

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

NICHOLAS POLADIAN,
Appellant

v.

D-04-213

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Representative:

James Nason
Grievance Coordinator
MCOFU
159 South Main St., Suite A
Milford, MA 01757-3255

Respondent's Representative:

Jeffrey S. Bolger
Director of Employee Relations
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Nicholas Poladian (hereinafter "Appellant"), filed this appeal on March 31, 2004 with the Civil Service Commission (hereinafter "Commission"), claiming that an action taken by the Respondent, Department of Correction (hereinafter "DOC") as Appointing Authority, suspended him for one day without just cause. The appeal was timely filed. A hearing was held on January 2, 2008 at the offices of the Commission. Witnesses offering sworn testimony were not ordered to be sequestered. One

audiotape was made of the hearing. The parties submitted proposed decisions thereafter, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits (JE's) 1-18 and Appellant's (App's) Exhibit 1) and the testimony of the Appellant, DOC Lieutenant Kenneth Arsenault (hereinafter "Lt. Arsenault"), DOC Sergeant Freddy Gonzalez (hereinafter "Sgt. Gonzalez") and DOC Lieutenant Donald M. Ferrara (hereinafter "Lt. Ferrara"), I make the following findings of fact:

1. The Appellant was a tenured civil service employee in the position of Correction Officer I (hereinafter "CO I") at the time of the alleged incident, September 5, 2003, for which he was disciplined. He was assigned to the Souza-Baranowski Correctional Center (hereinafter "SBCC") in Shirley and had been employed by the DOC since July 5, 1998. (Testimony of Appellant)
2. The Appellant had received two commendations from the DOC for demonstrating vigilance in his duties, including one for his emergency response to an incident involving the inmate who is central to the instant matter. Prior to the action which gave rise to this appeal, the Appellant had never before received any discipline from the DOC. (Testimony of Appellant and JE's 14 and 15)
3. The rules and regulations governing the conduct of all DOC employees are contained in a manual commonly referred to as the "Blue Book." The Appellant received a copy of the Blue Book at the beginning of his employment and was aware of all subsequent memoranda and post orders regarding his various assignments. (Testimony of Appellant and JE's 6, 9, 10, 11 and 16)

4. The Health Services Unit (hereinafter “HSU”) at the SBCC provides the institution’s medical services. It is also the location of the security cells necessary to conduct security/mental health watches (hereinafter “eyeball watch[es]”) of inmates. An eyeball watch requires an officer to “Maintain visual observation of said inmate at all times.” The officer observes the inmate through the glass window on the inmate’s cell door. (Testimony of Lt. Arsenault and JE 6)
5. On September 5, 2003, at approximately 9 p.m., the Appellant was working an overtime shift in the HSU and was assigned to an eyeball watch of Inmate “X”¹, who had been transferred to the HSU from the Special Management Unit (hereinafter “SMU”) earlier in the Appellant’s shift. Inmate “X” had murdered a high-profile inmate on August 23, 2003. (Testimony of Lt. Arsenault and Appellant)
6. On September 5, 2003, the HSU was staffed by Sgt. Gonzalez and two (2) CO I’s, including the Appellant. Sgt. Gonzalez was the Appellant’s supervisor for that shift. As usual, some nurses were on also duty. After the Appellant was assigned to the eyeball watch at 9 p.m., Sgt. Gonzalez and one other officer were left to run the HSU unit. (Testimony of Appellant and JE 12)
7. On September 5, 2003, sometime between 9:00 and 9:30 p.m., a “Code 99” emergency was called in response to an inmate performing self-mutilation in the J-1 housing area of the institution. As a result, all security staff and some of the medical staff in the HSU, including Sgt. Gonzalez, were required to respond to the emergency. The Appellant was required to remain on eyeball watch of Inmate “X”. (Testimony of Sgt. Gonzalez and Appellant and JE’s 4 & 5)
8. On September 5, 2003, the approved response to a life threatening medical emergency at the SBCC was a written procedure titled, “CODE 99 PROCEDURES – 103 DOC 622”.

¹ This inmate will be referred to herein as Inmate “X” in order to protect his identity.

This procedure had been reviewed and approved as of May 7, 2003. Within the document, a “Code 99/Medical Emergency” is defined as: “The designated terminology used to report a life threatening medical emergency situation which may include staff/inmates or visitors.” (JE 16)

9. In the same document, a “Life Threatening Medical Emergency” is defined as: “Any unusual or sudden medical problem that is, or may become, life threatening. Some examples are choking, suffocation/strangulation, major burns, falls, poisoning, overdose, chest pains, shock, bleeding, stab wounds, trauma, etc.” (Id.)
10. Noticing that the security staff had left the HSU to respond to the “Code 99”, Inmate “X” approached the cell door at approximately 9:32 p.m. and asked the Appellant if he was the sole remaining officer in the unit. The Appellant knew that, while there was some medical staff still present, he was, indeed, the lone correction officer. Not wishing Inmate “X” to be aware of this, the Appellant told the inmate that there was still some security staff present in the unit. (Testimony of Appellant and JE’s 5 & 13)
11. A video tape depicting the scene from inside, as well as outside, of Inmate “X’s” cell and played during the Commission hearing on this matter, clearly shows the interaction between the inmate and the Appellant. The time and date was indicated on the tape but there was no audio feature to accompany the video scenes. (JE 13)
12. Lt. Arsenault was assigned to investigate this matter as a member of the DOC Division of Internal Affairs Unit. Lt. Arsenault is a seasoned, trained investigator and has been employed by the DOC since 1981. As part of his investigation, Lt. Arsenault conducted an interview with the Appellant on October 1, 2003 (JE 5) and presented a written report regarding the incident to DOC Chief of Investigations Mark Reilly on October 3, 2003 (JE 4). I found him to be professional in demeanor and unhesitant in answering

questions. His testimony in this matter is given great weight as being credible.
(Testimony of Lt. Arsenault)

13. The Appellant was described by Lt. Arsenault's testimony as a "very experienced" officer. I found the Appellant to be a credible witness whose testimony was unhesitant and detailed, indicative of a good recall of the events in question. I find that his clever response to Inmate "X's" query as to whether he (the Appellant) was alone in the HSU (see Fact #10) to be the action of a "very experienced" officer. He maintained a respectful and professional demeanor throughout his examination and cross-examination and testified with the confidence of someone who is sure of the facts of a matter.
(Testimony of Appellant)

14. The video tape (JE 13), Lt. Arsenault's interview of the Appellant (JE 5) and the Appellant's testimony at the Commission hearing were factually consistent. I find that the written interview provides an accurate narrative of the video and the Appellant's testimony credibly attests to both.

15. A relevant excerpt of Lt. Arsenault's interview with the Appellant on October 1, 2003 reads as follows:

"Officer Poladian stated that at approximately 9:30 P.M. he observed inmate ["X"] lying across his bed reaching for something underneath. Officer Poladian stated he became suspicious and walked closer to the door and asked inmate ["X"] what he was doing. ["X"] responded by showing his hands and saying something about his fingernail.

Officer Poladian stated that at this time there was something going on in the out patient area of the H.S.U. possibly a code 99, and he radioed his supervisor #175, Sergeant Fred Gonzales (sic) to 10-25 his location so he could inform him of inmate ["X's"] strange behavior. Officer Poladian stated he was unsure of the (sic) Sergeant Gonzales' (sic) response because a nurse was trying to exit the infirmary area to assist with the code 99 in outpatient, and she was asking him countless times to open the door and he told her 'no, (sic) he couldn't leave the watch. Officer Poladian stated he was not sure if she did as he instructed or if someone let her out by key from outside the infirmary.

Officer Poladian stated that inmate ["X"] approached the cell door and began conversing with him and asked if they were alone in the unit. Officer Poladian stated he told ["X"] no, and that staff were around. Inmate ["X"] showed him his hand and fingernail, which he believed ["X"] had chewed off. Officer Poladian stated inmate ["X"] turned toward the sink and picked up a cup of water and stated 'watch this', then took a drink of water and started to push a pencil down his throat. Officer Poladian stated he was in disbelief at first and did not think ["X"] had actually swallowed a pencil, and thought ["X"] was going to pull the pencil back out. Officer Poladian states he gave several orders to ["X"] to stop and turn over the pencil but ["X"] turned away and grabbed a wad of paper from under the bed and pulled out a second pencil and began sharpening it on the floor. Officer Poladian states he gave ["X"] several more orders to give up the pencil and knock it off. ["X"] began to show the pencil to the observation camera then walked back to the cell door and swallowed the second pencil and stated 'I'm getting out of hear (sic) one way or another.'

Officer Poladian stated he radioed #175, Sergeant Gonzales (sic) again to 10-25 his location and the Sergeant replied 'in Rout' (sic). Officer Poladian was asked why he waited so long before calling for the Sergeant A (sic) second time. Officer Poladian stated he could hear keys outside the unit door and thought it was the Sergeant Gonzales (sic) making his way to his location.

Officer Poladian stated that when Sergeant Gonzales (sic) responded, inmate ["X"] reached under his bed and retrieved a pair of underwear and explained how he had hidden the pencils within the second pair of underwear prior to the strip search.

Officer Poladian states that Sergeant Gonzales (sic) handed him the video camera and ordered him to video tape inmate ["X"].

Officer Poladian states he was not sure if a medical code was called because there was staff and nurses present in the area to attend to ["X"].

Officer Poladian was asked why he did not enter the cell and try to stop inmate ["X"] from swallowing the second pencil. Officer Poladian stated because there was not a second officer present and he would have violated policy and may have endangered himself and the inmate."

(JE 5)

16. According to the time display on the tape taken from the observation camera inside the cell, Inmate "X" swallowed the two pencils approximately one minute apart. The tape also shows that, after being radioed by the Appellant, Sgt. Gonzalez responded to the

scene within one minute from the swallowing of the second pencil. Lt. Arsenault testified that Sgt. Gonzalez became the incident commander upon his arrival at Inmate “X’s” cell. Immediately after speaking with the Appellant and visually observing Inmate “X” and the situation in the cell, Sgt. Gonzalez provided a videotape recorder to the Appellant and instructed the Appellant to begin videotaping the inmate. The Appellant did videotape the inmate from then until the conclusion of the inmate’s outside hospital treatment. There is no evidence that Sgt. Gonzalez called a “Code 99” response to the inmate. (JE 13 and Testimony of Lt. Arsenault, Sgt. Gonzalez and Appellant)

17. The Mental Health Watch post order under which the Appellant was working states, under special instructions for Correction Officer I, the following:

“7. EMERGENCY RESPONSES FOR ALL EMERGENCIES:

Maintain visual contact with the inmate at all times. Report any unusual activities immediately to your supervisor or communicate via radio (either verbally or body alarm.)

Be prepared to respond, at the direction of your supervisor, and/or assist medical staff when dealing with an attempted suicide or other medical emergency.

Be familiar with emergency response, Use of Force and Code 99 procedures.

Prepare all written reports as directed by your supervisor prior to the completion of your tour of duty.

At the direction of your supervisor, you may, during ANY emergency, be directed to respond to and/or deliver emergency keys and/or equipment to any affected area within the facility.”

(JE 6)

18. I find that throughout this incident, the Appellant *maintained visual contact with the inmate at all times* and that he *reported any unusual activities to [his] supervisor*. There was no evidence presented that compels me to find that the Appellant was not *prepared to respond . . . and/or assist . . . with an attempted suicide or other medical emergency* or that he was not *familiar with emergency response, Use of Force and Code 99 procedures*. (Emphasis added.)

19. For his part, the videotape clearly shows Inmate “X” throughout his escapade. I find that the inmate was talkative and animated. He moved without physical restriction or difficulty about the cell. After swallowing each pencil, he showed absolutely no sign of discomfort or medical distress. On the contrary, Inmate “X” continued to regale the Appellant – and other staff as they arrived at the cell door – with what was consistently testified to in this proceeding as a boastful admission of his murder of the high-profile inmate two weeks prior. The inmate calmly showed the Appellant and Sgt. Gonzalez his underwear and explained how he had smuggled the contraband pencils into his cell. Indeed, unaware that the inmate had ingested two pencils before his arrival at the cell door, Sgt. Gonzalez credibly testified that, when he arrived on scene with 5 – 6 other correction officers and some nurses who had heard the Appellant’s radio call for assistance, he observed no signs of physical distress in the inmate. Sgt. Gonzalez testified at the Commission hearing that he would have entered the cell to attend to the inmate if the inmate had been in distress. (JE 13 and Testimony of Appellant and Sgt. Gonzalez)

20. I find that a reasonable person would deduce that another person required *some* sort of medical attention after observing that other person ingest two, crudely-whetted pencils. In fact, the Appellant reported that he was “in disbelief at first and did not think [“X”] had actually swallowed a pencil, and thought [“X”] was going to pull the pencil back out.” The record shows that it took less than two minutes for the inmate to swallow the pencils and for the Sergeant to arrive on scene with other staff. The record shows that no one, neither officers nor medical staff, took any immediate action to provide the inmate with medical attention. (JE’s 5 and 13)

21. I find that a preponderance of the credible evidence in this matter clearly shows that Inmate “X” did not experience “Any unusual or sudden medical problem that is, or may

become, life threatening. Some examples are choking, suffocation/strangulation, major burns, falls, poisoning, overdose, chest pains, shock, bleeding, stab wounds, trauma, etc.”, as defined in the “Life Threatening Medical Emergency” section of the DOC’s “Code 99/Medical Emergency” procedures in place at the time of the incident. I further find that, based on his observation of the situation as it unfolded, the Appellant did not call for a “Code 99” medical response to Inmate “X” but correctly called for an Emergency Response for All Emergencies in accordance with the Mental Health Watch post order under which he was working. Far from a failure of duty, the Appellant’s judgment and subsequent actions demonstrated reason and competence pursuant to the applicable DOC rules and regulations under which he was serving.

22. Approximately one hour after the inmate swallowed the pencils, he was taken to a hospital outside of the institution for treatment. The inmate subsequently admitted to ingesting the pencils in order to be moved to an outside facility. The Appellant, who accompanied and videotaped the inmate on his hospital visit, testified that he was aware that the inmate had x-rays taken but underwent no surgical procedure to remove the pencils. (Testimony of Appellant and JE 17)
23. On October 28, 2003, the Appellant was charged by written notice with the violation of the Rules and Regulations Governing All Employees of the Massachusetts, Department of Correction by his failure to initiate a “Code 99” emergency on September 5, 2003 at SBCC. Specifically, Rule 7c, which states in part, “Any employee...flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge”; Rule 10b, which states in part, “When suspicious behavior is noted you should take steps to satisfy yourself that nothing is being done to jeopardize the good order or safety of the institution”; Rule 10c, which states, “Employees assigned to or having duties related to inmates confined in

isolation, segregation, hospital or special housing sections must comply with institution and Department of Correction policy and orders relative to the daily medical attention, hourly care (unless special situations such as medical concerns indicate closer or more frequent observation), and custody of such inmates.”; and Rule 12a, which states, “Employees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities through presumption and, must familiarize yourself with assigned tasks and responsibilities including institution and Department of Correction policies and orders.” (JE’s 2 and 11).

24. On March 31, 2004, the Appellant filed this appeal with the Commission. (JE 1)

CONCLUSION:

The role of the Civil Service 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.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when 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.” Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

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.” Murray v. Second Dist. Ct. of E. Middlesex, 389

Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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). In reviewing an appeal under G.L. c. 31, § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The DOC, as Appointing Authority, bears the burden of substantiating the charges against the Appellant in order to prove just cause for suspending him for one day without pay. We find that the DOC has failed to substantiate the charges and, thus, had no just cause to discipline the Appellant in this matter.

By a preponderance of all the credible evidence presented at the Commission hearing, we find that the Appellant did not "flagrantly, wantonly, or willfully neglect . . . the duties and responsibilities of his . . . office" in violation of Rule 7c. We find that, "When suspicious behavior [was] noted", the Appellant did "take steps to satisfy [him]self that nothing [was] being done to jeopardize the good order or safety of the institution" in accordance with Rule 10b. We

find that the Appellant, as an “Employee assigned to or having duties related to inmates confined in isolation, segregation, hospital or special housing sections, [did] comply with institution and Department of Correction policy and orders relative to the daily medical attention, hourly care (unless special situations such as medical concerns indicate closer or more frequent observation), and custody of such inmates” in accordance with Rule 10c. Lastly, we find that the Appellant was compliant with the provisions of Rule 12a, which states, “Employees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities through presumption and, must familiarize yourself with assigned tasks and responsibilities including institution and Department of Correction policies and orders.”

Based upon all of the findings of fact and conclusions stated herein, the Commission finds that the DOC has not sustained its burden of proving just cause as it can not substantiate the reasons for the disciplinary action taken against the Appellant. Therefore, the appeal on Docket No. D-04-213 is hereby ***allowed*** and the Appellant shall be made whole for loss of compensation and/or benefits as a result of the one-day suspension.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Henderson, Marquis and Guerin, Commissioners) on April 3, 2008.

A true record. Attest:

Commissioner

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

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

Notice to:

James Nason, MCOFU
Jeffrey S. Bolger, DOC

