The Commonwealth of Massachusetts

Decision mailed: 11/13/09
Civil Service Commission
CB

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

WILLIAM PERRON,
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

Case No.: D-05-279

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on November 12, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated July 27, 2009. The Commission received comments from the Appellant on August 27, 2009, and comments from the Respondent on October 5, 2009. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein.

A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed.*

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, and Stein [Taylor- absent], Commissioners) on November 12, 2009.

A true record. Attest.

Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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 A. Stewart, Esq. (for Appellant)
Carol A. Colby, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)

THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 NORTH WASHINGTON STREET, 4TH FLOOR
BOSTON, MA 02114

SHELLY L. TAYLOR
Chief Administrative Magistrate

Tel: 617-727-7060
Fax: 617-727-7248

July 27, 2009

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

Re: ***William Perron v. Department of Correction***
DALA Docket No. CS-08-245

Dear Chairman Bowman:

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

Sincerely,

Shelly Taylor
Chief Administrative Magistrate

SLT/das

Enclosure

cc: Robert A. Stewart, Esq.
Carol A. Colby, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

William Perron,
Appellant

v. Docket Nos. D-05-279/CS-08-245

Department of Correction,
Appointing Authority

Appearance for Appellant:

Robert A. Stewart, Esq.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

Appearance for Appointing Authority:

Carol A. Colby, Esq.
Department of Correction
Legal Division
70 Franklin Street, Suite 600
Boston, MA 02110

Administrative Magistrate:

Sarah H. Luick, Esq.

SUMMARY OF RECOMMENDED DECISION

G.L. c. 31, § 43 discharge hearing. The Appointing Authority had just cause to impose discharge using a preponderance of the evidence standard, and discharge was not an excessive discipline. The Appellant keyed or scratched the Bristol County Sheriff's car causing monetary damage sufficient to support felony damages charges against the Appellant under G.L. c. 266, § 127. The Appellant entered an *Alford plea* and received probation, an order of restitution, and had to pay fees. I found credible and reliable the testimony and sworn court testimony of fellow union officials, that the Appellant admitted he keyed the car. I found the Appellant's testimony denying he had damaged the Sheriff's car not believable, and that the Court's acceptance of his *Alford plea* did not prevent such a determination.

RECOMMENDED DECISION

Pursuant to G. L. c. 31, § 43, the Appellant, William Perron, is appealing the July 25, 2005 decision of the Appointing Authority, the Department of Correction (DOC), discharging from his position as a Correction Officer (CO) I. (Ex. 2) The appeal was timely filed on July 28, 2005. (Ex. 1) A hearing was held April 14 and July 8, 2008 for the Civil Service Commission at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington Street, 4th Floor, Boston, MA 02114. The hearing was private as no written request was received by either party for the hearing to be public.

Various documents are in evidence. (Exs. 1 – 12)[1] Four (4) tapes were used. The Appointing Authority presented the testimony of Arthur "Red" Turner, a former DOC CO-I and union official. The Appellant testified on his own behalf, and presented the testimony of Steven Kenneway, DOC CO-Lieutenant and union President. The witnesses were sequestered. Both parties made arguments on the record, and filed briefs by August 25, 2008.

At the April 14, 2008 hearing, although subpoenaed to testify by the Appointing Authority, both Arthur Turner and Paul Reynolds did not appear. The Appellant moved to dismiss the case. This motion was denied, and the Appointing Authority was given time to seek enforcement of the subpoenas. Another hearing date was set for July 8, 2008 and Mr. Turner appeared. Mr. Reynolds never appeared. The Appointing Authority was Provided with time to determine whether it would enforce the subpoena. The

[1] Exhibit 12 is the testimony of Paul Reynolds at the March 7, 2003 probable cause hearing held on criminal charges against Mr. Perron and was filed post-hearing.

Appointing Authority did not. ("A")

FINDINGS OF FACT

Based on the evidence presented and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. William Perron[2] served in the military and received an honorable discharge before commencing employment in 1987 with DOC as a CO-I. He has worked out of MCI-Norfolk. (Testimony)

2. In May 2000, Mr. Perron was elected to the Norfolk Board of Selectmen. (Testimony)

3. Mr. Perron became involved in and around 1993 in efforts to gain recognition of the Massachusetts Correction Officers Federated Union (MCOFU) as the union to represent the COs. Once MCOFU took over as the union for the COs, Mr. Perron became a Union Steward at MCI-Norfolk. In March 2001 he successfully ran for the union job of Legislative Representative. He had to register as a lobbyist since his job was to draft legislation and lobby for its passage. This led to a conflict since he was also a Selectman. He resigned his post as Selectman. (Testimony)

4. While at MCI-Norfolk, Mr. Perron served with the Institution and Department Honor Guards from 1990 through 1995. He also served as a member of a select group that was trained to address emergencies at DOC facilities. He received good performance review evaluations. (Testimony)

5. In the mid-1990's, Mr. Perron lived near a pond in Norfolk that he and others in his community felt was being polluted by sewage from the MCI-Norfolk

[2] Full name is Raymond William Perron, Jr.

treatment plant. He organized neighbors and residents of Norfolk to raise concerns with DOC over this issue. This eventually led to a lawsuit that settled in and around 2006, and an appropriation from the Legislature to DOC to upgrade the treatment plant. Some of this effort involved media publicity, including photos and articles mentioning and featuring photographs of Mr. Perron. This work led to some conflicts with his DOC supervisors on occasion. He received some unfavorable performance review evaluations he felt were as a result of this community work. (Testimony)

6. In connection with his work as a Norfolk Selectman, Mr. Perron supported an effort to petition DOC to pay the Town of Norfolk a fee when DOC increased the number of inmates housed at MCI-Norfolk. In and around 2001, as the MCOFU Legislative Representative, he worked on securing a ballot question for the November 2002 elections to let voters recall an elected sheriff. This was aimed at Bristol County Sheriff Thomas Hodgson. Sheriff Hodgson was aware of Mr. Perron's involvement in this effort. (Ex. 12. Testimony.)

7. MCOFU paid Mr. Perron's salary while he was Legislative Representative. He served on the MCOFU Executive Board in this position. Other MCOFU positions on the Executive Board included the MCOFU President, Vice President, Treasurer, Secretary, and Grievance Coordinator. (Testimony)

8. Arthur "Red" Turner was the elected MCOFU Grievance Coordinator in March 2001. He worked as a CO-I at MCI-Cedar Junction, but during the late 1980's into the early 1990's, he worked at MCI-Norfolk and knew Mr. Perron while there. At that time they were not all that friendly, but became better known to one another during their service together on the MCOFU Executive Board. (Testimony)

9. During late 2001 and through the summer 2002, MCOFU's Executive Board, including Mr. Perron, investigated the MCOFU Treasurer for embezzling funds. The amount of money involved was about $250,000. At some point, Mr. Turner had agreed to sign/endorse a MCOFU petty cash check on behalf of the Treasurer so the check could be cashed at Mr. Turner's personal bank. This incident was examined by the Executive Board, but no conclusions were reached that Mr. Turner was embezzling MCOFU funds or helping the Treasurer embezzle funds. At one point, Mr. Turner had been asked to turn over his bank statements, but this was never pursued. The MCOFU Secretary was also investigated for breaches of his fiduciary duty to the union for possibly assisting the Treasurer to embezzle funds. Mr. Turner had some animosity toward Mr. Perron for his concerns about Mr. Turner being possibly involved in wrongdoing. (Ex. 12. Testimony.)

10. MCOFU represented COs working for the Bristol County Sheriff's Department. Mr. Turner was the point person on the MCOFU Executive Board for them. By October 2002, they had not had a new collective bargaining agreement for about nine years. Bristol County Sheriff Thomas Hodgson had been in office for a number of years, and MCOFU felt he had not moved this process along. When Sheriff Hodgson was hosting a convention of the Massachusetts Sheriffs at the Taunton Holiday Inn on October 19, 2002, MCOFU organized a picket of the event. About 200 MCOFU members came between noon and 7:00 PM to picket the event in shifts of about 100 at a time. They picketed along the street but not in the Holiday Inn parking lot. Most of the MCOFU Executive Board were present for the picket, including Mr. Turner, Mr. Perron, and the MCOFU President, Steven Kenneway. (Testimony)

11. After the picketing had ended, Mr. Turner and other MCOFU members were piling up the pickets to go into a truck. Mr. Perron approached Mr. Turner and told him he "got the van and keyed the Sheriff's car too." Mr. Turner did not respond to Mr. Perron. There were others around Mr. Turner and Mr. Perron but the statement was said only to Mr. Turner. Mr. Perron did not say anything else. (Testimony)

12. Paul Reynolds is a MCOFU Field Representative and Chief Steward at the Dartmouth House of Correction. He was a union colleague and personal friend of Mr. Turner. While at the picket, he and MCOFU Business Agent Robert Brouillette were in the parking lot across from the Holiday Inn when Mr. Perron approached them. Mr. Reynolds did not hear what Mr. Perron said besides the end of his statement: "I did it. I did it." Mr. Perron left the two men after that. Mr. Reynolds asked Mr. Brouillette what Mr. Perron said and Mr. Brouillette replied: "The fuckin' asshole keyed the Sheriff's car." Mr. Reynolds asked Mr. Brouillette to go over to Mr. Perron and tell him to "shut his mouth." He did not want Bristol County COs finding out about this. He was concerned they would be blamed for the damage. He saw Mr. Brouillette approach Mr. Perron. Mr. Reynolds did not accompany him. (Ex. 12)

13. Mr. Reynolds knew Mr. Perron as a MCOFU colleague but was not a personal friend. Mr. Reynolds did not serve on the MCOFU Executive Board. He was aware Mr. Perron was involved in efforts to terminate the MCOFU Treasurer. He understood Mr. Perron led efforts to secure legislation to permit recalling County Sheriffs, and that this effort was aimed primarily at Sheriff Hodgson. (Ex. 12)

14. Mr. Reynolds spoke to Mr. Turner after learning about what Mr. Brouillette said Mr. Perron did to the Sheriff's car. He was accompanied by Joseph

Zekus a MCOFU CO from the Bristol County Sheriff's Department. This occurred while the pickets were being piled up and placed in a truck. When he told Mr. Turner what Mr. Perron admitted to doing, Mr. Turner told him Mr. Perron had already told him this news. (Ex. 12. Testimony)

15. On October 19, 2002, once the picketing had ended before picketors had left the site, Mr. Reynolds told MCOFU President Kenneway what Mr. Perron admitted doing. Mr. Turner also told Mr. Kenneway this information. Mr. Perron never told Mr. Kenneway he had damaged the Sheriff's car or the van, and Mr. Kenneway did not speak to Mr. Perron after the picketing was over once he learned this information about Mr. Perron. Mr. Kenneway never saw the Sheriff's car or the Deputy Sheriff's van once he received this information. (Testimony)

16. After the picketing, MCOFU's plan had been to get a meeting with the Bristol County Sheriff's administrative staff to address the need for a collective bargaining agreement, but due to the damage done to the two motor vehicles, this plan was put on hold. (Testimony)

17. The Bristol County Sheriff's Department began an investigation to determine who was responsible for damaging the Sheriff's car and the Deputy Sheriff's van; both parked outside the Holiday Inn but not on the street during the picket. Between October 21-23, 2002, they interviewed fifteen Bristol County Sheriff's Department MCOFU COs about this matter, including Mr. Zekus. As the MCOFU point person for these MCOFU members, Mr. Turner learned about these interviews. These COs were concerned about losing their jobs. He contacted the investigators on October 22, 2002 to inform them what Mr. Perron told him. (Ex. 8. Testimony.)

18. MCOFU President Kenneway spoke to the MCOFU counsel about this information concerning Mr. Perron. As a result, the MCOFU Executive Board held an emergency meeting about this matter on October 23, 2003. Mr. Kenneway did not provide Mr. Perron with any opportunity to deny or admit the allegations about damaging Bristol County Sheriff's Department motor vehicles, but as advised by counsel, only allowed Mr. Perron to resign from his MCOFU position or accept a suspension from the post without pay pending the outcome of the investigation being done into this matter. Mr. Perron had no forewarning about having to make this choice. He did not have the benefit of legal counsel to discuss it. He chose to resign his MCOFU position. This meant he returned to being a CO-I working at MCI-Norfolk with his salary again being paid by DOC. (Testimony)

19. Mr. Turner was interviewed on October 24, 2002 by the Bristol County Sheriff's Department investigators to confirm in person what he had reported over the telephone. Mr. Zekus was also present. Mr. Turner repeated what Mr. Perron had told him that he "got the van and keyed the Sheriff's car too." He told the investigators how he had not responded to Mr. Perron upon hearing this. Thereafter, Mr. Perron was never asked to come in for an interview by the Bristol County Sheriff's Department investigators. (Ex. 8. Testimony.)

20. The Bristol County Sheriff's Department investigators contacted the Taunton Police for help with investigating the damage done to the two motor vehicles. Taunton Police Captain Edward Finnegan contacted Mr. Perron for an interview. Mr. Perron was informed it was about the damage done to the two Sheriff's Department motor vehicles and that the matter involved a felony offense. Mr. Perron sought legal

counsel. On October 24, 2002, his counsel contacted Capt. Finnegan to refuse to give the interview unless Capt. Finnegan first turned over the evidence he had concerning Mr. Perron. This was not done and Mr. Perron was not interviewed. (Ex. 8. Testimony.)

21. The Bristol County Sheriff's Department produced a report of their investigation that concluded Mr. Perron was solely responsible for the damage done to the two Department motor vehicles on October 19, 2002. On October 30, 2002, the Bristol County Sheriff's Department filed a criminal complaint against Mr. Perron in the Taunton District Court for malicious destruction of personal property valued at or over $250, G. L. c. 266, § 127. (Exs. 7 & 8)

22. On December 12, 2002, after the Bristol County Sheriff's Department had produced its report, Mr. Turner signed an affidavit stating that Mr. Perron had approached him on October 19, 2002 once the picketing had ended, and said he "got the van, and keyed the Sheriff's car too." The Bristol County Sheriff's Department attached this affidavit to its investigation report. On January 30, 2003, the Court dismissed the charges as filed against Mr. Perron but without prejudice. (Exs. 7 & 8. Testimony.)

23. Thereafter, the Bristol County Sheriff's Department appealed. The Supreme Judicial Court affirmed the dismissal on or about January 29, 2004. While the appeal process was going on, the District Court held a probable cause hearing before a Clerk Magistrate. At this hearing, Mr. Turner, Mr. Reynolds and Mr. Perron testified. Then, on May 21, 2003, the Bristol County Sheriff's Department filed a second criminal complaint against Mr. Perron only about the Sheriff's car. This charge went forward. Mr. Perron had spent about $20,000 in legal fees by this time. (Ex. 12. Testimony.)

24. On April 11, 2005, Mr. Perron entered into an *Alford plea,* and received a

sentence of probation and restitution. The probation covered six months and the restitution was to the Sheriff's Department for $1,012.40. He also had to pay a victim witness fee of $50, and a probation fee of $30 per month. Mr. Perron decided not to go to trial at least in part due to the additional $20,000 he anticipated it would cost him. He understood that by entering an *Alford plea* he was not having to make an admission of guilt so he was not admitting to sufficient facts himself to support a guilty finding, but was acknowledging that there was enough evidence against him that supported a guilty finding against him.[3] (Exs. 10 & 12. Testimony.)

25. During the times he had to make court appearances in connection with these criminal charges, Mr. Perron, as required by DOC, provided to his superiors the information that he was making these court appearances. DOC was also informed about the disposition of the criminal case on April 11, 2005. (Ex. 10. Testimony)

26. Thereafter, DOC issued a letter of contemplated action to Mr. Perron on May 24, 2005; that he faced possible discipline up to and including discharge in connection with the vandalism done to the Bristol County Sheriff's car, noting also the court disposition that imposed restitution, a term of probation and payment of fees based on the charge of malicious destruction of personal property valued over $250, a violation of G. L. c. 266, § 127A. DOC also cited violations of various DOC rules and regulations. (Ex. 4)

27. DOC held a hearing on June 15, 2005 before a designated hearing officer who produced findings that were forwarded to the DOC Commissioner. Mr. Perron

[3] "Under an *Alford plea*, a defendant who professes innocence may nevertheless plead guilty and `voluntarily, knowingly and understandingly consent to the imposition of a prison sentence, "if the State can demonstrate a `strong factual basis' for the plea." *Commonwealth v. Del Verde*, 398 Mass. 288, 297 (1986), quoting *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

testified at the hearing. The Bristol County Sheriff's Department investigation report and the court docket were presented. The audiotapes of the court proceeding on April 11, 2005 when Mr. Perron entered an *Alford plea* were presented. Also considered was the April 20, 2005 letter of Mr. Perron's counsel that included a tender of plea form and a court transcript. The Appointing Authority hearing was taped. The hearing officer recommended in his July 5, 2005 report to the DOC Commissioner that Mr. Perron be discharged. He found he had violated DOC Rules and Regulations under *General Policy*, under 1. *Standards of Correctional Service*, 6. *Interpersonal Relationships Among Employees*, 7. *General Conduct*, and 20. *Rules and Laws of Particular Interests*. The hearing officer found Mr. Perron "engaged in the acts of malicious destruction of property on October 19, 2002" as charged, and that the criminal docket showed Mr. Perron "admitted to the existence of 'Sufficient Facts' which was accepted by the Court." Mr. Perron's plea in Court was found to be inconsistent with his denial of vandalizing the Sheriff's car made at the Appointing Authority hearing. (Ex. 3)

28. On or about July 12, 2005 and before the DOC Commissioner issued a final decision concerning the disciplinary hearing, Mr. Perron filed a union grievance regarding lunch breaks. Thereafter, on July 18, 2005, Mr. Perron received notice from the Acting Superintendent of DOC that he was being detached with pay from his CO I position at MCI-Norfolk effective July 15, 2005, pending the outcome of the disciplinary proceedings. (Ex. 5)

29. On July 25, 2005, the DOC Commissioner issued her decision, and notified Mr. Perron that he was being discharged for his conduct in damaging the Bristol County Sheriff's car in violation of DOC Rules and Regulations at the *General Policy*

and at Rule 1. The DOC Commissioner relied on the report of the hearing officer. (Ex. 2)

30. Mr. Perron filed a timely appeal with the Civil Service Commission under G. L. c. 31, § 43. (Ex. 1)

31. Mr. Perron received a copy of the DOC Rules and Regulations at the time of his hire. (Stipulation) The *General Policy* of the DOC Rules and Regulations states in pertinent part:

> Nothing in any part of these rules and regulations shall be construed to relieve an employee ... from his/her constant obligation to render good judgment, full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents, or by their authority. All persons employed by the Department of Correction are subject to the provisions of these rules and regulations. Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations.

(Ex. 6)

32. Rule 1. *Standards of Correctional Service* of the DOC Rules and Regulations states in pertinent part:

> You must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent.

(Ex. 6)

Conclusion and Recommendation

The Appointing Authority must satisfy a preponderance of the evidence standard to show just cause for discharging the civil service employee. *Gloucester v. Civil Service*

Commission, 408 Mass. 292 (1990). Just cause is found when an employee has engaged in "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *Murray v. 2nd District Court of Eastern Middlesex*, 389 Mass. 508, 514 (1983); *School Committee of Brockton v. Civil Service Commission,* 43 Mass. App. Ct. 486, 488 (1997). On appeal, the Civil Service Commission determines whether or not the Appointing Authority had a reasonable justification for the action it took. *Watertown v. Aria*, 16 Mass. App. Ct. 331, 334 (1983). This means the Appointing Authority's action had to be "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." *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997), quoting *Wakefield v. 1st District Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928); *Civil Service Commission v. Municipal Court of Boston*, 359 Mass. 211, 214 (1971). In making this determination, the Civil Service Commission cannot simply substitute its decision for that of the Appointing Authority. *Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. at 304; *School Committee of Salem v. Civil Service Commission*, 348 Mass. 696, 699 (1965). The parties do not dispute this is the proper standard for determining the outcome of the Appellant's appeal.

The Appointing Authority's decision to discharge the Appellant rests on the outcome of the criminal charges he faced in connection with the damage done to the Bristol County Sheriff's car. It also rests on the evidence presented to prove the Appellant actually damaged the Bristol County Sheriff's car with or without consideration of the outcome of the criminal matter. I conclude there is a reasonable justification for the action taken to discharge the Appellant on both grounds. The

Appointing Authority has met its burden of proof to show just cause for discharging the Appellant.

Although with an *Alford plea* a defendant is not admitting to sufficient facts, the Court must be satisfied that there are sufficient facts to support imposing a sentence based on the criminal charge involved. The *Alford plea* establishes guilt without a trial. *Com. v. Nikas*, 431 Mass. 453, 455 (2000). And, no evidence shows the Appellant's "plea was not knowing or intelligent." *Id.* at 456. Here, the Appellant faced a felony charge and received a sentence of paying restitution to the Bristol County Sheriff's Department for damage to the Sheriff's car, undergoing six months of probation, and paying fees.

I found credible the testimony of the Appellant that he did not want to go to trial as that route would have been expensive and he had already paid a lot of legal fees to reach the point of a trial. But, that reason is not persuasive evidence that he did not damage the Sheriff's car. The *Alford plea* recognizes that the defendant can continue to protest his innocence, but it is nevertheless a recognition that there exists sufficient facts to support a finding of guilt on the particular charge involved in the plea. The Appellant's arguments that the *Alford plea* cannot be used to support imposition of discipline is not persuasive, and it is proof that there existed sufficient facts against the Appellant in regard to doing damage to the Sheriff's car.

Even if the Appellant had never faced criminal charges, the evidence presented at the hearing is sufficient to show he was responsible for damaging the Sheriff's car. Although he denied doing the damage at the hearing, I was not persuaded by his testimony. The source of finding he did the damage comes primarily from the testimony

of Mr. Turner. I believed Mr. Turner. He testified that as MCOFU members and Executive Board Officers were packing up the pickets once the picketing event was over, the Appellant came to him and said he "got the van and keyed the Sheriff's car too." Mr. Turner's response of not saying anything in the less than private setting the two men were in when the Appellant made this revelation is also credible. And, I found Mr. Turner's decision to contact the Bristol County Sheriff's Department once he learned MCOFU Bristol County Sheriff's Department COs were being questioned about doing the damage to the van and car, to be understandable; that he did not want any of these persons to have their jobs in jeopardy when he knew the Appellant had admitted his responsibility for the damage. Mr. Turner did not testify at the Appointing Authority hearing, but this evidence is referred to in the Bristol County Sheriff's Department investigation report. I believed Mr. Kenneway that Mr. Turner told him what the Appellant had admitted to him.

In addition, I found that Mr. Reynolds had learned this same information. He could not hear the Appellant well enough when the Appellant came to him and Mr. Brouillette to say he had damaged the Sheriff's car, but he did hear the Appellant say, "I did it. I did it." Once the Appellant walked away, Mr. Reynolds learned from Mr. Brouillette that the Appellant had keyed the Sheriff's car. Mr. Reynolds testified to this information at the criminal case probable cause hearing on March 7, 2003, about five months after he gained this knowledge. I relied on this sworn testimony contained in Exhibit 12. I found no cause for discrediting what Mr. Reynolds stated at that time. This is particularly the case because I found to be credible, Mr. Turner's and Mr. Kenneway's testimony about their conversations with Mr. Reynolds on the day of the picketing.

The Appellant contends that at the time of the picketing event he and Mr. Turner were not on good terms so that confiding such information to Mr. Turner makes no sense. The Appellant argues that Mr. Turner had been targeted for investigation that included the Appellant's participation in regard to the embezzling the MCOFU Executive Board felt its Treasurer was engaging in; as much as $250,000. But, Mr. Turner was never implicated in any embezzling, and no evidence established that Mr. Turner blamed the Appellant for any concerns he may have had over this investigation. Their relationship at the time of the picketing event does not show the Appellant would not have told Mr. Turner he damaged the motor vehicles because they were hostile to one another.

Also, there was no showing of any animosity between Mr. Kenneway and the Appellant. There is no reason not to rely on Mr. Kenneway's testimony that both Mr. Turner and Mr. Reynolds told him what the Appellant had admitted. Moreover, no evidence shows Mr. Reynolds or Mr. Brouillette were not on good terms with the Appellant at the time of the picketing event. There is no evidence to support a conspiracy to set-up the Appellant for criminal charges or for discharge among any of these MCOFU officials.

The report of the Bristol County Sheriff's Department (Ex. 8) was wrong when it reported that the Appellant admitted his guilt at the MCOFU Executive Board meeting. Mr. Kenneway's testimony as supported by the Appellant's testimony, amply demonstrates he did not admit his guilt at that meeting. I do not consider the fact that he resigned his MCOFU post at this meeting to be proof that he engaged in the misconduct.

There is sufficient proof that Mr. Perron engaged in this conduct by relying upon the accounts of Mr. Turner, Mr. Reynolds and Mr. Kenneway considered together. I also

rely on the report of the Bristol County Sheriff's Department and on the criminal case evidence to show the Sheriff's car had been damaged on the day of the picketing. COs facing similar charges have not been discharged. The Appellant contends that DOC had trouble in the past dealing with him when he complained about DOC's treatment plant being responsible for polluting a lake he lived near, and that he worked on a ballot initiative thought to be targeting Bristol County Sheriff Hodgson. He contends this past history provides a pretext for this excessive discipline. But, examining the general reasons for prior disciplines imposed upon COs does not show DOC was overreacting or acting in a discriminatory way toward the Appellant who faced felony charges in court and ended up with a criminal sentence imposed upon him, and who the evidence shows intentionally damaged at least the Bristol County Sheriff's car. (See, Ex. 9.)

For these reasons, I recommend that the Civil Service Commission affirm the discharge decision made by the Appointing Authority based on the evidence presented.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Sarah H. Luick

Sarah H. Luick, Esq.
Administrative Magistrate

DATED: JUL 27 2009

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

WILLIAM PERRON,
Appellant

v.

CASE NO: D-05-279

DEPARTMENT OF CORRECTION,
Respondent

OPINION OF COMMISSIONER STEIN CONCURRING IN RESULT

I concur in the conclusion that, based on the preponderance of the credible evidence presented through the testimony of witnesses and exhibits, the Department of Correction (DOC) has sustained its burden of proof to justify the discharge of the Appellant, William Perron. I find problematic, however, the recommended decision's discussion and reliance on the Appellant's "Alford plea" as a grounds "to support imposition of discipline" and that the plea, alone "is proof that there existed sufficient facts against the Appellant in regard to doing damage to the Sheriff's car." The Commission has previously decided that the fact that an Appellant has "admitted to sufficient facts" in a criminal action that resulted in a CWOF ("continued without a finding") without a guilty plea cannot be used as "substantial evidence" of proof that the Appellant was guilty of the criminal charge. See Suppa v. BPD, 21 MCSR 614 (2008). See generally Burns v. Commonwealth, 430 Mass. 444, 449-451, 720 N.E.2d 798, 803-805 (1999) (state police officer discipline based on officer's CWOF was reversed as legal error); Santos v. Director of Div. of Empl. Sec., 398 Mass. 471, 474, 498 N.E.2d 118, 120 (1986) ("The record reflects that the *plaintiff claimed he was innocent*; for all that is shown in the record, he may have admitted to sufficient facts to avoid the expense, publicity, and notoriety which a full trial

might engender"); Wardell v. Director of Div. of Empl. Sec., 397 Mass. 433, 436-37, 491 N.E.2d 1057, 1059-60 (1986) ("*Criminal charges not resulting in conviction do not provide adequate or reliable evidence that the alleged crime was committed*. To the extent that the 'deliberate misconduct' relied upon by the board refers to the alleged criminal act of the employee, there was no substantial evidence on the record to warrant his disqualification [from receiving unemployment benefits]." (*emphasis added*) [1]

The Commission has not considered if an "Alford plea" should be treated in the same way. cf. Commonwealth v. Nikas, 431 Mass. 453 (2000) citing North Carolina v. Alford, 400 U.S. 25 (1970) ("Alford plea" means the defendant pleads guilty but case continued without a finding of guilt and dismissed if conditions of probation are met). As the recommended decision notes, many of the same motivations to "admit to sufficient facts" also apply in the case of an "Alford plea". Thus, I would not decide whether or not the Commission should treat an "Alford plea" as sufficient evidence, as that legal issue is not necessary to support the discharge here, where the evidence of the underlying misconduct was directly established through credible and substantial evidence.

Paul M. Stein

Commissioner

[1] This Commissioner does not question use of true prior convictions as disqualifiers. The Commission notes that police officers may, in the course of their duties, be called to testify in court, where a felony *conviction* could be used to impeach the officer's testimony. See, e.g.., Commonwealth v. Fano, 400 Mass. 296, 302-303, 508 N.E.2d 859, 863-64 (1987) ("earlier disregard for the law may suggest to the fact-finder similar disregard for the courtroom oath"); Brillante v. R.W. Granger & Sons, Inc., 55 Mass. App.Ct. 542, 545, 772 N.E.2d 74, 77 (2002) ("one who has been convicted of crime is presumed to be less worthy of belief that one who has not been so convicted') As discussed above, however, these policy reasons do not apply where the disposition does not amount to a conviction. See Commonwealth v. Jackson 45 Mass.App.Ct. 666, 670, 700 N.E.2d 848 (1998) (admission to sufficient facts not a conviction for purposes of statute allowing impeachment by prior conviction); Commonwealth v. Petros, 20 Mass.L.Rptr. 664, 2006 WL 1084092*4n3 (2006) (same)