the majority's conclusion that the Appellant, who was in a supervisory position at the time, was aware that a female was conducting unauthorized visits with the shift commander while he was on duty for personal reasons and failed to report this violation of DOC rules.

Sullivan v. Department of Correction, D-05-117

By a 3-2 vote of the Commission (Bowman, Chairman, McDowell and Marquis, Commissioners), the majority of Commissioners did not concur with the hearing officer's conclusion to rescind Mr. Sullivan's suspension and demotion. Rather, for the same reasons cited above regarding Ms. Christie, the majority concluded that, by a preponderance of the evidence, DOC has proven that there was reasonable justification to discipline the Appellant and that the Commission's intervention in the form of a reduced penalty is not warranted. (Commissioner Stein voted no as he did not believe the record supported that Mr. Sullivan was aware that the female's visits to the shift commander were unauthorized and personal in nature.

For all of the above reasons, Mr. Monteiro's appeal under Docket No. D-05-116 is hereby ***allowed***. The appeals of Mr. Sullivan and Ms. Christie are hereby ***dismissed***.

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)(1), 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:

Robert A. Stewart, Atty. (for Appellant)

Earl Wilson, Atty. (for Appointing Authority)