

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

BRUCE OBERG,
Appellant

v.

D-18-117

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Bruce Oberg

Appearance for Respondent:

Joseph Santoro
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION

On July 3, 2018, the Appellant, Bruce Oberg (Lt. Oberg), a Correction Officer III (CO III or Lieutenant) at the Department of Correction (DOC), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of DOC to suspend him for one (1) day for failing to properly follow departmental policy and procedure regarding a planned use of force. The appeal was timely filed and I held a pre-hearing conference at the offices of the Commission on August 7, 2018. A full hearing was held at the same location on

October 26, 2018.¹ The full hearing was digitally recorded and both parties were provided with a CD of the recording.²

FINDINGS OF FACT

Nineteen (19) exhibits were entered into evidence by the Appointing Authority (AA Exhibits 1-19) and one (1) exhibit (APP Exhibit 1) was entered into evidence by Lt. Oberg. Based on the records submitted and the testimony of the following witnesses:

Called by DOC:

- Robert D. Clauss, DOC Captain / Shift Commander;
- Charles Primack, Director, Special Operations;
- Ronald Gardner, Director of Security, MCI Shirley;

Called by Lt. Oberg:

- Bruce Oberg, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. Lt. Oberg has been employed by DOC since October 1997. (Stipulated Fact)
2. Lt. Oberg has served as a lieutenant at DOC since January 2012. (Stipulated Fact)
3. His prior discipline consists of a one (1)-day suspension in 2004. (Stipulated Fact)
4. On March 27, 2017, Lt. Oberg was assigned to a 3:00 P.M. – 11:00 P.M. shift as the
“Compound Lieutenant” at MCI Framingham. (Testimony of Lt. Oberg)

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, these CDs should be used to transcribe the hearing.

5. MCI Framingham is a “female level-IV facility” in Framingham, MA. (Testimony of Lt. Oberg)
6. As the Compound Lieutenant on March 27, 2017, Lt. Oberg was responsible for ensuring proper operation of the facility and “making sure everyone is doing their job.” (Testimony of Lt. Oberg)
7. As the Compound Lieutenant, Lt. Oberg was responsible for overseeing approximately fifteen (15) DOC employees. Lt. Oberg reported to the Shift Commander, Captain Robert Clauss. (Testimony of Lt. Oberg)
8. Upon arrival for his shift that day, Lt. Oberg reported to Captain Clauss to receive his assignments for the shift and information regarding any planned events. (Testimony of Lt. Oberg)
9. During their conversation, Captain Clauss informed Lt. Oberg that there would be a “planned use of force” regarding Inmate A who was going to be transported to the Worcester House of Recovery during the shift. (Testimony of Lt. Oberg)
10. Captain Claus informed Lt. Oberg that the planned use of force would be necessary due to Inmate A’s prior non-compliance. (Testimony of Lt. Oberg)
11. A planned use of force includes “suiting up a team”, getting briefed by the Shift Commander, briefing other members of the team and entering the cell in protective gear. (Testimony of Lt. Oberg)
12. The above-referenced briefings must occur on video. (Testimony of Lt.Oberg)
13. As part of a planned use of force, you give the inmate the opportunity to come to the door, and voluntarily be placed in restraints. If she does not comply, the team enters the cell and

uses the minimal force necessary to extract the inmate from the cell. (Testimony of Lt. Oberg)

14. During his shift, Lt. Oberg went about conducting his rounds, making sure employees were performing their duties and addressing any issues that arose during the shift. (Testimony of Lt. Oberg)

15. During his rounds, Lt. Oberg observed that Inmate A was on “eyeball-watch”, as expected. (Testimony of Lt. Oberg)

16. At some point during his shift, Lt. Oberg, while sitting in the lieutenant’s office, received a call from a male Correction Officer I (CO I) who was working in the Health Services Unit. The male COI, referring to Inmate A’s transport, told Lt. Oberg that “the County’s here; do you want to be part of this?” Lt. Oberg responded by saying, “absolutely, I thought this was a planned use of force.” (Testimony of Lt. Oberg)

17. After receiving the above-referenced call from the CO I, Lt. Oberg tried to contact Captain Clauss via phone and radio, but was unsuccessful. (Testimony of Lt. Oberg)

18. Lt. Oberg walked over to the Health Services Unit and while, standing in front of the officers’ station (10-15 feet from Inmate A’s cell), told staff words to the effect, “alright, let’s get ready to suit up.” (Testimony of Lt. Oberg)

19. A female CO I then told Lt. Oberg that Captain Clauss had just been in the unit and that his direction had changed and, effectively, that a planned use of force was no longer required and that staff should simply enter the cell, place the inmate in restraints, and transport her. (Testimony of Lt. Oberg)

20. Lt. Oberg asked the female CO I if she was sure that Captain Clauss had changed plans and she stated “yes”. (Testimony of Lt. Oberg)

21. Lt. Oberg made no attempt to contact Captain Clauss and verify that his prior instructions, conveyed to Lt. Oberg at the beginning of the shift, had changed. (Testimony of Lt. Oberg)
22. Captain Clauss never told the female CO I that the planned use of force was off and never authorized entry into the cell without following the planned use of force protocol. (Testimony of Captain Clauss)
23. Lt. Oberg then allowed staff to enter the cell. Inmate A became combative and a “spontaneous use of force” ensued. (Testimony of Lt. Oberg)
24. Lt. Oberg was eventually charged with various rule violations including: a) allowing staff to enter the cell of a CCU / Extra restraint inmate and transport her to Admission without being placed in proper restraints; b) the Appellant became directly involved during a Use of Force and failed to give proper guidance to staff; c) the Appellant failed to intervene when County Correction Officers were observed carrying the inmate to their van and her feet were dragging on the floor; d) the Appellant failed to have the inmate examined by medical staff or give the inmate the opportunity to refuse medical treatment following the use of force used to transition her into county restraints.

Applicable Civil Service Law

G.L. c. 31, § 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is “justified” if it is “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. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority’s burden of proof by a preponderance of the evidence 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).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew;” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task.. is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority; Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

Analysis

DOC is a paramilitary organization where chain of command and following orders is critical to ensuring the safety and well-being of DOC employees and inmates. Lt. Oberg acknowledges that, at the beginning of his shift, he was told, unequivocally, by the Shift Commander (Captain Clauss) that there would be a “planned use of force” as part of a medical transport for Inmate A. Further, he was told that the planned use of force was necessary due to prior non-compliance by Inmate A who was on a continued “eyeball-watch” requiring a correction officer to sit outside Inmate A’s cell and observe her at all times.

Lt. Oberg failed to follow the directive of Captain Clauss. He did not have staff suit up. He did not have staff follow the protocol of allowing the inmate to come to the cell door and be put in restraints voluntarily. He did not follow any of the protocol associated with a planned use of force. Rather, he allowed staff to enter the cell without proper preparation. Inmate A became non-compliant and a spontaneous use of force ensued. All of this could have been avoided had Lt. Oberg followed the directive of the Shift Commander.

Lt. Oberg’s argument that he was simply “taking the word” of a subordinate CO I who told him that Captain Clauss had changed his mind, is not persuasive. Captain Clauss never informed Lt. Oberg that his prior directive had changed. Further, Lt. Oberg, after speaking with the CO I, made no attempt to contact Captain Clauss and verify that his directive had changed. There was ample time for him to do so and he chose not to.

As Lt. Oberg’s failure to follow the directive of Captain Clauss, alone, justifies DOC’s decision to discipline him, I have not issued any findings regarding the ancillary charges. In determining whether a one (1)-day suspension was the appropriate level of discipline here, I did consider that DOC ultimately chose not to discipline the female Correction Officer. While it

would appear, based solely on the information available as part of this appeal, that discipline may have been warranted against the female CO I, it does not warrant a modification in Lt. Oberg's penalty. Lt. Oberg, given his position of authority, and years of experience, understood the need to follow the chain of command regarding the serious issue of a planned use of force. He failed to do so and a modest, one-day suspension is an appropriate level of discipline to ensure that this does not occur in the future.

Conclusion

For all of the above reasons, Lt. Oberg's appeal under Docket No. D-18-117 is hereby **denied**.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners on December 20, 2018).

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice To:
Bruce Oberg (Appellant)
Joseph Santoro (for Respondent)