Decision mailed: 11/8/10
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PERRY PAGE,
Appellant

v.

D-08-249

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

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Commissioner:

Daniel Henderson

DECISION

The Appellant, Perry Page, (hereafter "Appellant" or "Page"), is appealing the September 10, 2008 decision of the Department of Correction (hereinafter "DOC" or "Appointing Authority") to impose a three (3) day suspension from his position of Corrections Officer II (Sergeant). The appeal was timely filed. The Civil Service Commission (hereinafter "Commission") held a full hearing on February 9, 2009. Because no written notice was received from either party to make the proceeding public, the hearing was declared private. The witnesses were sequestered. The hearing was recorded on two (2) audio tapes, kept by the Commission. Both parties submitted proposed decisions.

FINDINGS OF FACT:

Fourteen (14) exhibits were entered into evidence at the hearing (Appointing Authority Exhibits 1-11; Appellant Exhibits 12-14).

Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Correction Officer, Sergeant Anthony Ciccone, (hereinafter "Ciccone";
- Father George Williams, Catholic priest at MCI-Concord, (hereinafter "Father Williams");
- Pastor David Renna, Protestant chaplain at MCI-Concord, (hereinafter Pastor Renna");

For the Appellant:

- Appellant Perry Page;

I make the following findings of fact:

1. The Appellant is a tenured civil service employee of the DOC serving in the position of Correction Officer II. He had been employed by DOC for approximately seventeen (17) years. (Exhibit 6, Testimony of Appellant).
2. The Appellant has a disciplinary record with the DOC: a ten (10) day suspension on July 18, 2007 which was later reduced to five days; a three (3) day suspension on June 5, 2006; a one (1) day suspension on August 5, 2005; a letter of reprimand on October 30, 1996; a one day suspension on January 2, 1996; a letter of reprimand on December 21, 1995; a letter of reprimand on August 17, 1995, and a one (1) day suspension on November 10, 1994. (Exhibit 4).
3. Inmate "B" was the originator of this complaint against the Appellant. He initiated the complaint-investigation process on October 29, 2007. On that date he complained orally to Deputy Dinardo about these matters during "access hour". Deputy Dinardo then

submitted a confidential incident report #436828, that same day, based on Inmate B's oral complaint. On October 30, 2007 Sgt. David Ciccone was assigned and began his investigation. He interviewed both Inmate A and Inmate B that day. (Exhibit 2 and testimony of Ciccone)

4. Sgt. Anthony R. Ciccone of the IPS unit was assigned by the DOC to conduct an investigation of this matter. He conducted interviews of various witnesses, including Inmates identified as "A", "B" and "C" as listed in the Investigatory packet. (Exhibit 2). He did not audio or video record these interviews nor swear the witnesses under oath, nor ask them to sign and verify a written statement. He did not re-interview any of the witnesses based on new information acquired from subsequent interviews or other sources, even if inconsistencies arose in the investigation. He did not report the content of his interviews verbatim in his notes. He merely "summarized" the content of the interviews for his report. (Exhibit 2 and testimony of Ciccone)
5. Inmates may attend religious services or programs either through "Open Call," for the Protestant services conducted by Pastor Renna, or through "List Only," for the Catholic services conducted by Father Williams. **"Open Call"** means that any inmate who wishes to attend religious services or programs may attend, whereas **"List Only"** means that those inmates who have signed up previously with Father Williams may attend. Because of staffing limitations, security and fire code etc., on some occasions inmates may be turned away from religious services because of a **"cap"** or limit placed on number of attendees. (Exhibits 2 and 14, Testimony of Father Williams and Pastor Renna).
6. The "Chapel Officer(s)" make the call or announcement for religious services and other activities. The Chapel Officer makes this call over the radio to all of the units or all the

units that qualify to send inmates. The "Unit Officer" for each inmate resident unit then implements the call by releasing the appropriate inmates; all in the unit for open call or the inmates on the relevant list for list only calls. There is a capacity limit in the chapel for services. The Chapel Officer makes the count and closes the doors when the limit has been reached and sends the excess inmates back to their respective units. The cap limit is 120 when there is 1 Chapel Officer and 160 when there are 2 Chapel Officers. The inmates also have the option of going to the gym or to the yard for recreation, ("activities") instead of the religious services, since recreation is also called (open call) at the same time, at least for the Protestant religious services on Sunday at 1:00PM. (Testimony of Pastor Renna, Exhibit 2-p.11 CO McCormack)

7. None of the witnesses who testified at this hearing knew whether a "Cap" limit had been met or exceeded, and inmates turned away on either Saturday or Sunday, October 27-28, 2007. No testifying witness knew whether 1 or 2 "Chapel Officers" were assigned or working either day for the relevant religious services. (Testimony of all witnesses)
8. Sgt. Ciccone did review the staff rosters for both Saturday and Sunday, October 27-28, 2007. **However, Sgt. Ciccone did not identify and interview any of the "Chapel Officers" who were assigned and worked the relevant shifts for that week-end.** (Exhibits 2, 10 and testimony of Ciccone)
9. **On Saturday, October 27, 2007**, the Appellant, CO Mark Linscott, and CO Robert Montalvo worked at the New Line Unit during the 7 AM - 3 PM. shift. They were both interviewed by Sgt. Ciccone. **Montalvo reported to Ciccone that he "did not hear Sgt. Page say anything inappropriate".** He did hear Sgt, Page rely to Inmate A: "If you're not on the list you're not going." Linscott stated to Ciccone that Sgt. Page and Inmate A

were "arguing" about religious services and whether or not he was on the list. **Linscott also reported to Ciccone that "Sgt. Perry did acknowledge that he made a mistake and let Inmate A go to the Chapel" and that "Father Williams did report to the new Line unit to escort Inmate A to the Catholic Services." Linscott also reported to Ciccone that "Inmate A was insolent and displayed a negative attitude."** (Emphasis added) (Exhibits 2 and 10).

10. That Saturday, Father George Williams conducted the Alpha Program, a 1:00PM Catholic program that is "List Only." (Exhibit 2 and 10). Inmate A, an inmate in Concord's New Line Unit, told the Appellant that he was on the list and would like to attend the Alpha Program.[1] (Exhibits 2 and 5).
11. The Appellant did not see Inmate A's name on the list and told Inmate A he would not be allowed to attend the Alpha Program unless his name was on the list. (Exhibit 2). An argument ensued. (Exhibit 2, Testimony of Appellant). Other DOC employees noted that Inmate A's behavior was disruptive. (Exhibit 2).
12. Having noticed Inmate A was not at Saturday's service, Father Williams called the New Line Unit and informed the Appellant that Inmate A was on the list to attend services. The Appellant responded A was not on the list. Father Williams asked him to check the list again, which the Appellant did and found A's name on the list. The Appellant told Williams that A had been insolent. Father Williams then asked the Appellant that if he came to get A, would A be released for the service. The Appellant answered "OK" or "Yes". **Father Williams, then as agreed with the Appellant came to the unit and**

[1] The inmate for whom the DOC is claiming denial of services on Saturday, October 27, 2007 will be referred to as Inmate A.

picked up Inmate A and escorted him to the "Alpha" service. Inmate A attended Father Williams' services that day. (Testimony of Father Williams)

13. Father Williams reviewed Sgt. Ciccone's report (Exhibit 2) prior to his testimony at this Commission hearing. Father Williams was closely examined as a witness, by the DOC, especially in reference to Ciccone's report. He testified that he told Ciccone exactly what he testified to today. He did not have a problem with A or the Appellant and he did not even know about this matter or appeal until two weeks earlier. He testified that the Appellant had told him on the telephone that day that A had been "insolent" and that the Appellant sounded "irritable". Father Williams did not file a report or complaint regarding A and the Appellant. Father Williams did not testify that the Appellant was asked to admit that he was wrong or refused to admit that he was wrong, as stated in Ciccone's report. (Testimony of Father Williams)
14. However, Sgt. Ciccone's report is contradicted by Father Williams' testimony; as he reported in his report that Inmate A told him in the interview that Father Williams came looking for him **after the services** "to inquire why he had not attended the Services." Inmate A also informed Ciccone in the interview that "the issue[with Appellant and attending services] is now resolved." Sgt. Ciccone also reported in his report that: **"Father Williams stated that Sgt. Page refused to admit that he was wrong."** This statement implies that The Appellant was asked to admit that he was wrong, presumably by Father Williams, but refused to do so.(Emphasis added) (Exhibit 2, reasonable inference).
15. Inmate A also attended the Catholic Services on Sunday, October 28th. (Exhibit 2).

16. Inmate A did not file a formal complaint against the Appellant. The complaint regarding Inmate A was initially reported orally by Inmate B, then repeating it in his (B's) interview with Ciccone and also orally reported by B to Pastor Renna. Ciccone considered that his investigation of Inmate B's allegations regarding Inmate A to have formalized it. (Exhibit 2, testimony of Ciccone and Renna)

17. **On Sunday, October 28, 2007**, the Appellant, CO Donald McCormack, and CO Craig Berthiume were working the New Line unit 7 AM. - 3 PM shift. **Berthiume** reported to Ciccone that: He did not recall October 28, 2007. However, he **did recall the Catholic priest coming over to the New Line unit and conducting religious services in the unit but did not know any specific date.** He did not recall seeing a sign posted on the office door. **McCormack** reported to Ciccone that: **He did not recall any incident on October 28, 2007,** and he also did not observe any signs on the office door. Additionally, he reported to Ciccone that the Catholic priest **[Father Williams] "comes to the New Line unit on Sundays to perform services in the day room."** McCormack also reported to Ciccone that on Sundays at 1PM, the New Line unit has **Gym and Yard activities along with religious services**, and that when he calls out the general movement and opens the cells, **"most of the inmates will exit the unit to the gym, yard or Chapel."** (Emphasis added) (Exhibit 2).

18. On Sunday, October 28, 2007, **Pastor David Renna** held Protestant services at the prison. There is an "open call" to attend these services, which means inmates' names do not have to appear on a list for the inmate to attend. Sgt. Ciccone reported that Pastor Renna informed him during the interview that he noticed that day that no inmates from

the New Line Unit were in attendance, **even though there was no cap on attendance and all inmates were allowed to attend.** (Emphasis added) (Exhibit 2).

19. However, **Pastor Renna** testified clearly at the Commission hearing that: the "Chapel Officer(s)" conduct the count and determine if there a "cap" thereby shutting the doors and sending the excess back to their units. Pastor Renna did review Ciccone's investigatory packet (Exhibit 2) earlier, prior to his testimony. He does not keep documentation on attendance or cap limits being met. Cap limits are not something he is involved in or aware of. He was not aware of how many Chapel Officers were assigned on Sunday, October 28, 2007. He is not privy to how the Chapel Officers determine the count and cap, except for the 120 or 160 limit based on number of Chapel Officers. The services are announced or called out over the radio and he does not have a radio. He is too busy with the preparation for his services to be involved in the count or cap determination. Pastor Renna was asked leading questions and shown documents, E.g. Exhibit 13; in an attempt to elicit a response in affirmation that he had informed Sgt. Ciccone in his interview that the cap had not been reached that Sunday or that he had informed Ciccone that he had previously requested that a 2nd. Chapel Officer be regularly assigned on Sundays. He did not remember telling Ciccone either of these two statements in his interview. Pastor Renna, as a witness, was more pressured by the examination of the DOC than by the Appellant. Pastor Renna testified in a manner, with sufficient yet polite certitude and conviction that made it appear more likely than not that he would have remembered making either statement, if he had actually made them.(Exhibit 2, Testimony and demeanor of Pastor Renna, reasonable inferences)

20. Inmate B told DOC Deputy Dinardo that the Appellant, who was on duty, never called for Protestant Services open call but had called for Praise Team, the group of inmates who lead the Protestant services. (Exhibit 2).

21. Inmate B also stated to Deputy Dinardo that because there was a sign on the office door stating "Office Closed. Do not open or knock," he did not ask about open call to Protestant services."[2] (Exhibit 2). Inmate A also stated he saw the sign, but thought it was a joke. (Exhibit 2). As no DOC officials saw this sign, the DOC investigator did not find any truth in this allegation of the door sign. (Exhibit 2).

22. On October 30, Investigator Ciccone interviewed inmates A and B. Ciccone reported that Inmate A stated the Appellant had not allowed him to attend Catholic services/programs on Saturday, Oct. 27. Ciccone also reported that Inmate B told him that because the Appellant had not called for "Open Call" Protestant services on Sunday, Oct. 28, he did not attend services. Inmates A and B both told the investigator there was a pink sheet of paper stating "Office Closed. Do not disturb" on the closed door of the office on Sunday afternoon at 1 p.m. (Exhibit 2).

23. On November 5, 2007, Investigator Ciccone interviewed Father Williams and Pastor Renna. Ciccone reported the following: Father Williams talked to the Appellant on Saturday, Oct. 27 about Inmate A's absence from his service, and after telling the Appellant that Inmate A was on the list for services, picked up Inmate A at the New Line Unit to escort him to services. (Exhibit 2). Pastor Renna noticed the New Line inmates' absence from Protestant services on Sunday, October 27, though there was no cap on

[2] The inmate for whom the DOC is claiming denial of services on Sunday, October 28, 2007 will be referred to as Inmate B.

attendance. (Exhibit 2). Neither Father Williams nor Pastor Renna noticed any signs on the office door of the New Line Unit, as claimed by Inmate B. (Exhibit 2).

24. Father Williams testified at the Commission hearing that there was a period when he performed services in the New Line unit. However he had gotten "in trouble" for it because he had not obtained prior authorization from the DOC for it. (Testimony of Father Williams)

25. The Intake Report, Number 9151, was submitted on 11/07/2007, after the Investigator Ciccone interviewed inmates A and B, Father Williams, and Pastor Renna. The investigation was assigned to Ciccone the following day. (Exhibit 2)

26. On January 25, 2008, Ciccone interviewed the Appellant, nearly three (3) months after the alleged incidents. The Appellant told Ciccone that **Sunday, October 28th** did not stand out in his mind. He relayed his usual Sunday services practice to Ciccone. Ciccone then relayed statements by Pastor Renna and Father Williams that no New Line inmates attended services on that particular day. The Appellant then stated that if that was the case, either there was a cap on attendance or his radio battery could have been dead and he therefore didn't receive open call over the radio. Then: "**Sgt. Ciccone advised Sgt. Page that there was no cap that day.**" The Appellant then offered another possible explanation: of the New Line inmates holding back to be last at the services, or being afraid, due to PC issues, of being in the general inmate population during the mass movement of inmates. The Appellant reported that on **Saturday, October 27th** he could not find Inmate A's name on the list only call for Catholic services. The Appellant relayed he had contact with Father Williams over the issue but did not have a clear memory as to whether the contact was before or after the Catholic services. The

Appellant offered possible or plausible conversations and sequence of events since his memory was not clear. He qualified his statements as only possibilities with the language: "Father Williams may have come to the unit before the services to discuss the issue." And "he may have said to Father Williams..." He denied placing or seeing any sign on the office door at any time. (Emphasis added) (Exhibit 2).

27. On January 25, 2008, Sgt. Ciccone submitted his investigative report, which concluded that the Appellant refused to allow inmates to attend religious service on October 27 and 28, 2007, to DOC Superintendent Peter A. Pape. (Exhibit 2)

28. On February 26, 2008, Superintendent Pape requested Commissioner Harold W. Clarke hold a Commissioner's Hearing for the Appellant concerning the investigation's conclusions. (Exhibit 2)

29. On June 9, 2008, the DOC gave the Appellant notice of a hearing for July 22, 2008 at MCI- Concord. The purpose of the hearing was to determine whether the Appellant **1.) "deliberately denied an inmate or inmates access to participate in religious services"** and **2.)Whether the Appellant "lied when questioned by a DOC investigator"**, violating G.L. c. 127 § 88 and the following Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (hereinafter "Blue Book"):[3]

1. Rule 1: Employees must "remember that [they] are employed in a disciplined service which requires an oath of office . . . Employees should give dignity to their position . . ."
2. Rule 8(a): "For those employees having job responsibilities which require inmate contact, your attitude toward inmates should be . . . strict not unjust."

[3] G.L. c. 127 § 88 provides "An inmate of any prison or other place of confinement shall not be denied the free exercise of his religious belief and the liberty of worshiping God according to the dictates of his conscience in the place where he is confined."

3. Rule 19 (c): "Since the sphere of activity within an institution of 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." (Exhibits 1 and 3).

30. On July 22, 2008, DOC held a disciplinary hearing after which the hearing officer, Susan Herz, found there was substantial and credible evidence that the Appellant **(1) deliberately denied an inmate or inmates access to participate in religious services;** and **(2) lied when questioned by a Department Investigator regarding the investigated incidents.** (Exhibit 5)

31. On September 10, 2008, Commissioner Clarke suspended the Appellant for three (3) working days for violating G.L. c. 127 § 88 and Rules 1, 8(a), and 19(c). (Exhibits 6 and 7).

32. The hearing at the Commission took place on February 9, 2009. I find the Appellant's testimony that he did not recall all of the details of the October 27 and October 28 to be plausible and reasonable, especially considering the nearly three month interval before he was interviewed. Under questioning by Investigator Ciccone, he relayed his best memory, his usual practice and plausible explanations in spontaneous reaction to the alleged novel facts that Ciccone proposed to him. (Exhibit 2, reasonable inferences)

33. The Appellant testified that each unit receives a separate list for "list only". The list is computer generated but he does not know how the names on the list are relayed and compiled. The list is by time and inmate name in his unit and by activity. He made the call from the list for the Catholic services "list only" on that Saturday but did not find In mate A's name on the list even after checking it several times. He admitted to having a

dispute with Inmate A over it. He discovered his error and called the Chapel Officer to try and arrange for Inmate A to go over to the Chapel late. In the meantime Father Williams did call and it was agreed that Father Williams would come over to the unit and pick-up Inmate A for the services. Father Williams did arrive and escort Inmate A to the Chapel for services. He did not intentionally overlook Inmate A's name on the list. He attempted to be "very forthcoming" in his interview by Sgt. Ciccone but did not have a clear recollection of the sequence of events or the conversation then. Inmate A did attend services that Saturday. Regarding Sunday, October 28, 2007; the Appellant stated there was a "call out list" for the "Praise Team" for the Protestant services that day. He did not recall an "open call" for the Protestant services that Sunday, but there is a "gym and yard" call that day. He has no specific memory of that Sunday. However, no inmates of the unit complained to him regarding the lack of an "open call" for the Protestant services. He did remember that in October, 2007 there was an ongoing problem of short staffing and the cap limit being met at 120, due to only 1 Chapel Officer being assigned. He has noticed from experience that the New Line unit Inmates delay or slow down when going to activities or during major movement of the inmate population. He interpreted this as an effort to stay in a group for protection. The New Line inmates have some special issues or circumstances and are assigned to or request to be in the New Line unit. The Appellant stated that he has a good working relationship with Father Williams and Pastor Renna.(Testimony and demeanor of Appellant)

34. The Appellant also testified CO Jason Barnes died suddenly on Friday October 26, 2007. Officer Barnes was scheduled to work that Friday, Saturday and Sunday. The Appellant was shocked and saddened by Officer Barnes' death, since he was friendly with him,

Barnes being only 28 years old and having worked with him for a year. He did attend Officer Barnes' funeral. Both Father Williams and Pastor Renna were questioned about any other unusual event including specifically Officer Barnes' death, that week end and neither remembered Officer Barnes death. (Testimony of Appellant, Father Williams and Pastor Renna)

35. The Appellant offered into evidence Exhibit 14, to which the DOC objected. This exhibit is an incident report dated 07/16/2008 describing overcrowding in the Chapel for services resulting in the cap limit being met and large numbers of inmates being turned away. This exhibit is admitted as some evidence of overcrowding in July, 2008, which is not the relevant time of this appeal. It is considered only as some evidence that reaching the cap limit situations existed at that time, July, 2008. (Exhibit 14, reasonable inference)

36. Sgt. Ciccone testified essentially by reading from his report or the Investigatory packet. He was utterly incapable of answering even simple questions without first reading it in his report. He had virtually no present memory of his own interviews as he recorded or summarized them in his report. The DOC was cautioned at the hearing by this hearing officer, that Ciccone should not be testifying by simply reading his report and that his report, Exhibit 2, was already in evidence and that he should therefore be examined on matters not in the report or to augment or correct that report. The witness's memory of his investigation has nearly completely faded at the time of this Commission hearing. His testimony do to his faulty memory is not considered to be reliable. (Exhibit 2, Testimony of Ciccone)

37. At the hearing, Father Williams testified he did not remember the events of Sunday, Oct. 28, 2007. (Testimony of Father Williams). Pastor Renna testified he did not remember

whether or not there was a cap on attendance at services on Sunday, Oct. 28. Beyond noticing no New Line Inmates at Open Call Protestant Service, he did not note anything unusual about that day. (Testimony of Pastor Renna).

38. None of the New Line Correction Officers who worked this Sunday, Oct. 28th shift noticed any thing unusual occurring. Arguments with inmates are not uncommon events. The New Line inmates are on an "Open Call" at that time for religious services or also for recreation in the "gym or yard". Insufficient evidence was presented to show whether a "cap" on attendance at the protestant religious services was in place or not, at that time. It is unlikely that if the New Line inmates were denied attendance at the services, that either the inmates as a group would not have protested and/or the Officers in the unit would have become aware of this circumstance. No evidence of either event: New Line inmate group protest or awareness by the New Line Officers of any failure to "open Call" for services were presented. (Exhibits and testimony, reasonable inferences)

39. The Appellant testified in a straight forward and unhesitant manner. His description of events that occurred on that Saturday materially coincided with and was not inconsistent with the description he gave to Sgt. Ciccone in the interview three months after the events. Any indefiniteness in detail or sequence is attributed to that passage in time. Arguments or disagreements with inmates are not uncommon in his experience. He is a very big man. He was dressed properly in a suit and tie, for this hearing and comported himself professionally. His body language and facial expressions were consistent with someone speaking honestly and truthfully. His answers, in language and tone rang true. His description of and answers regarding the October 27 & 28, 2007 incidents was delivered with sincerity and conviction. He attempted to answer Sgt. Ciccone's interview

questions to the best of his memory and did rely on his practice and experience, when his memory failed to try and answer Ciccone's questions. He qualified his answers to incorporate alleged facts proposed by Ciccone. His testimony and his interview statements were plausible and reasonable, within the context of his lack of a clear memory of certain details. He had no clear memory of anything unusual occurring on Sunday of that week-end. His presentation, demeanor and testimony at this hearing were that of an honest and forthcoming person. I find the Appellant's testimony to be credible and reliable. (Testimony and demeanor of Appellant)

40. Inmates A, B and C did not testify at the DOC disciplinary hearing or at this Commission hearing. Their attributed statements are untested hearsay and their status at the time was that of convicted and incarcerated inmates. They were not subjected to cross-examination to test their testimonial abilities or credibility. Inmates A & B stated they saw a sign posted on the office door, yet no other witness interviewed by Ciccone saw such a sign on the office door. Inmate A stated that he had resolved any disagreement that he may have had with the Appellant. The statements attributed to these non-testifying inmates are given very little probity or weight as their reliability and credibility has not been tested nor determined. (Exhibits and testimony, reasonable inferences)

41. Father Williams and Pastor Renna are both good witnesses despite being hobbled by a lack of a clear memory of some aspects of that week-end's events, due to the lapse of time since these events. Both witnesses reviewed Sgt. Ciccone's report prior to taking the stand and testifying at this hearing. Pastor Renna did not know if there had been a "cap" reached on that Sunday, despite Sgt. Ciccone attributing a statement to him that no cap had been reached that day. Pastor Renna explained that he is not involved in that process;

it is all done by the Chapel Officer. Pastor Renna also denied telling Ciccone in his interview that he had previously requested that 2nd Chapel Officer be regularly assigned for the Protestant services on Sunday. Father Williams denied telling Ciccone in the interview that the Appellant "...refused to admit he was wrong" and testified that he came as agreed with the Appellant and escorted Inmate A to the Saturday services, a clear contradiction of A's claim that Father Williams only came to inquire from him only after he had not attended the Saturday services. Both Father Williams and Pastor Renna were professional, straight forward and exact in their testimony. They would not testify to something that they could not recall, even under the pressure of suggestibility from Ciccone's report or other documentation. I find them both to be credible witnesses. (Testimony and demeanor of Father Williams and Pastor Renna)

CONCLUSION OF THE MINORITY (HEARING COMMISSIONER 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); Bielawksi 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)

The Appointing Authority has not met its burden of showing by preponderance credible evidence in the record that the Appellant is guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service. The record does not clearly show that the Appellant deliberately denied Inmates A and B access to participate in religious services on that week-end. The testimony and evidence on behalf of the Appellant is more credible and reliable than the evidence supporting the allegations regarding Inmates A and B.

Regarding the Catholic services on Saturday, October 27th., the DOC determined that the Appellant's actions were deliberately intended to deny Inmate A's rights to attend Catholic religious services and that Inmate A did not attend services on that Saturday. However, it was found here that Inmate A did actually attend the Catholic services on that Saturday. The Appellant testified at the Commission hearing that he could not initially find Inmate A's name on a lengthy list of inmates and the "List only" services they could attend. The Correction Officers interviewed by Ciccone confirmed that Inmate A's words and actions at this time were disruptive, even "insolent" while the Appellant was addressing the issue and delay in finding A's name on the list. His testimony that he called the Chapel Officer to see if he could send Inmate

A over late and that he later spoke with Father Williams remained consistent throughout the investigation and hearings. This testimony is further corroborated by Father Williams, who told the Commission that when he spoke to the Appellant concerning Inmate A's absence at services that day, the Appellant told him he had not found Inmate A's name on the list. The Appellant and Father Williams agree that the Appellant allowed Inmate A to attend services that day under Father Williams' supervision. Father Williams told the Commission that he escorted Inmate A to the services, sometime between 1 PM. and 1:20 PM. that day.

The record does not support the allegation that the Appellant lied about the events of this day. When DOC interviewed him nearly three months after the incident occurred, the Appellant told officials that he could not find Inmate A's name on the list for Catholic services, and that Father Williams may have come to the unit either prior to or after the services to discuss the issue of Inmate A being late to services. It is not surprising the Appellant would have no clear memory of the exact timing of events on this day, given that his interview occurred so long after the incident. In fact, the Appellant testified credibly at the Commission hearing that his memory of this day was unclear. The Appellant has asserted from the onset that he did not intentionally overlook Inmate A's name in order to deliberately keep him from attending services. This testimony is consistent with his statements during DOC's investigation.

Inmates' A and B claims that a sign on the door of the office prevented them from asking officials about attending services on Sunday cast doubt upon their credibility. No other of the many witnesses interviewed by Ciccone, including: Officers, Father Williams and Pastor Renna, saw a sign on the office door stating the office was closed. I find the inmates' statements about a sign on the office door casts substantial doubt upon their claims that the Appellant deliberately intended to keep them from religious practice. Inmate A resolved any problem he may have had

with the Appellant and never filed any complaint against him. Ironically, Inmate B was the source of both complaints against the Appellant. Because the DOC did not sustain the allegations of a "do not disturb" sign in their investigation, they too must have believed these inmates lied. The Appointing Authority has not proven they had reasonable justification to conclude the Appellant deliberately kept Inmate A from religious services on October 27 and then was untruthful in the ensuing investigation.

As to the events of Sunday, October 28, the Appellant testified at the Commission hearing that he did not know if he called for "open call" Catholic services and did not have a clear recollection of the time before or during service. This testimony corresponds with the statements he made during his investigation interview, that he had called for the "Praise Team," but did not remember calling for Open Services. (Exhibit 2). When the DOC investigator asked him why inmates from the New Line Unit were not present at services on Sunday, the Appellant stated he did not remember, but offered reasons why those inmates might not have been there, such as a cap on the number of inmates allowed at the service. (Exhibit 2) Likewise, the Appellant told the Commission his memory of that day was not clear. In any event none of the other assigned unit officers remembered anything unusual regarding that Sunday and no complaints (Except Inmate B) were filed, which loud complaining would have resulted, if that well attended service was not called. Additionally, there were other optional activities such as "gym and yard" recreation for the New Line Inmates, at the same time as the Sunday, Protestant services. Investigator Ciccone failed to inquire into the possibility that any of the New Line inmates opted to go to the yard or gym for activities instead of the Protestant services.

Ciccone's investigatory report shows that Pastor Renna noted a peculiarity in the low numbers of inmates from New Line Unit at service that day, but the investigator did not

interview either of the Chapel Officers on duty that day to see if and when inmates were turned away, due to a cap. The Chapel Officer turns away inmates from church services when the cap on attendance has been met. Renna testified and denied that he told the investigator Ciccone that there was "no cap" reached that day. He does not become involved in and is usually unaware of the cap limit process. (Exhibit 14, Testimony of Pastor Renna). Ciccone also wrongly attributed a statement to Father Williams that the Appellant "refused to admit that he was wrong" regarding Inmate A's name being on the "Call List" that Saturday. Father Williams testified and denied that he made such a statement to Ciccone. Ciccone failed to interview the assigned Chapel Officers regarding the existence of any cap limit being implemented that week-end. This is a serious omission, since his investigation misquoted Pastor Renna and relied on this misquote regarding the nonexistence of a cap that Sunday.

Investigator Ciccone has a methodology by which he does not record the people he interviews. He also does not require them to read, verify and affirm a written statement under oath or otherwise by signature. He simply summarizes the interviews and records the summarized statement in his report. He did not interview key witnesses nor did he re-interview witnesses after some inconsistency or omission was later discovered. He completely failed to address the fact that no other assigned officer noticed any unusual occurrence; such as a failure to make the "Open Call" for Sunday Protestant services. Some of these contradictions, inconsistencies and oversights of Ciccone's investigation have been stated above. The DOC failed to introduce any evidence that the Appellant had ever displayed any motive or inclination to deprive any inmate of religious services, whether Protestant or Catholic. The DOC had this opportunity, through witnesses: Father Williams, Pastor Renna and the numerous other Officers interviewed by Sgt. Ciccone.

It is the function of the Commission's hearing to determine what degree of credibility should be attached to witness testimony. *School Comm. of Wellesley v. Labor Relations Comm'n.*, 376 Mass. 112, 120 (1978); *Doherty v. Retirement Bd. of Medicine*, 425 Mass. 130, 141 (1997). I find Father William's testimony that he had called the New Line Unit to ask for Inmate A and spoke with the Appellant credible. The Appellant's testimony as to the events of the weekend of October 27-28, 2007 is likewise credible and consistent with Father William's and Pastor Renna's testimony. According to the record, the Appointing Authority did not prove by a preponderance of the credible evidence in the record, that the Appellant intentionally denied an inmate or inmates access to religious services and lied in the investigation surrounding the incident. Accordingly, the DOC was not justified in suspending him without pay for three days.

For the reasons above, the Appellant's appeal under Docket No. D-08-249 should be allowed. He should be returned to his position without any loss of pay or other benefits.

For the Minority:

Civil Service Commission

Daniel M. Henderson
Commissioner

CONCLUSION OF THE MAJORITY (BOWMAN, CHAIRMAN; COMMISSIONERS MARQUIS, MCDOWELL & STEIN)

The Majority of the Commission concludes that the DOC has met its burden of proof to show, by a preponderance of the evidence that there is just cause to impose a 3-day suspension on the Appellant. The findings of fact as determined by the Hearing Commissioner might well warrant the conclusion that the Appellant did not maliciously deprive Inmate A or Inmate B (or any other Inmate in the New Line Unit (NLU) the privilege of attending religious programs or services on the weekend in question. However, the testimony of two clergymen, with no motive

to prevaricate, together with the Appellant's own testimony, leave no doubt that it is more likely than not likely that, at the least, the Appellant acted in willful disregard of his duty that he knew, or should have known, denied Inmate A and B, if not others, of the opportunity to exercise their constitutional right to enjoy freedom of religion so long as it is consistent with "the discipline of any correctional institution so far as may be needful for the good government and safe custody of its inmates". Jackson v. Hogan, 388 Mass 376, 381 (1983); G.L.c.127, §88.

When civil rights issues are implicated – which could subject the DOC and the Commonwealth to potential liability – the DOC can rightly expect its officers to exercise diligence and care that the law is respected. None of the witnesses had totally clear and convincing recollection of the events. The Appellant's various versions of what he says occurred, both in his interviews with the DOC investigator and in his testimony, coupled with the relatively consistent recollections of the two clergy, are more than sufficient to confirm the DOC's charges that he was deficient in his duties on the two days in question.

As to Inmate A, the Hearing Commissioner devotes considerable attention to the issue of whether the Appellant knew Inmate A was on the "list" for services, or had simply overlooked the fact. This begs the question. By his own testimony, the Appellant claimed he checked the list many times and never saw the Appellant's name. The list in question (Exhibit 11) is a two page computer record. It is inconceivable that anyone exercising due diligence would be unable to find a name on the list if he/she were looking for especially multiple times, and, particularly, after being informed that he/she had missed a specific name the first time. Moreover, the evidence that the Appellant got into an argument with the Appellant over this issue, during which he allegedly stated "you're a con; I don't have to respect cons.", confirms that the Appellant had no real concern for whether he had made a mistake or not. This problem had escalated into an

argument and would likely have escalated further, had Father Williams not called in and arrived on the scene. Moreover, the fact that the Appellant seems unable to recall whether the list was twelve names or sixty-five names, or the order in which the names were arranged, further confirms the conclusion that he paid little, if any attention to Inmate A's plea to be released to attend the Alpha Services. The DOC can rightly demand more diligence from the Appellant and may rightly discipline him for falling short of what can reasonably be expected of him. While reasonable minds may differ as to the exact degree of Appellant's malfeasance, the differences in how the Hearing Commissioner sees it and how the DOC found it (and the Commission majority concurs in the DOC's reasonable view) are too inconsequential and immaterial to justify rejecting the DOC's decision to discipline the Appellant for his actions, which, at bottom, undisputedly impeded Inmate A's exercise of his freedom of religion. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334 rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited; Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 602 (1996); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982).

As to Inmate B, it is not disputed that as many as 30-40 NLU inmates regularly attend Sunday Protestant services but, on the Sunday in question, not *one* NLU inmate was present at services. It is also undisputed that although there may have been a "cap" in effect at the time (there is some question whether that problem had been cured by October 2007 with the addition of an additional chaplain), the "cap" was imposed "at the door" – i.e., inmates were free to respond to the "open call" for services and, if the chapel was full, they would be turned away at the door. As to the "cap" issue, the Commission Majority believes that it is more likely than not that there was no "cap" that day, but that, too, is something of a red herring. There is no logical

explanation for why no NLU inmate attended the service, unless none of them heard a call to release them to go to that service. Even the Appellant seems to acknowledge that he may not have issued such a call, claiming that his "radio was broken". If it were true that his radio was not functioning but never reported at the time (as it appears it wasn't), that situation would seem to implicate the Appellant in far more serious security concerns, and is absolutely not credible. Whether the Appellant forgot to relay the call for services, didn't hear it for some reason or knowingly ignored it, he is just as culpable for a breach of duty. As with Inmate A, the Appellant's failure to enable the NLU inmates to exercise their freedom of religion involves a serious lapse of judgment. By thereafter trying to make a phony excuse for his mistake, the Appellant only exacerbated his malfeasance.

For the majority:
Civil Service Commission

Paul M. Stein
Commissioner

Accordingly, for the reasons stated, the Majority of the Commission concludes that the appeal of the Appellant, Perry Page, should be, and hereby is, ***dismissed.***

By a 4-1 vote of the Commission (Bowman, Chairman – Yes; Stein, Commissioner – Yes; Marquis, Commissioner – Yes; McDowell-Commissioner – Yes; Henderson, Commissioner – No) on November 4, 2010.

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)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Robert M. Stewart, Atty. (for Appellant)
Heidi D. Handler, Atty. (for Appointing Authority)