

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**WILLIAM PERKINS IV,**  
*Appellant*

v.

**DEPARTMENT OF  
CORRECTION,**  
*Respondent*

**Case No.:** G2-12-87

**DECISION**

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission.

The Commission received and reviewed: 1) the Tentative Decision of the Magistrate dated November 1, 2013; 2) the Appellant's Objections to the Recommended Decision; and 3) the Respondent's Response to the Appellant's Objections.

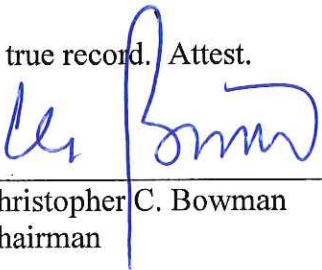
After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

To ensure clarity, however, our decision here relied in part on the record and findings which established that the Appellant's pending disciplinary matter was resolved prior to the date of bypass and the result was another disciplinary action against him (suspension).

The decision of the Appointing Authority to bypass the Appellant is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 9, 2014.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

William Perkins (Appellant)

Jeffery Bolger (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

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Docket No: G1-12-87, CS-12-454

**WILLIAM PERKINS, IV,**  
Appellant

v.

**DEPARTMENT OF CORRECTION,**  
Respondent

**Appearance for Petitioner:**

Pro se

**Appearance for Respondent:**

Jeffrey S. Bolger  
Division of Human Resources  
Department of Correction  
P.O. Box 946  
Norfolk, MA 02056

**Administrative Magistrate:**

Angela McConney Scheepers, Esq.

**SUMMARY OF TENTATIVE DECISION**

The Department of Correction had reasonable justification to bypass the Appellant for promotion to Correction Officer II. I therefore recommend that the Civil Service Commission dismiss the appeal.

**TENTATIVE DECISION**

**INTRODUCTION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, William Perkins IV (Appellant), appealed an action taken by the Respondent, the Department of Correction (Department or DOC), bypassing him for promotion from Correction Officer I to Correction Officer II.

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CIVIL SERVICE COMMISSION

A pre-hearing was held on April 24, 2012 at the offices of the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. Pursuant to 801 CMR 1.01(11)(c), on July 27, 2012 a Magistrate from the Division of Administrative Law Appeals (DALA) conducted a full hearing at DALA, One Congress Street, Boston, MA 02114 in accordance with the Formal Rules of the Standard Rules of Practice and Procedure. 801 CMR 1.01. The hearing was digitally recorded. The witnesses were not sequestered.

The Appellant testified on his own behalf. James O’Gara, Personnel Officer II, testified for the Respondent. Eleven (11) exhibits were admitted into evidence. The record was left open in order for the Appellant to submit further documentation. Those documents were received on August 20, 2012 and marked as Exhibit 12, whereupon the record closed.

The Appellant’s Pre-Hearing Memorandum was marked “A” for identification. The Appellant submitted his post-hearing brief on August 30, 2012. The Respondent submitted its post-hearing brief on September 5, 2012.

### **FINDINGS OF FACT**

Based on the documents admitted into evidence and the testimony presented, I make the following findings of fact:

1. The Department hired the Appellant, William Perkins, IV, on January 9, 2006 as a Correction Officer I. (Testimony of Appellant.)
2. At all relevant times, the Appellant has been assigned to Massachusetts Correctional Institution Cedar Junction (MCI – Cedar Junction), in Walpole. His regularly scheduled shift is 3:00 p.m. to 11:00 p.m. (Testimony of Appellant.)
3. On April 28, 2007, the Appellant passed the promotional examination for Correction Office II. He received a score of 74%. (Exhibits 3 and 11.)

4. An eligible list for Correction Officer II was established on September 24, 2007.  
(Exhibit 11.)

5. On August 2, 2008, the Appellant signed the civil service list, Certification #4010025, for employment as a Correction Officer II (Exhibits 2 and 11.)

6. The Appellant ranked 175th on the certification of those willing to accept employment. 159 candidates were selected for appointment, 17 of them ranking below the Appellant. (Exhibit 11.)

*A. Disciplinary History*

7. On October 26, 2007, the Appellant received a letter of reprimand because he was arrested for domestic assault and battery on January 29, 2007. (Testimony of O’Gara; Exhibit 4.)

8. On May 21, 2009, the Appellant received a letter of reprimand due to an April 9, 2009 unauthorized absence under the Small Necessities Leave Act. (Testimony of O’Gara; Exhibit 5.)

9. On March 16, 2011, the Appellant received a letter of reprimand because he failed to appear for a scheduled swap from 7:00 a.m. to 3:00 p.m. and failed to call the facility before not appearing for his regularly scheduled shift. (Testimony of O’Gara; Exhibit 6.)

10. On July 11, 2011, the Appellant received a letter of reprimand for failing to appear for his shift on May 27, 2011. (Testimony of O’Gara; Exhibit 7.)

11. The Department Rules and Regulations provide:

18. Attendance and Absences.

(b) Employees who abuse sick leave, fail to produce satisfactory medical evidence of illness (physician’s slip) when requested, or use sick leave for personal matters no related to illness, will be denied said sick leave, and may be subject to disciplinary action up to and including discharge, in compliance with all valid collective bargaining agreements.

(Exhibit 8.)

12. The Collective Bargaining Agreement provides in part:

Article 8, Section 1(k)

An employee with forty-eight hours of sick leave during the calendar year shall provide satisfactory evidence (as contained in the Department's Illness Certificate Form) for each absence thereafter for the remainder of the calendar year ... The Department's Illness Certificate Form must be completely and accurately filled out to be on authorized leave. Failure to provide such medical evidence within seven (7) days of its request or upon the employee's return to work may result, at the discretion of the Appointing Authority, in denial of the sick leave for the day(s) involved, and/or disciplinary action.

(Exhibit 8.)

13. On November 1, 2011, the Appellant used sick time in excess of the permitted 48 hours allowed without providing satisfactory medical evidence within seven days. (Testimony of O'Gara; Exhibit 8.)

14. On November 8, 10 and 11, 2011, the Appellant used sick time in excess of the permitted 48 hours allowed without providing satisfactory medical evidence within seven days. (Testimony of O'Gara; Exhibit 9.)

15. In November 2011, the Department issued the preliminary list for promotion to Correction Officer II. Although the Appellant never received written notification, the Department informed the Appellant that he would be promoted. (Testimony of O'Gara.)

16. On November 22, 2011, Captain Steven Fairley interviewed the Appellant to determine if there was just cause to discipline him for his failure to submit satisfactory medical evidence within seven days for his absences on November 1, 8, 10 and 11, 2011. At the interview, the Appellant admitted that he had utilized sick time on November 1, 8, 10 and 11, 2011. (Exhibits 8 and 9.)

17. On November 30, 2011, on behalf of MCI – Cedar Junction Superintendent James Saba, Betty Ann Genz sent Patricia Snow, Personnel Officer I, an email informing her that the

Appellant had just had two investigatory hearings, which would result in one-day and a two-day suspensions. (Testimony of O’Gara; Exhibit 10.)

18. Before receiving this email, the Personnel Department was unaware that the Appellant was undergoing two disciplinary investigations at his correctional facility. Ms. Snow advised Ms. Genz to let the Appellant know that his promotion was rescinded. (Testimony of O’Gara; Exhibit 10.)

19. By letter dated December 12, 2011, Superintendent James Saba informed the Appellant that his failure to submit satisfactory medical evidence for his November 1, 2011 absence was a violation of Rule and Regulation 18(b), and that he was suspended for one day to be served on January 17, 2012. The Appellant was advised that any future violation of the Rules and Regulations may result in disciplinary action up to and including termination. (Testimony of O’Gara; Exhibit 8.)

*B. The Bypass*

20. By letter dated January 5, 2012, Alexandra McInnis, Director of Personnel, informed the Appellant that he was bypassed due to “Poor work history/discipline: Pending Discipline.” (Exhibit 2.)

21. It is Department “practice” to automatically bypass all employees who have been disciplined in the previous twelve months or who are subject to pending investigations within twelve months of the effect date of promotion. This practice is unwritten. (Testimony of O’Gara.)

22. James O’Gara has served as Personnel Officer II for six years. His duties include responsibility for the selection and hiring process, the attendant record keeping and the certification and promotional process. He testified that he was unaware of any individuals who

had been the subjects of pending investigations or discipline being promoted within twelve months of a violation of Department Rules or Regulations or policies. (Testimony of O’Gara.)

23. Mr.O’Gara testified that a letter of reprimand is grounds for suspension, but not a promotional bypass. (Testimony of O’Gara.)

24. After the Civil Service hearing, the Appellant submitted evidence that at least one correction officer had been promoted while disciplinary action was pending. Correction Officer II, O.O., was promoted in less than one year from Correction Officer II to Sergeant while under investigation for filing a false incident report after a March 2, 2008 incident. On August 13, 2008, the Department sent O.O. a Notice of Charges and Hearing. On February 1, 2009, O.O. was promoted to Sergeant. His section 41 hearing was eventually held on June 1, 2009. On June 12, 2009, the Hearing Officer issued a report to Commissioner Harold W. Clarke, finding that O.O. had filed a false report in connection with the beating of an inmate and testified untruthfully during the ensuing Department investigation. On August 4, 2009, Commissioner Clarke adopted the hearing officer’s report and found just cause to suspend O.O. for five days. On August 7, 2009, O.O. filed a grievance appealing his suspension. (Exhibit 12; Testimony of Appellant.)

25. Unlike the Appellant, O.O. had no previous disciplinary history. (Exhibit 12.)

26. The promotions for Correction Officer II from Certification #4010025 became effective December 4, 2011. (Testimony of O’Gara.)

27. The Appellant filed a promotional bypass appeal with the Commission on March 2, 2012. (Exhibit 1.)



## CONCLUSION AND ORDER

### A. *Applicable Legal Standards*

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 under G.L. c. 31, § 43, which 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, *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 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).

“The commission's task, however, 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 town, 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.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).” *Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823-24 (2006).

Under G.L. c. 31, § 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. The role of the Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” *Cambridge v. Civil Service Comm’n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 Mass. 1102, (1997). *See also Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003); *Police Dep’t of Boston v. Collins*, 48 Mass. App. Ct. 411, *rev. den.* (2000); *McIsaac v. Civil Service Comm’n*, 38 Mass App. Ct. 473, 477 (1995); *Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev. den.*, 390 Mass. 1102 (1983).

The Commission’s role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority’s actions. *Beverly v. Civil Serv. Comm’n*, 78 Mass. App. Ct. 182, 189, 190-91 (2010), *citing Falmouth v. Civil Serv. Comm’n*, 447 Mass. 814, 824-26 (2006). *See also Methuen v. Solomon*, Docket No. 10-01813-D, at \*10 no. 7 (Essex Sup. Ct. July 26, 2012). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether just cause was shown.

Moreover, it is inappropriate for the Civil Service Commission to modify an employee's discipline where it finds the same core of consequential facts as the appointing authority regarding the misconduct of the employee, but makes different "subsidiary" findings of fact.

*Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 797-99 (2004).

*B. Reasonable Justification for Bypassing the Appellant*

I find that the Department of Correction has proven by a preponderance of the evidence that it had reasonable justification to bypass the Appellant for promotion to Correction Officer II.

It is undisputed that the Appellant was under investigation for violation of established department rules and regulations at the time of the December 4, 2011 appointments from Certification #4010025. On November 22, 2011, the Appellant had an investigatory interview with regard to two separate investigations for failure to submit substantiating medical documentation for sick time in excess of the allotted forty-eight hours. By November 2011, the Appellant should have been familiar with the Department's policy on unauthorized absences: he had received letters of reprimand on May 21, 2009, on March 16, 2011, and on July 11, 2011 for failing to appear for work. However, he had never been suspended.

Before making offers for promotion, the Department verifies with the correctional facilities whether any of the eligible promotional candidates are on medical leave or Workers' Compensation leave, or are undergoing discipline. On November 30, 2011, the MCI – Cedar Junction superintendent's office notified Personnel that the Appellant was the subject of two separate investigations. On January 5, 2012, the Director of Personnel notified the Appellant that he was being bypassed due to pending disciplinary action. Mr. O'Gara testified that it is Department "practice" that employees are not promoted within twelve months of a violation.

This practice is not codified within the Department Rules and Regulations or in any Department policy.

It is undisputed that at the time of the appointments, effective December 4, 2011, the Appellant was under investigation for absences in violation of sick leave. The violations occurred on four dates, November 1, 8, 10 and 11, 2011 – less than five weeks before the effective date of appointment.

Mr. O’Gara testified that he was unaware of the promotion of candidates who had been subject to disciplinary investigations within the preceding twelve months. He testified that letters of reprimand did not constitute grounds for bypass, thus the only discipline under consideration for the Appellant was his November 2011 incidents. No correction officers with pending discipline were promoted from Certification #4010025 on December 4, 2011.

In the instant matter, the Appellant offered testimony and submitted documents which indicated that Correction Officer O.O. had been promoted to sergeant in February 2009, eleven months after a March 2, 2008 incident. (*See Exhibit 12.*) On August 13, 2008, the Department issued a Notice of Charges and Hearing. The hearing was eventually held on June 1, 2009. After the Hearing Officer issued her report on June 12, 2009, the Commissioner adopted her findings that O.O. had violated the Department’s Rules and Regulations by filing a false report and testifying untruthfully in an investigation of excessive use of force on an inmate, and imposed a five-day suspension on August 4, 2009. Sergeant O.O. had no prior letters of discipline. His work evaluations were good and he had received letters of commendation.

The Appellant has not submitted any evidence that anyone from his certification, with pending discipline, was promoted on December 4, 2011. The Appellant has offered that he was dealing with the illness of his father and his later death, the death of his grandmother, and the

illness of his wife. However, he never applied for Family Medical Leave, or consulted with the Department about measures that would enable him to care for family members. Instead, he took unauthorized absences. This was irresponsible.

Notwithstanding the matter of Sgt. O.O., the Respondent offered two cases to buttress its “practice” of not promoting correction officers within twelve months of discipline. In *Gonsalves v. Department of Correction*, 21 MCSR 120 (2008), the Department mistakenly informed a candidate under disciplinary investigation that he was promoted to Correction Officer II in December 2006. The Commission did not reach the issue of the Department’s “practice.” The Commission denied the Appellant’s appeal because a preponderance of the evidence showed that the Appellant was mistakenly omitted from the disciplinary list. *Gonsalves v. Department of Correction*, 21 MCSR 120, 121.

In *Budka v. Department of Correction, et al.*, Docket No. 08-4199, at \*1 (Suff. Sup. Ct. June 26, 2009), the court denied the Appellant’s appeal of the Department’s decision to bypass him for promotion to Correction Officer III. The Appellant was part of a move team that was investigated and found responsible for an inmate who had become injured. Correction Officer Budka also claimed disparate treatment because four other correction officers were promoted to Correction Officer II or Correction Officer III (lieutenant) positions despite past discipline. Further, he claimed that his post-discipline evaluations had been exemplary. However, Correction Officer Budka could not provide any details of the promoted candidates’ behavior or degree of discipline. No correction officer disciplined in the same incident as Correction Officer Budka was promoted. The court found that there was substantial evidence in the decision of the Civil Service commissioner that the Department’s bypass had been reasonably justified.

There is a uniform Department practice for bypassing promotion candidates due to disciplinary investigations or discipline imposed in the previous twelve months. *See Peck v. Department of Correction*, 26 MCSR 148 (2013). Even if the practice did not exist, the Department has the discretion to bypass unsuitable candidates on a case-by-case basis. In this matter, not only was the Appellant under investigation at the time of the appointments, he was later suspended for two different sets of violations. The violations also occurred closely to the time of the appointments. The Department did not have twelve months to evaluate whether the Appellant had corrected his behavior.

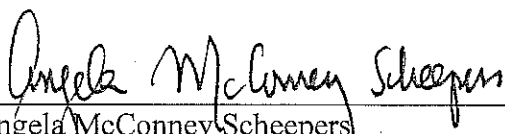
The Department was reasonably justified in not promoting the Appellant and has stated sound and sufficient grounds for doing so. The decision to promote an employee into a position of leadership and trust deserves a studied look at the employee's work history. *Budka v. Department of Correction et al.*, Docket No. 08-4199, at \*2 (Suff. Sup. Ct. June 26, 2009). Showing up for work is the most basic requirement for any position, even more so in a paramilitary organization such as the Department of Correction. The Appellant received three letters of reprimand for failing to appear for work. Less than five weeks before the promotions would have been effective on December 4, 2011, he was absent without authorization on November 1, 8, 10 and 11, 2011. Based on testimony given and evidence presented, the Appellant has not conducted himself in a manner befitting a superior correction officer.

There is no evidence that the DOC's decision was based on political considerations, favoritism or bias. Thus the DOC's decision to bypass the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that Department of Correction was reasonably justified in bypassing the Appellant. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

  
\_\_\_\_\_  
Angela McConney Scheepers  
Administrative Magistrate

DATED: **NOV 1 - 2013**