# COMMONWEALTH OF MASSACHUSETTS
# CIVIL SERVICE COMMISSION

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

**ARIANA RIVERA**
*Appellant*

v.

**DEPARTMENT OF CORRECTION,**
*Respondent*

**Case No.:** D1-12-222

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 October 23, 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.

The decision of the Appointing Authority to terminate 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)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:
Regina Ryan, Esq. (for Appellant)
Heidi Handler, Esq. (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

**COMMONWEALTH OF MASSACHUSETTS**

Suffolk, ss.

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**ARIANA RIVERA,**
Petitioner

*v.*

Docket Nos.: D1-12-222
CS-12-651

**DEPARTMENT OF CORRECTION,**
Respondent



**Appearance for the Appellant:**

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**Appearance for Respondent:**

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**Administrative Magistrate:**

Angela McConney Scheepers, Esq.

## SUMMARY OF TENTATIVE DECISION

The Department of Correction had just cause to terminate the Appellant for using her personal cell phone to contact former inmates while on duty; for sexual contact with a former inmate and socializing with former inmates and their associates while off duty – all without the requisite authorization from the DOC. The Appellant's conduct compromised the discipline, safety and security of the Department. I therefore recommend that the Civil Service Commission dismiss the appeal.

## TENTATIVE DECISION

INTRODUCTION

The Appellant, Ariana Rivera, pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission on August 1, 2012, claiming that the Department of Correction

(Department or DOC) did not have just cause to terminate her from her position as a Correction Officer I.

The appeal was timely filed. A pre-hearing was held on August 28, 2012 at the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. The Appellant filed a Motion to Suppress Evidence and a Motion to Disclose the Identity of the Department's Confidential Information on August 30, 2012. After the Department responded on September 11, 2012, the Commission denied both motions on November 11, 2012.

On November 13, 2012, pursuant to 801 CMR 1.01(11)(c), a Magistrate from the Division of Administrative Law Appeals (DALA) conducted a full hearing at the Commission in accordance with the Formal Rules of the Standard Rules of Practice and Procedure. 801 CMR 1.01.

The Appellant testified on her own behalf. The Respondent's sole witness, Lieutenant Mark McCaw, Internal Affairs, was not sequestered. The hearing was digitally recorded. As no notice was received from either party, the hearing was declared private.

Ten joint exhibits were submitted into evidence. The legend for the inmates' names was marked as Exhibit 10 and impounded. The record was left open in order for the Respondent to submit further evidence. That document was received on November 30, 2012 and marked as Exhibit 11, whereupon the record closed. The Appellant submitted her proposed decision on December 21, 2012. The Respondent submitted its proposed decision on December 24, 2012.

## FINDINGS OF FACT

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

*A. Appellant's Background*

1. The Appellant worked for the Department as a Correction Officer I from September 6, 2005 until she was terminated on July 20, 2012. She was assigned to the Massachusetts Correctional Institution at Concord (MCI-Concord). (Exhibits 1 and 7.)

2. The Appellant worked in the Property Department. Her regular shift was from 1:00 p.m. to 9:00 p.m. (Exhibit 3F; Testimony of Appellant.)

3. On December 20, 2007, the Appellant received a one-day suspension after being arrested for operating under the influence of alcohol. (Exhibits 3J1 and 7.)

4. On July 15, 2011, the Appellant received a reprimand for failing to report that she had appeared in court. The Appellant was arraigned in Woburn District Court on February 22, 2011 for speeding and operating under the influence of alcohol. (Exhibits 3J1 and 7.)

*B. First Investigation: Previous Allegation of Sexual Misconduct*

5. On September 20, 2007, Inmate H[1] informed MCI-Concord Deputy Karen Dinardo that he and the Appellant had had a relationship before his current incarceration, and that he wanted to avoid the Appellant. A diabetic, he had missed his insulin shots for two days in order to avoid the Appellant who was assigned to the Health Services Unit (HSU). (Exhibit 3I13.)

6. On September 21, 2007, Sergeant Anthony Ciccone interviewed Inmate H. Inmate H claimed that he met the Appellant in 2006 when he was visiting his brother, an inmate at MCI-Concord. Inmate H was barred from visiting at MCI-Concord because he was a former

[1] During the Commission hearing, the parties referred to current and former inmates by their initials. Due to the extent of communication among current inmates, former inmates and their associates, I use the letters assigned to them during the §41 hearing and used throughout the exhibits, in order that they may not be so easily identified. The current inmates and former inmates' true identities are contained within Exhibit 10, which is impounded.

inmate. However, according to Inmate H, the Appellant gave her telephone number to his brother's girlfriend for him, and he and the Appellant had a four-month sexual affair. The affair ended when Inmate H's wife discovered it. (Exhibit 3I13.)

7. Inmate H was re-incarcerated on August 24, 2007, and was held at MCI-Concord. He spoke to the Appellant on his first day. Inmate H informed Sgt. Ciccone that the Appellant gave him dirty looks whenever she saw him, and that other inmates had noticed and made comments to him. (Exhibit 3I13.)

8. The Department, pursuant to its Rules and Regulations,[2] enforces strict rules regulating contact among employees, inmates and former inmates in order to maintain the safety and the security of the Department. Rule 8(c) Conduct between Employee and Inmate, Rules and Regulations Governing All Employees of the Department of Correction provides:

> You must not associate with, accompany, correspond or consort with any inmate or *former inmate* except for a chance meeting without specific approval of your Superintendent, DOC Department Head or the Commissioner of Correction. Any other outside inmate contact must be reported to your Superintendent, DOC Department head or Commissioner of Correction. Treat all inmates impartially, do not grant special privileges to any inmate. Your relations with inmates, their relatives or friends shall be such that you should willingly have them known to employees authorized to make inquiries. Conversation with inmates' visitors shall be limited only to that which is necessary to fulfill your official duties. ...

(Exhibit 8 (*emphasis added*).)

9. Sgt. Ciccone spoke to Superintendent Peter Pepe, who determined that the Appellant had not submitted confidential reports, as required under the Department Rules and Regulations 8(c), regarding Inmate H and their alleged relationship. Inmate H was transferred to MCI-Shirley on September 21, 2007. (Exhibit 3I13.)

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2 As approved by the DOC Commissioner on February 1, 1983.

10. The Department opened an investigation into the matter on September 24, 2007. When Inmate H was interviewed, he admitted that he had fabricated the allegations. His incarcerated cousin did not corroborate the allegations. When the Appellant was interviewed, her demeanor was professional and appeared concerned and sincere in her answers. (Exhibit 3I13.)

11. The investigation was closed on March 26, 2008 after Inmate H's allegations proved to be unfounded. Inmate H was issued a disciplinary report for lying. (Exhibit 3I13.)

*C. Second Investigation: MCAD Complaint*

12. On September 16, 2009, the Appellant filed with the Massachusetts Commission Against Discrimination (MCAD) a Complaint of Discrimination and Harassment against the Department. (Exhibits 3I18 and 4.)

13. The Appellant complained that since December 4, 2008, she had been "the subject of a continuing and escalating barrage of sexual comment and abusive treatment by both the inmates and [her] fellow Officers." (Exhibit 4.)

14. In her complaint dated January 6, 2009, the Appellant said that on October 21, 2008, she saw an inmate with whom she had had a previous sexual relationship. The Appellant filed a confidential incident report with the Department and asked to speak to the Director of Security (DOS). The Appellant alleged that she spoke to DOS Devine and Deputy Russo and requested that the inmate be transferred to another facility or house him in a different unit. Instead, the inmate was made a "runner," which gave him special privileges to move around the facility and even more opportunities to run into the Appellant. (Exhibit 4.)

15. On October 27, 2008, when Investigator Sergeant Anthony Ciccone contacted the Appellant, she said that she had not seen the inmate in several years, there was no hostility between them, and she had not spoken to him. (Exhibit 4.)

16. On December 4, 2008, the Appellant overheard inmates discussing her past relationship with the inmate. The inmates accused her of bringing drugs into the facility for the inmate, causing him to be transferred when a correction officer caught him with the drugs she had allegedly brought in to MCI-Concord. (Exhibit 4.)

17. The Appellant spoke with DOS Jomar Manpar, who informed her that the Department would not disclose her confidential incident report. Not satisfied with that answer, the Appellant, with the assistance of her union steward, approached the Shift Commander and reported the inmates' conversation. The Appellant was so upset that she left work before the end of her shift on December 4, 2008. (Exhibit 4.)

18. On December 10, 2008, while still at home due to stress, a correction officer called her and told her that there were rumors spreading among the inmates and among the correction officers that she had had sexual relations with the inmate and was taking drugs into the facility. The rumors also included specific details of her sexual relationship with the inmate. The Appellant informed the union steward of the comments. (Exhibit 4.)

19. On December 12, 2008, the Appellant heard from yet another correction officer, who informed her that the correction officers were now gossiping with the inmates and "eating her alive." (Exhibit 4.)

20. On December 14, 2008, the Appellant received two phone calls, minutes apart, where the caller said, "Inmate fucker and drug lugging whore." The Appellant called the Department and requested that her phone number not be given to anyone. (Exhibit 4.)

21. On December 15, 2008, a third correction officer called the Appellant and told her that "people were now accusing her of being a gang member, part of the Almighty Latin King and Queen Nation … ." (Exhibit 4.)

22. On December 17, 2008, the Appellant filed a formal complaint with the Department's Investigative Services. In her complaint, the Appellant alleged that the Department had done nothing to investigate the source of the rumors or punish any persons involved, and that she had to petition the Department Investigative Services to conduct a formal investigation into her allegations of sexual harassment and hostile work environment. The Appellant also alleged that she was completely disabled due to the sexual harassment and the hostile work environment that the Department allowed to occur. (Exhibit 4.)

23. In its response to the MCAD, the Department stated that the Appellant filed a Workers' Compensation claim on December 4, 2008 and had not returned to work since that time. When Sgt. Ciccone contacted the Appellant on October 27, 2008, she informed him that she had no issues or concerns with the inmate's placement at the facility. Based on his conversation with her, Sgt. Ciccone did not think that the Appellant was threatened or uncomfortable working in the same facility where the inmate was housed. (Exhibit 4.)

24. However, the inmate told a correction officer that the relationship with the Appellant had ended badly, that he believed that she was still angry with him about the breakup, and that she sometimes used the word "hate" to express her feelings about him. The inmate was concerned that the present situation could escalate and preferred to be transferred to another facility. Upon the inmate's request, he was transferred on December 5, 2008. (Exhibit 4.)

25. The Department denied that it had disclosed information from the Appellant's confidential incident report, and asserted that it was more likely the inmate who had

disseminated particulars about their relationship among the other inmates. After the Appellant's formal complaint to Investigative Services, the Department investigated, transferred the inmate and disciplined correction officers for spreading rumors. (Exhibit 4.)

26. MCAD found that the Appellant had established a prima facie case of sexual harassment and hostile work environment due to the December 4, 2008 comments, her report of them, leaving work for safety concerns, being informed that inmates and corrections officers were "eating her alive," and phone calls with profane messages.

> Such information and phone calls impressed upon the Appellant that she would return to a hostile, humiliating and offensive work environment. In a prison setting, such a situation would likely create a safety issue raising concerns about the inmate's willingness to view Complainant as an authority figure, which interferes with Complainant's ability to perform her job duties.

(Exhibit 4.)

27. However, MCAD found that the Department had acted in response to the Appellant's concerns and allegations according to practice and procedure. There is a protocol for dealing with conflicts involving inmates, the correction officer fills out a Conflict Form and the inmate is transferred immediately. The Appellant never filled out a Conflict Form, in order to give the Department a reason to transfer the inmate. (Exhibit 4.)

28. When the Appellant overheard inmates discussing her on December 4, 2008, the Department was already in the process of transferring the inmate. The Department acknowledged that the December 14, 2008 harassing phone calls were placed from MCI-Concord but could not identify the callers. The Department insisted that it took prompt action upon receiving the Appellant's December 17, 2008 complaint. (Exhibit 4.)

29. On December 9, 2011, the MCAD reviewer recommended a Lack of Probable Cause finding:

> [At the DOC] Hostile work environment harassment is defined by the Prevention and Elimination of Discrimination and Retaliation in the Workplace policy 103-DOC-239 as "where a person's deliberate and repeated conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or offensive work environment based on an employee's membership in a protected class."
>
> The Complainant has failed to articulate how the alleged DOC disclosure of her prior intimate relationship with an inmate was deliberate and repeated conduct by the DOC which had the effect or purpose of unreasonably interfering with her work performance based on her membership in the protected class, female. Moreover, although the Complainant did not articulate the above, this reviewer notes that there is no evidence that the Complainant experience a hostile work environment or sexual harassment as defined by "The Prevention and Elimination of Discrimination and Retaliation in the Workplace: policy 103-DOC-239 or MGL Chapter 151B.[3]

(Exhibits 3I18, 4 and 5.)

The MCAD Office of Diversity recommended that:

> ... on-going training is made available to all line staff that reinforces the significance of "Conflict Policy DOC-103-426-sec.04" and Blue Book policy "Interpersonal Relationships among Employees,["] Chapter 6 paragraph (a) and (b).

(Exhibit 3I18.)

*D. Third Investigation: Allegations from Confidential Informant(s)*

30. On January 19, 2011, Captain Jeffrey Padula received information from a confidential informant (CI) that the Appellant was involved in a sexual relationship with Inmate A. The CI stated that the Appellant had performed oral sex on the inmate and allowed him to penetrate her digitally on January 17, 2011 while she was on duty in the Property Department

[3] In its Dismissal and Notification of Rights, under the heading "Your complaint has been dismissed for the following reasons," MCAD checked off the box "[X] The Commission issues the following determination. Based upon the Commission's investigation, the Commission is unable to conclude that the information obtained establishes a violation of the statutes. This does not certify that the Respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this complaint." (Exhibit 4.)

office, located in the L building. A review of the roster showed that the Appellant was on duty in the Property Department on January 17, 2011. (Exhibit 2.)

31. The CI alleged that the Appellant brought her cell phone into MCI-Concord for Inmate A's use and also brought contraband into the facility for Inmate A's use. (Exhibits 2, 3H and 3J8; Testimony of McCaw.)

32. 103 DOC 501.05.A. 3. a. of the Institution Security Procedures (September 2010)[4] provided the protocol for taking cell phones into Department facilities:

> Personal cell phones are prohibited from entering any DOC institution. … Any cell phone … capable to taking photos or video shall be prohibited from entering the institution …
> During an institution emergency requiring the response of a Special Operations Unit, the commanders of those units … shall be allowed entrance into the facility with a cell phone equipped with photo or video capabilities. …

(Exhibit 9.)

33. 103 DOC 501.05. A. 1. of the Institution Security Procedures provided the protocol for taking items into Department facilities:

a. All articles allowed into the institution shall be subject to search upon entering and exiting the pedestrian trap.
b. Employees may only bring in a minimum of personal items. …

(Exhibit 9.)

34. At all relevant times, the Appellant remained subject to Rule 8(c) of the Department's Rules and Regulations, which prohibited all contact between correction officers and inmates without the permission of management, except for a chance meeting. (*See supra* Finding of Fact 8; Exhibit 8.)

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[4] The current version of 103 DOC 501 Institution Security Procedures became effective in October 2011. (Exhibit 9.)

35. In further regulating contact among employees, inmates, and former inmates in order to maintain the safety and the security of the department, the Department promulgated in Rule 4(d):

> Personal telephone calls shall not be made or received during the course of your duties without the specific approval of your Superintendent or DOC Department Head, or their designee's [*sic*]. Urgent messages may be received and forwarded with a record kept identifying the caller.

36. Rule 16 also provides:

> Employees must not bring personal property other than personal effects and car, on or within the precincts and dependencies of the institution without the prior approval of the Superintendent or his/her immediate subordinate. ...

(Exhibit 8.)

37. On January 21, 2011, Central Intelligence Unit (CIU) officer Brian Estevez received information from a confidential informant (CI 2) that the Appellant had hired Inmate A to work in the Property Department as an inmate runner. CI 2 further stated that the Appellant brought her cell phone into the facility and allowed inmate A to use it for making telephone calls and texting photos of himself to his family. Inmate A bragged about his sexual relationship with the Appellant and revealed that she brought food, cosmetics, and pills into the institution for his use. CI 2 also said that there was an iPhone application on Property Sergeant Thomas Hebert's desk computer, which was placed there with the Appellant's cell phone. A few days earlier, the Appellant had passed out in the Property Department office for several hours during the night. (Exhibits 3E and 3G.)

38. The Department did not determine whether CI and CI 2 were the same person. (Exhibit 3F.)

39. On January 27, 2011, the Internal Affairs Unit (IAU) ordered that the Property Department computer be delivered immediately to the Office of Technology and Information

Services for a forensic review. IAU was unable to find an iPhone application on the computer or evidence of any files associated with an iPhone thereon. (Exhibits 3E and 3F.)

40. Lieutenant Mark McCaw was assigned to investigate the matter on January 24, 2011. (Exhibits 3B and 3E; Testimony of McCaw.)

41. On January 25, 2011, Lt. McCaw recommended that Deputy Dinardo transfer Inmate A from MCI-Concord. The inmate was transferred on January 27, 2011 to MCI-Shirley. (Exhibits 3D and 3F.)

42. Lt. McCaw contacted Sgt. Ciccone to discuss the matter on January 26, 2011. Lt. McCaw interviewed Inmate A on January 28, 2011. Inmate A denied sexual contact with the Appellant, denied that he had used her phone and that she has ever conveyed items to him. (Exhibit 3F.)

43. On January 27, 2011, Lt. McCaw requested a mail monitor on inmate A's mail, and the MCI-Shirley Inner Perimeter Security Unit (IPS) began to do so on January 28, 2011. The IAU began to monitor Inmate A's telephone calls. (Exhibits 3D and 3F.)

44. On January 31, 2011, Lt. McCaw interviewed Cpt. Padula, who said that CI 2 said that Inmate A was bragging to other inmates about his sexual contact with the Appellant. Because Inmate A had told Padula that, in the past, the Captain found him credible. Cpt. Padula was familiar with the location where the alleged sexual act took place, and said that there were times when staff and an inmate could be alone there. The Captain did not know the Appellant and was unaware of any corroborating information. (Exhibits 3D and 3F.)

45. The IPS was able to retrieve an outgoing letter from inmate A on February 18, 2011.[5] IPS photocopied the handwritten letter and returned it to the mail stream. The letter was riddled with spelling and grammar errors and stated in pertinent part:

> I had 4 C/O that were on my team. ...but the chick was the one that was really with me. She was taking care of me for shore. The bitch was in love ... I bagd it. She was letting me use my cell phone to call my out of town bichis and all that. Bich was brining me home cooked food every day. She was telling me she wanted to get up with the kid when I got out. She was gonna bring me out to wear she's from so we can have fun ... You know who this bitch is to remember that bich Rivera. .... She took a picture of me with her iPhone when I wasn't looking and saved it on her phone, and then weeks later, she dropt her phone some wear in the jail and another C/O found it, and he was trying to find out who's phone it was, so he lookt through the phones pics and the first thing he saw was my pic, so the motherfucker told on me. So the IPS grab me up and brong me to the hole [segregation]. I have told her before not to save any pic of me cus one time I let her take a pic of me without a shirt ...

(Exhibits 3F and 3I3.)

46. The IAU reviewed staff rosters to determine where the Appellant was assigned from December 1, 2010 until January 27, 2011. The rosters showed that the Appellant was in

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[5] 103 CMR 481.00 Inmate Mail Policy

481.13 Inspection of Non-Privileged Correspondence and Packages

(2) ... The opening and inspection of outgoing non-privileged mail and packages at all security level facilities shall be at the discretion of the superintendent to prevent the transmission of materials and/or information which represents a threat to security, order, rehabilitation or public safety ...

481.14 Reading/Disapproval of Outgoing Non-Privileged Correspondence

It is the policy of the Massachusetts Department of Correction not to read or censor outgoing mail, except where necessary to protect legitimate governmental interests.

(1) The superintendent may authorize the reading of outgoing non-privileged correspondence when in his opinion such action is necessary to prevent the transmission of materials and/or information which represents a threat to security, order, rehabilitation or the public safety.

(2) For outgoing mail, such authorization may be granted when the superintendent has received specific information that a particular inmate's mail contains information which may jeopardize institutional security, order, rehabilitation or the public safety. Ordinarily, such specific information shall indicate that the contents of the outgoing correspondence fall as a whole or in significant part into any one of the following categories:

... (b) plans for criminal activity or any activity which violates any departmental or institutional rule, regulation, order or policy; ...

training on December 1, 2010, was not assigned to the Property Department on December 2 and 3, 2010, and, due to shift swaps with other correction officers, did not work on the days of December 23, 2010, January 24, 25, 26 and 27, 2011. Lt. McCaw calculated that there were twenty-six days that the Appellant worked between December 6, 2010 and January 21, 2011. The Appellant worked on December 6, 7, 8, 9, 10, 15, 16, 21, 24, 27, 29, 30, and 31 in 2010. The Appellant worked on January 3, 4, 5, 6, 7, 11, 12, 14, 17, 18, 19, 20 and 21 in 2011. (Exhibits 3F, 3J5 and 3J7; Testimony of McCaw.)

47. Because the allegations made by the confidential informant(s) were criminal, the Department notified the Middlesex District Attorney's Office (DA) of the alleged incidents. On February 20, 2011, the DA's office filed an administrative subpoena with the cell phone provider requesting the Appellant's cell phone records from December 1, 2010 until January 27, 2011. At that time, the Appellant's cell phone number was xxx-xxx-3228. The Department received the cell phone records on March 1, 2011. Lt. McCaw then contacted the New England State Police Information Network (NESPIN) for assistance in analyzing the records. (Exhibits 3D, 3F, 3I(1) and 3J4; Testimony of McCaw.)

48. NESPIN's analysis revealed that there were 1,186 instances of incoming and outgoing telephone calls and/or text messages made while the Appellant was on duty, between 1:00 p.m. and 8:50 p.m., on the twenty-six days that she worked between December 6, 2010 and January 21, 2011. 1,083 of the 1,186 phone usages were text messages and 117 were telephone calls. (Exhibits 3F, 3J4 and 3J9; Testimony of McCaw.)

49. The cell phone details also showed that the Appellant had sent and received telecommunications (including text, voice, and data) to ninety-three different numbers from December 1, 2010 until January 27, 2011. NESPIN was able to provide subscriber

information for all telecommunications except for those involving web browsing, instant messaging through a social media website such as Facebook, and network games. Those telecommunications were sent or received without a phone number. (Exhibits 3F and 3J9; Testimony of McCaw.)

50. The Appellant placed fifty-six phone calls and received sixty-one calls while she was on duty from December 1, 2010 until January 27, 2011. The Appellant's cellular phone either uploaded or downloaded data to and from the cellular network on each of those twenty-six days that she was on duty from December 1, 2010 until January 27, 2011. The Appellant also sent 549 text messages and received 534 text messages while she was on duty from December 1, 2010 until January 27, 2011. (Exhibit 3F and 3J9; Testimony of McCaw.)

51. Rule 7(d) of the Rules and Regulations provides:

> Employees should not read, write, or engage in any distracting amusement or occupation during their required work hours, except to consult rules or other materials necessary for the proper performance of their duties.

52. Global Tel*Link System (GTL) is the vendor for the inmates' personal telephone calls. The Department must approve each telephone number after inmates file a written request. Inmates must identify the name and the relationship of the person they wish to call. Pre-approved numbers are listed on the inmates' PIN sheet. During the calls, the inmates are subject to live monitoring. GTL records the calls and maintains them in a database. (Exhibit 3F; Testimony of McCaw.)

53. On March 11, 2011, Lt. McCaw entered the ninety-three telephone numbers gleaned from the Appellant's cell phone records into the GTL. He also requested Criminal Offender Registry Information and Registry of Motor Vehicle checks and internet queries on the subscribers. (Exhibit 3F; Testimony of McCaw.)

54. Lt. McCaw found that six of the ninety-three phone numbers matched telephone numbers in the GTL database. Those numbers were xxx-xxx-8116, xxx-xxx-8331, xxx-xxx-7970, xxx-xxx-5645, xxx-xxx-2313 and xxx-xxx-8623. Those same telephone numbers were on the PIN lists of seventeen different MCI-Concord inmates during the period from December 1, 2010 until January 27, 2011. However, there was no evidence linking Inmate A to any of the ninety-three numbers. (Exhibit 3F; Testimony of McCaw.)

55. Upon appointment to a Department position, Department employees acknowledge their receipt and acceptance of the Rules and Regulations. The following Department Rules and Regulations provide:

General Policy I:

> ... Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/ her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and 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. Your acceptance of appointment to the Massachusetts Department of Correction shall be acknowledged as your acceptance to abide by these rules and regulations. ...

Rules and Regulations
Department Rule 1:

> 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.

Rule 4(d):

> Personal telephone calls shall not be made or received during the course of your duties without the specific approval of your Superintendent or DOC Department Head, or their designee's. Urgent messages may be received and forwarded with a record kept identifying the caller.

Rule 16:

> Employees must not bring personal property other than personal effects and car, on or within the precincts and dependencies of the institution without the prior approval of the Superintendent or his/her immediate subordinate. You must permit your car and effects to be searched or inspected, which should be done in your presence, except, where the safety and good order of the institution is considered sufficiently important to warrant otherwise. The posting of political or other handbills is forbidden on the property of the institution. Pictures or photographs of institution property or inmates may only be taken with the knowledge and approval of the Superintendent.

Rule 19(c) provides:

> 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.

*a. xxx-xxx-8116*

56. A single text message was sent from xxx-xxx-8116 to the Appellant's cell phone on January 3, 2011 at 6:59 p.m. The Appellant was on duty at this time. (Exhibit 3F; Testimony of McCaw.)

57. NESPIN provided that E from Saugus, MA was the subscriber for telephone number xxx-xxx-8116. There was no information on E in the Inmate Management Service (IMS) to indicate that he had ever been incarcerated within the DOC, and he had no criminal record. According to the GTL, three inmates had this number on their PIN sheets. The first inmate, Inmate F, listed the number on his PIN sheet as that of his friend, G. (Exhibit 3F; Testimony of McCaw.)

58. Due to his investigation, Lt. McCaw identified xxx-xxx-8116 as belonging to former Inmate G. By listening to the recorded phone calls via the GTL, he also determined that Inmate F was the brother of G. (Exhibit 3F; Testimony of McCaw.)

59. G was a former inmate who was committed from October 2, 1998 until December 30, 1999. He had been arraigned thirty times and was convicted for multiple drug distribution offenses. According to Lynn Police Department records, former Inmate G also owned a store in Lynn, MA. Inmate F was held at MCI-Concord from September 18, 2008 until December 18, 2008. He was held at Pondville Correctional Center on January 3, 2011 when the January 3, 2011 text message was sent to the Appellant's cell phone. Inmate F was affiliated with a gang.. (Exhibit 3F; Testimony of McCaw.)

60. On March 7, 2011, Lt. McCaw listened to the recorded telephone call that inmate F had placed to 617-240-8116 on September 21, 2010. At that time, Inmate F was being held at MCI-Norfolk. Inmate F spoke for twenty minutes former Inmate G, discussing criminal activity in the Lynn, Massachusetts area. Inmate F mentioned that another inmate, H, had been transferred to MCI-Norfolk because his girlfriend was going to work as a correction officer at MCI-Concord. (Exhibits 3D and 3F; Testimony of McCaw.)

61. The Appellant returned to work September 9, 2010, approximately two weeks before the September 21, 2010 call, after being out of work since December 4, 2008. (Exhibit 3J; Testimony of McCaw.)

62. On September 29, 2010, Inmate F called xxx-xxx-8116 again. Former Inmate G referred to Inmate F as "cuz" throughout the conversation. Former Inmate G said that Inmate H was a liar because he knew the correction officer involved. Former Inmate G told Inmate F said that he had spoken to the correction officer and that she had told him that she was not Inmate H's girl, that she had not been working because she had a lawsuit against the jail, that she had even produced the appropriate documentation – which also listed Inmate H's name, and that Inmate H had made the whole story up. Former Inmate G identified Inmate H's brother as J. During the

conversation, he stated that the correction officer frequented his store on a daily basis and provided details of her car, her hair, her ethnicity and finally her name, Ariana. (*See supra* Findings of Fact 12-29; Exhibits 3F and Exhibit 3I; Testimony of McCaw.)

63. In the conversation, former Inmate G also said that the Appellant promised him that she would have her best friend, a fellow correction officer, look out for Inmate F. According to G, that same correction officer also let the Appellant know Inmate H was still housed at MCI-Concord. Former Inmate G was under the impression that Inmate H was moved at the Appellant's request as a condition of her return to work. (*See supra* Findings of Fact 12-29; Exhibit 3F; Testimony of McCaw.)

64. Rule 3(a) provides:

> In your discussion of the affairs of the institution and/or Department of Correction you must be circumspect and discreet, limiting such discussions or revelations strictly to those employees in or about the institution or Central Administrative Offices, unless otherwise necessitated in the line of duty. Discussion will be permitted with an outside organization affiliated with a recognized employees' organization if such discussion is limited to hours, wages, and employment conditions.

65. The Appellant's MCAD Complaint was still pending at the time of the September 21 and 29, 2010 conversations between Inmate F and G. (Exhibit 3J8 and 6; Testimony of Appellant.)

66. During the Civil Service hearing, the Appellant testified that she had been aware of former Inmate G's arrest record, but he was a childhood friend who was also dating another friend. (Testimony of Appellant, Testimony of McCaw.)

67. At the Commission hearing, the Appellant testified that she had discussed her MCAD case involving Inmate H with former Inmate G. (Exhibit 6; Testimony of the Appellant.)

68. According to the GTL, Inmate K was the second inmate to list xxx-xxx-8116 on his PIN sheet. Inmate K designated the number as that of his friend, L. Inmate K had been held at MCI-Concord since February 9, 2009, and was housed there throughout the Department investigation. There was no information on L in the IMS, and he had no criminal record. (Exhibit 3F; Testimony of McCaw.)

69. Lt. McCaw listened to the four phone calls that Inmate K made to xxx-xxx-8116. The same person, believed to be G, answered each time. Those conversations offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

70. According to the GTL, Inmate M was the third inmate to list [redacted]-8116 on his PIN sheet. Inmate K designated the number as that of his cousin, G. According to the IMS, Inmate K was from Boston and was a suspected member of the Four Corners Pirates street gang. (Exhibit 3F; Testimony of McCaw.)

71. Inmate K was held at MCI-Concord from October 6, 2005 until February 17, 2006. He was held at MCI-Shirley throughout the Department investigation. (Exhibit 3F; Testimony of McCaw.)

72. Inmate K did not complete any calls to xxx-xxx-8116 via the GTL telephone system. (Exhibit 3F; Testimony of McCaw.)

*b. xxx-xxx-8331*

73. There were 103 telecommunications, comprising telephone calls and text messages, between xxx-xxx-8331 and the Appellant's cell phone. Each of the telecommunications occurred when the Appellant was on duty in the Property Department at MCI-Concord between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

74. NESPIN determined that N from Boston, MA was the subscriber for telephone number xxx-xxx-8331. There was no information on N in the IMS to indicate that he had ever been incarcerated within the DOC, and he had no criminal record. According to the GTL, Inmate O listed the number on his PIN sheet as that of his son, P. (Exhibit 3F; Testimony of McCaw.)

75. Inmate O was held at MCI-Concord from June 29, 2010 until January 1, 2011 when he was transferred to the Souza Baronowski Correctional Center (SBCC). (Exhibit 3F; Testimony of McCaw.)

76. Lt. McCaw listened to the eleven recorded telephone calls that Inmate O placed to xxx-xxx-8331. Each time Inmate O called, an unidentified female answered. Based on those conversations, she was the mother of the inmate's young son. Those conversations offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

*c. xxx-xxx-7970*

77. According to the GTL, nine inmates listed xxx-xxx-7970 on their PIN sheets. Six of the nine inmates completed sixty-two telephone calls to that telephone number. (Exhibit 3F; Testimony of McCaw.)

78. There were also 39 text messages between xxx-xxx-7970 and the Appellant's cell phone: twenty-four were outgoing from the Appellant's cell phone and fifteen were incoming. Each of the telecommunications occurred when the Appellant was on duty in the Property Department at MCI-Concord between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

79. NESPIN provided that Q from Lynn, MA was the subscriber for telephone number [redacted]-7970. There was no information on Q in the IMS to indicate that he had ever been incarcerated within the Department, and he had no criminal record.

80. From listening to the sixty-two recorded calls, Lt. McCaw was able to determine that the six inmates spoke to C, a former inmate who was on parole at the time of the Department's investigation. Parolee C, who was from Lynn, MA, had been held at MCI-Concord from April 10, 2006 until October 11, 2006. He was paroled on September 28, 2009, and was on supervised release during the Department investigation. Parolee C had been charged with possession and intent to distribute a class B substance in 2005. (Exhibit 3F; Testimony of McCaw.)

81. First inmate: according to the GTL, Inmate R listed [redacted]-7970 on his PIN sheet as that of S. Inmate R completed twenty calls to [redacted]-7970 between December 6, 2010 and January 21, 2011, and each time C answered the telephone. On most of those calls, Inmate R asked parolee C to initiate a three-way call for him. On those three-way calls, Inmate R spoke to an unidentified female. Based on the conversations, Lt. McCaw was able to determine that Inmate R had been involved in a relationship with the unidentified female before his incarceration. Those conversations offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

82. Second inmate: according to the GTL, Inmate T listed xxx-xxx-7970 on his PIN sheet as that of C, "family." Inmate R completed thirty-three telephone calls to [redacted]-7970 between December 6, 2010 and January 21, 2011. Lt. McCaw listened to those thirty-three telephone calls and determined that the other party in the conversations was Parolee C. (Exhibit 3F; Testimony of McCaw.)

83. Inmate T was housed at MCI-Concord from March 7, 2006 until September 14, 2006 before being transferred to North Central Correctional Institution (NCCI) at Gardner. (Exhibit 3F; Testimony of McCaw.)

84. Inmates T and C met each other when they were held together at MCI-Concord. Parolee C had been held at MCI-Concord from April 10, 2006 until October 11, 2006 when he was transferred to NCCI. According to IMS, Inmate T had known gang affiliations with the Eastern Ave. Posse and the Latin Kings. (Exhibit 3F; Testimony of McCaw.)

85. During their January 14, 2011 telephone conversation, Parolee C alleged having a sexual encounter with a redhead the previous evening, stating, "I did her dirty last night." Parolee C gave other identifying information about the Appellant, who had red hair at the time of the January 14, 2011 conversation and during the time of the Department investigation. (Exhibit 3F; Testimony of McCaw.)

86. Third inmate: according to the GTL, Inmate U listed xxx-xxx-7970 on his PIN sheet as that of V, his cousin. Inmate U completed one telephone call to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

87. Inmate U was held at MCI-Concord from March 27, 2007 until October 4, 2007. Inmate U was being held at the Boston Pre-Release Center when the thirty-nine contacts between xxx-xxx-7970 and the Appellant's cell phone took place. Inmate U had no known gang affiliation. This one telephone call completed by Inmate U to xxx-xxx-7970 offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

88. Fourth inmate: according to the GTL, Inmate W listed xxx-xxx-7970 on his PIN sheet as that of C, his friend. Inmate W completed two telephone calls to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

89. Inmate W was housed at MCI-Shirley during the course of the Department investigation, but had been held at MCI-Concord from March 25, 2005 until September 23, 2005. According to IMS, he was affiliated with the La Familia gang. His conversations to xxx-xxx-7970 offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

90. Fifth inmate: according to the GTL, Inmate X listed xxx-xxx-7970 on his PIN sheet as that of C2, his friend. Inmate U completed four telephone calls to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

91. Inmate X was housed at MCI-Concord from March 20, 1997 until May 21, 1997, and was housed at SBCC during the course of the Department investigation. According to IMS information, he was affiliated with the Five Percenters gang. Inmate X's telephone calls to xxx-xxx-7970 offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

92. Sixth inmate: according to the GTL, Inmate Y listed xxx-xxx-7970 on his PIN sheet as that of Z, his friend. Inmate Y did not complete any telephone calls to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. According to IMS information, he was from Marshfield, MA and had no known gang affiliation. (Exhibit 3F; Testimony of McCaw.)

93. Seventh inmate: according to the GTL, Inmate AA listed xxx-xxx-7970 on his PIN sheet as that of BB, his friend. Inmate AA did not complete any telephone calls to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

94. Inmate X was housed at MCI-Norfolk during the course of the Department investigation and was paroled on March 11, 2011. According to IMS information, he was from Attleboro, MA and was affiliated with the Mafioso gang. (Exhibit 3F; Testimony of McCaw.)

95. Eighth inmate: according to the GTL, Inmate CC listed xxx-xxx-7970 on his PIN sheet as that of DD, his friend. Inmate CC did not complete any telephone calls to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

96. Inmate CC was housed at MCI-Norfolk during the course of the Department investigation and was paroled on March 11, 2011. According to IMS, he was from Lawrence, MA and was affiliated with the Latin Gangster Disciples gang. (Exhibit 3F; Testimony of McCaw.)

97. Ninth inmate: according to the GTL, Inmate EE listed xxx-xxx-7970 on his PIN sheet as that of C3, his friend. Inmate EE completed two telephone calls to xxx-xxx-7970 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

98. Inmate EE was housed at MCI-Norfolk during the course of the Department investigation and was paroled on March 11, 2011. According to IMS, he was from Lynn, MA and was affiliated with the Latin Gangster Disciples gang. (Exhibit 3F; Testimony of McCaw.)

*99.* The two telephone calls completed by Inmate EE to xxx-xxx-7970 offered no substance to the Department investigation. (Exhibit 3F; Testimony of McCaw.)

*d. xxx-xxx-5645*

100. There were eight text messages between xxx-xxx-5645 and the Appellant's cell phone. Each text occurred when the Appellant was on duty in the Property Department at MCI-Concord between December 6, 2010 and January 21, 2011. There was one incoming text to the Appellant's cell phone on December 16, 2010, two incoming texts and one outgoing text from the Appellant's cell phone on December 21, 2010 and two incoming texts and two outgoing texts from the Appellant's cell phone on January 20, 2011. (Exhibit 3F; Testimony of McCaw.)

101. NESPIN determined that FF from Decatur, GA was the subscriber for telephone number xxx-xxx-5645. There was no information on FF in the IMS to indicate that she had ever been incarcerated within the DOC, and she had no criminal record. According to the GTL, Inmate GG listed the number on his PIN sheet as that of his step-sister, FF. (Exhibit 3F; Testimony of McCaw.)

102. Inmate GG was held at MCI-Concord from March 6, 2009 until March 8, 2011, when he was transferred to Old Colony Correctional Center OCCC). According to the IMS, Inmate GG was from Hyannis, MA and had no known gang affiliations. Inmate GG never completed any telephone calls to xxx-xxx-5645 over the GTL system. (Exhibit 3F; Testimony of McCaw.)

*e. xxx-xxx-2313*

103. There were three telecommunications between the Appellant's cell phone and [redacted]-2313 on December 6, 2010. There was an outgoing telephone call from the Appellant's cell phone to [redacted]-2313 at 7:03 p.m. That call lasted for three minutes and seven seconds. At 8:06 p.m., an attempted call from [redacted]-2313 to the Appellant's cell phone could not be completed. Then at 8:09 p.m., there was an incoming text to the Appellant's cell phone. Each telecommunication occurred when the Appellant was on duty in the Property Department at MCI-Concord. (Exhibit 3F; Testimony of McCaw.)

104. NESPIN determined that HH from Boston, MA was the subscriber for telephone number [redacted]-2313. According to IMS, HH had been released from Northeastern Correctional Center, Concord, MA on December 27, 2000. HH had been arraigned fifty-two times and had been convicted of the offense of possession of a firearm. (Exhibit 3F; Testimony of McCaw.)

105. Inmate GG was held at MCI-Concord from March 6, 2009 until March 8, 2011, when he was transferred to Old Colony Correctional Center (OCCC). According to the IMS, Inmate GG was from Hyannis, MA and had no known gang affiliations. Inmate GG never completed any telephone calls to [redacted]-5645 over the GTL system. (Exhibit 3F; Testimony of McCaw.)

106. According to the GTL, Inmate II listed [redacted]-2313 on his PIN sheet as that of JJ, his friend. Inmate II did not complete any telephone calls to 857-222-2313 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

107. Inmate II was housed at MCI-Concord from January 3, 2006 until May 9, 2006. Inmate II was being held at SBCC during the course of the Department investigation. According to IMS information, he had no known gang affiliation. (Exhibit 3F; Testimony of McCaw.)

108. According to the GTL, Inmate KK listed [redacted]-2313 on his PIN sheet as that of LL, his friend. Inmate KK did not complete any telephone calls to [redacted]-2313 between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

109. Inmate II was housed at MCI-Concord from January 10, 2007 until August 3, 2007. Inmate II was being held at MCI-Norfolk during the course of the Department investigation. According to IMS information, he had no known gang affiliation. (Exhibit 3F; Testimony of McCaw.)

*f. [redacted]-8623*

110. There was an incoming call from xxx-xxx-8623 to the Appellant's cell phone on December 6, 2010 at 2:54 p.m. That call lasted fifty-six seconds. On December 7, 2010, there were two incoming calls to the Appellant's cell phone from [redacted]-8623: at 7:47 p.m. for fifty-one seconds and at 7:48 p.m. which was not completed. At 7:57 p.m., there was an outgoing call

from the Appellant's cell phone which lasted one minute and thirty-three seconds. At 7:59 p.m., there was another outgoing call from the Appellant's cell phone to xxx-xxx-8623. That call lasted thirteen minutes and fifty seconds. At 8:15 p.m., there was another outgoing call to xxx-xxx-8623, which lasted for two minutes and twenty-four seconds. Each call occurred when the Appellant was on duty in the Property Department at MCI-Concord between December 6, 2010 and January 21, 2011. (Exhibit 3F; Testimony of McCaw.)

111. NESPIN determined that MM was the subscriber for telephone number xxx-xxx-8623. There was no information on MM in the IMS to indicate that he had ever been incarcerated within the DOC, and he had no criminal record. According to the GTL, Inmate NN listed the number on his PIN sheet as that of his friend, MM2. (Exhibit 3F; Testimony of McCaw.)

112. Inmate NN was held at MCI-Concord from April 7, 1993 until April 9, 1993. According to the IMS, Inmate NN was housed at Bay State Correctional Center during the course of the Department investigation, and had no gang affiliation. Inmate NN never completed any telephone calls to xxx-xxx-8623 over the GTL system. (Exhibit 3F; Testimony of McCaw.)

113. On August 31, 2011, again with the assistance of the DA's office, the Department sought a search warrant for the cell tower in order to identify the location of the Appellant's cell phone at the time telecommunications were made while she was on duty. (Exhibits 3D and 3J(4); Testimony of McCaw.)

114. On October 18, 2011, Lt. McCaw reviewed the Appellant's cell phone records and cell tower coordinates to ascertain the location of her cell phone when telecommunications were made during her working hours. The cell tower records confirmed that the

telecommunications were transmitted by towers located at 40Y Annursac Hill Road, Concord, MA and 843 Acton Street, Carlisle, MA, during the hours in which the Appellant was on duty, and in the vicinity of MCI-Concord, Concord, MA. Those cellular telephone tower locations were determined by the longitude and latitude coordinates contained in the call phone records of the Appellant. (Exhibits 3D, 3F, 3J9, 10 and 11; Testimony of Lt. McCaw.)

115. On September 27, 2011, Lt. McCaw asked the Federal Bureau of Prisons (FBP) to run the Appellant's cell phone number through the FBP inmate telephone system. The Appellant's cell phone number was listed on federal Inmate B's PIN sheet on November 18, 2009, who identified the number as that of a friend. Federal prisoner B (JL), who was from Lynn, MA, had called the Appellant's telephone number twenty-six times between April 2, 2009 and January 25, 2010. All outgoing calls from the Federal Bureau of Prisons were branded, i.e., they are preceded by a recording that identifies that the call is being made from the correctional facility. (Exhibits 3D, 3F and 3I17; Testimony of McCaw.)

116. Federal Inmate B was held at Fort Dix Federal Prison, Fort Dix, NJ after being convicted of drug and firearm offenses. He was sentenced to ninety months and was on three years' supervised release at the time of the investigation. (Exhibits 3F and 3I17; Testimony of McCaw.)

117. The Appellant did not inform the Department of her prohibited contact with federal Inmate B. The Appellant was on leave from the Department at the time of these calls. (Testimony of McCaw, Testimony of the Appellant.)

118. On October 25, 2011, Lt. McCaw interviewed Parolee C IF at the Parole office in Lawrence, MA in the presence of Captain Tina Goins, Parole Officer Laurie O'Donnell, and Parole Supervisor James Roache. Paroled on September 28, 2009, Parolee C said that he had

known the Appellant before he was incarcerated at MCI-Concord from April 10 until October 11, 2006. Parolee C saw the Appellant at work while he was imprisoned at MCI-Concord, but he denied any inappropriate behavior between them at that time. (*See supra* Findings of Fact 77-82; Exhibit 3D.)

119. After his release from MCI-Concord, Parolee C had a chance meeting with the Appellant. The Appellant told him that she was not working because she had a "case against the jail." (*See supra* Findings of Fact 77-82; Exhibit 3D.)

120. The Appellant and Parolee C exchanged telephone numbers and communicated by text messaging and on Facebook. Parolee C said that he and the Appellant had sexual intercourse when she showed up at his house unexpectedly in March 2011. (Exhibit 3F; Testimony of McCaw.)

121. When Lt. McCaw questioned him about the alleged sexual encounter as recounted in his recorded January 14, 2011 telephone call, Parolee C said that he was trying to impress upon Inmate T that he was friendly with the Appellant. (*See supra* Finding of Fact 82; Exhibits 3F and 8.)

122. Parolee C showed Lt. McCaw approximately ten text messages from the Appellant on his cell phone, the last one dated October 17, 2011. That last message stated that the parolee was treating the Appellant like a "groupie." (Exhibit 3F; Testimony of McCaw.)

123. Parolee C denied speaking with MCI-Concord inmates via the Appellant's cell phones. He said that she was the only person he ever communicated with on that telephone number. (Exhibit 3F; Testimony of McCaw.)

124. The Appellant did not inform the Department of her prohibited contact with Parolee C. The Appellant testified before the Commission that she was aware that pursuant to

Rule 8(c), she had to seek Department approval before communicating with inmates or former inmates and that she had failed to do so. Throughout the Department investigation, she failed to disclose her contact with the inmates and former inmates. (Testimony of McCaw, Testimony of the Appellant.)

125. On October 25, 2011, Lt. McCaw attempted to interview the Appellant after reading her her Miranda rights. The Appellant then requested a lawyer and agreed to telephone McCaw before the end of the day. She failed to do so. (Exhibit 3D.)

126. By letter dated October 25, 2011, Superintendent Gelb informed the Appellant that she was detached with pay and without prejudice effective immediately, pending the results of an investigation. (Exhibit 3I19.)

127. On October 27, 2011, Lt. McCaw scheduled an interview for October 31, 2011 for the Appellant. On October 31, 2011, the Appellant appeared with counsel and union representation. Cpt. Goins was also present. Lt. McCaw informed the Appellant that she would be Mirandized because the allegations were criminal. He then informed her that a search warrant and subpoena for her cell phone records had been obtained through the DA's office. Lt. McCaw also informed the Appellant that the interview would be non-custodial and that she would be free to leave without threat of discipline. At that point, Appellant's counsel ended the interview. (Exhibits 3D and 3F.)

128. On October 28, 2011, Lt. McCaw re-interviewed Inmate A at MCI-Shirley in regard to his letter, which was intercepted on February 18, 2011. Inmate A denied that the letter was true, and stated that he wanted to impress his friends. He was concerned that his friends in Springfield would think that his abrupt transfer was due to "snitching." Such transfers were a common practice in the Department. Inmate A stated that he was able to fabricate the letter

based on the officers' questions during his January 27, 2011 interview. (*See supra* Finding of Fact 45; Exhibits 3D and 3F.)

129. On November 29, 2011, Assistant Deputy Commissioner Karen Hetherson ordered the Appellant to appear for an Internal Affairs interview on December 13, 2011. Commissioner Hetherson advised that the Appellant's failure to appear would serve as grounds for discipline. (Exhibit 3I20.)

130. On December 13, 2011, Lt. McCaw interviewed the Appellant in the Internal Affairs office in Shirley. Appellant's counsel, a union representative, and Cpt. Goins were present. The Appellant asserted her Fifth Amendment rights under the United States Constitution and her rights under Article 12 of the Massachusetts Declaration of Rights, but agreed to answer questions on a case by case basis. (Exhibits 3D, 3F and 3I22.)

131. The Appellant said that she knew that Inmate A was an inmate worker assigned to the Booking Area at MCI-Concord. She denied having any type of relationship with him, and denied bringing him food, cosmetics or clothing. When asked if she ever brought him pills or drugs, or if she ever had sexual contact with Inmate A, the Appellant asserted her right against self-incrimination. (*See supra* Finding of Fact 45; Exhibits 3D and 3F.)

132. The Appellant denied that Inmate A was allowed to use her cell phone and stated that he could not have used it without her knowledge. (Exhibits 3D and 3F.)

133. The Appellant admitted that she had brought her cell phone into the facility at MCI-Concord, but denied that any inmate had possession of her phone while she was at work. She admitted that she brought her cell phone into work often although she knew that it was against Department regulations. The Appellant stated that the cell phone was for her personal use in downtime, and admitted to texting, making telephone calls, surfing the internet, and

gaming during work hours on a regular basis. (Exhibits 3D, 3F, 3J8 and 6; Testimony of the Appellant.)

134. Lt. McCaw advised the Appellant that the Department had obtained her cell phone records and was able to determine that she had used her cell phone on dates and times while she was on duty between December 6, 2010 and January 21, 2011. The Appellant admitted that her cell phone number was xxx-xxx-3228, and that she had had that number for three or four years. (Exhibits 3D and 3F.)

135. Lt. McCaw advised the Appellant that xxx-xxx-8116 had appeared on her cell phone records and that Inmates F, K and M had that number approved on their PIN sheets. The Appellant acknowledged knowing Inmate K, but denied knowing Inmates F and M. When advised that [redacted]-8116 was G's number, she admitted knowing G since she was a kid, and further stated that he was dating a friend of hers. She denied discussing her MCAD matter regarding Inmate H with G, or showing G the relevant documentation. (*See supra* Findings of Fact 54-68; Exhibits 3D and 3F.)

136. The Appellant said that she looked after Inmate K's children when she worked in child care. The Appellant further stated that she has been friends with everyone that Inmate K had ever dated, and that K and G were friends. (Exhibit 3F.)

137. Lt. McCaw advised the Appellant that xxx-xxx-8331 had appeared on her cell phone records. The Appellant acknowledged that the number was for N, her best friend and belonged to N's sister. When advised that xxx-xxx-8331 was on Inmate O's PIN sheet, the Appellant said that Inmate O was the father of N's two older children. The Appellant admitted knowing that Inmate O had been incarcerated before and was incarcerated at the time she was working at MCI-Concord. (Exhibits 3D and 3F.)

138. During the course of her employment, the Appellant failed to inform the Department that she knew Inmate O. Exhibits 3D and 3F; Testimony of McCaw, Testimony of the Appellant.)

139. Lt. McCaw advised the Appellant that xxx-xxx-7970 had appeared on her cell phone records and that it was the number for parolee C. She was further informed that there had been thirty-nine text messages between her telephone number and his, all taking place while she was on duty, between December 6, 2010 and January 21, 2011. The Appellant stated that she had known parolee C since they were teenagers, she was good friends with one of his family members, and that she had cared for one of his children when she worked at a child care center in Lynn, MA. The Appellant denied intentionally meeting Parolee C after his release from prison. Instead, she said that they socialized in the same circles. She admitted sending him the texts, but said that some of them were meant for the family member that she was friendly with. The Appellant admitted seeing parolee C incarcerated while she was still working at MCI-Concord, and she admitted sending him the "groupie" text. She said that she could not recall having a sexual encounter with parolee C upon his release. She said, "I can't … answer that because I don't really recall." She offered that she had asked him not to treat her like a groupie because she did not want to be treated the same as others in their social circle. (*See supra* Findings of Fact 73-95, 121; Exhibits 3D and 3F.)

140. During the course of her employment, the Appellant failed to inform the Department that she knew parolee C and failed to seek Department permission to contact him after his incarceration. Exhibits 3D and 3F; Testimony of McCaw, Testimony of the Appellant.)

141. The Appellant admitted knowing FF, whose telephone number was xxx-xxx-5645. FF was a childhood friend, and the Appellant had been a bridesmaid in FF's sister's

wedding. The Appellant denied knowing Inmate GG, who had listed the number on his PIN sheet. She did not know if FF had any affiliation with GG. (*See supra* Findings of Fact 96-98; Exhibits 3D and 3F.)

142. Lt. McCaw advised the Appellant that xxx-xxx-8623 had appeared on her cell phone records and on Inmate R's PIN sheet. The Appellant denied knowing Inmate R. However, she acknowledged knowing the subscriber MM, who was her professor in college and her mentor. She said that she did not recall speaking to MM while on duty, but it was possible that she could have. (*See supra* Findings of Fact 106-108; Exhibits 3D and 3F.)

143. The Appellant acknowledged knowing federal Inmate B and that he had been in federal prison. She reiterated that she could not recall receiving telephone calls from him, even after she was advised that her cell phone records proved that she did. (*See supra* Findings of Fact 113-116; Exhibits 3D and 3F.)

144. The Appellant told Lt. McCaw that she failed to seek Department permission to speak to HH (xxx-xxx-2313), a former inmate, because at the time she had been out of the Department for twenty-two months. She admitted that she knew that HH had been incarcerated before she had become a correction officer and that she had known him since she was a teenager. (*See supra* Finding of Fact 100; Exhibits 3D and 3F.)

145. The Appellant admitted that she had failed to seek Department permission to communicate with any of the inmates, former federal inmate or former Department inmates mentioned in the interview. (Exhibit 3F.)

146. The Appellant said that she never brought controlled substances into MCI-Concord for Inmate A and that she never had sexual contact with an inmate. She admitted violating Rule 8(c) unintentionally. She concluded, "It's hard for me, living where I live with

the type of people I have around me, to just … I don't keep up with certain things that I should I guess, but that's it." (Exhibits 3F and 3G.)

147. The Appellant had failed to disclose to the Department, before and during her employment, that she lived in the same neighborhood with former inmates and that she associated with them on a regular basis. (Testimony of the Appellant.)

148. On December 21, 2011, Parolee C was arrested in New Hampshire and returned to custody at MCI-Cedar Junction. (Exhibit 3D.)

149. The Internal Affairs investigation ended on January 19, 2012. On that date, Paul L. DiPaolo, Acting Deputy Commissioner of the Administrative Services Division, informed the Appellant that as a result of the Internal Affairs investigation, a Commissioner's Hearing would be forthcoming. The Internal Affairs investigation did not sustain the allegations that the Appellant had delivered contraband to Inmate A, who passed a urinalysis test; that she allowed Inmate A to use her cell phone; and that she engaged in sexual contact with Inmate A. There was no evidence of an iPhone application on the Property Department computer. (Exhibits 3A, 3B and 3G.)

150. Although the original allegations were not sustainable, the Department's investigation revealed misconduct outside the original complaint. The Department's ensuing investigation after Inmate A's intercepted letter revealed cause to find that Ms. Rivera had engaged in violation of departmental rules, regulations and policies, to wit, General Policy I, Rules 1, 3(a), 4(d), 7(d), 8(c), 16(a), 19(c) and103 DOC 501 Institutional Security Procedure:

1. On numerous occasions during the calendar years 2010, you brought your personal cellular telephone into MCI-Concord without authorization and used it for your own personal use. Such use included, but was not limited to

making and/or receiving personal telephone calls and/or sending or receiving text messages.
2. Some of the communications made while on duty … were with current or former inmate(s).
3. You engaged in friendships and communicated with several former inmates.
4. You discussed the affairs of the institution and/or Department of Correction with at least one former inmate.
5. You had a sexual encounter with at least one former inmate after he was released from the Department custody and while he was on parole.
6. You had contact with the friends and/or family of at least one former inmate.
7. At least one former inmate that you knew became incarcerated at MCI-Concord on several separate occasions while you were employed by the Department and assigned to MCI-Concord.
8. At no point prior to or during your employment did you disclose your relationship with former inmates you associated with and/or maintained friendships and relationships with to your Superintendent, DOC Department Head or the Commissioner of Correction, or otherwise seek their approval to maintain said relationship or contact.
9. At no point prior to or during your employment did you disclose your relationship with the current inmate's relatives or friends, to your Superintendent, DOC Department Head or the Commissioner of Correction, or otherwise seek their approval to maintain said relationship or contact.
10. You were friends with a current federal inmate, and received numerous telephone calls from this inmate while he was incarcerated between April 2, 2009 and January 25, 2010.
11. At no point during your employment did you disclose your relationship with the inmate's relatives or friends, to your Superintendent, DOC Department Head or the Commissioner of Correction, or otherwise seek their approval to maintain said relationship or contact.

(Exhibit 2.)

151. On January 25, 2012, the DOC issued a Notice of Charges and Hearing to the Appellant in accordance with G.L. c. 31, § 41. (Exhibits 2 and 6.)

152. The appointing authority hearing was held on April 13 and 30, 2012, with Susan E. Herz presiding as hearing officer. The Appellant was represented. (Exhibits 1 and 2.)

153. Ms. Herz found that the Appellant's conduct was in violation of General Policy I, Rules 1, 3(a), 4(d), 7(d), 8(c), 16(a), 19(c) and103 DOC 501, Institutional Security Procedures and issued thirteen findings:

1. On numerous occasions during the calendar years 2010 and 2011, CO Ariana Rivera brought her personal cellular telephone into MCI-Concord without authorization and used it for your own personal use. Such use included, but was not limited to making and/or receiving personal telephone calls and/or sending or receiving text messages.
2. Some of the communications made while on duty and described in paragraph one (1), were with current or former inmate(s).
3. CO Rivera engaged in friendships and communicated with several former inmates.
4. CO Rivera discussed the affairs of the institution and/or Department of Correction with at least one former inmate.
5. CO Rivera had a sexual encounter with at least one former inmate after he was released from the Department custody and while he was on parole.
6. She had contact with the friends and/or family of at least one former inmate.
7. (At least one former inmate that CO Rivera knew became incarcerated at MCI-Concord on several separate occasions while she were employed by the Department and assigned to MCI-Concord.)[6]
8. At no point prior to or during your [*sic*] employment did CO Rivera disclose her relationship with the former inmates she associated with and/or maintained friendships and relationships with to her Superintendent, DOC Department Head or the Commissioner of Correction, or otherwise seek their approval to maintain said relationship or contact.
9. At no point prior to or during your employment did CO Rivera disclose her relationship with the current inmate's relatives or friends, to her Superintendent, DOC Department Head or the Commissioner of Correction, or otherwise seek their approval to maintain said relationship or contact.
10. (CO Rivera is friends with a current federal inmate, and received numerous telephone calls from this inmate while he was incarcerated between April 2, 2009 and January 25, 2010.)[7]
11. At no point prior to or during her employment did she disclose her relationship with the inmate's relatives or friends, to her Superintendent, DOC Department Head or the Commissioner of Correction, or otherwise seek their approval to maintain said relationship or contact.

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[6] Although the Hearing Officer found that Finding 7 was true, she did find that it did not constitute a chargeable offense. "Specifically, without more, CO Rivera cannot be aid to violate the rules, regulations and or policies of the Department based on the fact that "at least one former inmate [Inmate O] known to CO Rivera became incarcerated at MCI-Concord on several separate occasions while CO Rivera was employed by the Department and assigned to MCI-Concord…" (Exhibit 6.)

[7] Although the Hearing Officer found that Finding 10 was true, she did find that it did not constitute a chargeable offense. Specifically, without more, the Appellant cannot be aid to violate the rules, regulations and or policies of the Department based on the fact she "was friends with a current federal inmate, and received numerous telephone calls from this inmate while he was incarcerated between April 2, 2009 and January 25, 2010." At the time that the Appellant communicated with the federal inmate, she was on leave from the Department. (Exhibit 6.)

12. CO Rivera exercised poor judgment by not reporting, either prior to or during her employment, that she currently lives in the same neighborhood as numerous former inmates, and regularly encounters former inmates and associate [sic] with the friends and/or family of former inmates.
13. CO Rivera was less than truthful when interviewed by a Department Investigator regarding the above captioned matters.

(Exhibit 6.)

154. After reviewing Ms. Herz's report and supporting documentation, Commissioner Luis S. Spencer adopted the hearing officer's report. In a letter dated July 20, 2012, the Commissioner informed the Appellant that her conduct was inconsistent with the standards to which DOC employees are held, and in violation of General Policy I, Rules 1, 3(a), 4(d), 7(d), 8(c), 16(a), 19(c) and103 DOC 501, Institutional Security Procedures. The Commissioner terminated the Appellant's employment immediately. (Exhibit 1.)

155. On August 1, 2012, the Appellant filed a timely appeal with the Commission. (Exhibit 8.)

## CONCLUSION AND ORDER

*A. Applicable Legal Standards*

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by

correct rules of law." *Commissioners of Civil Service v. Municipal Ct. of Boston*, 359 Mass. 211, 214 (1971); *Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304, *rev. den.*, 426 12 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 . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006). *See Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006) and cases cited. 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, 390 Mass. 1102 (1983).

*B. Analysis*

The DOC has shown, by a preponderance of the evidence, that Ariana Rivera failed to comport herself to the standards to which DOC employees are held, and in violation of General Policy I, Rules 1, 3(a), 4(d), 7(d), 8(c), 16(a), 19(c) and103 DOC 501, Institutional Security Procedures.

It is undisputed that the Appellant violated General Policy I, Rule 1, Rule 4(d) and Rule 7(d), Rule 16 and 103 DOC 501 when she brought her personal cell phone into the MCI-Concord facility and used it while on duty. General Policy I prohibits personal cell phones in DOC facilities for security reasons, even if they are incapable of taking photographs, absent specific Department approval. *See Bloomfield v. Department of Correction*, 23 MCSR 500, 504 (2010). Cell phones that are capable of taking photographs, even if issued by the Commonwealth of Massachusetts or the Department, are also prohibited. *See Gonsalves v. Department of Correction*, 22 MCSR 413, 415 (2009). The DOC is unable to monitor an inmate's conversations on a cell phone, as compared to the calls on the GTL system.

Taking a cell phone into a Department facility is also a violation of Rule 16(a), which prohibits employees from taking personal property other than personal effects and a car within the precincts of the institution without the prior approval of the Superintendent or an immediate subordinate. The Appellant never sought permission for having her personal cell phone on the premises of MCI-Concord. The Appellant's conduct was also a violation of Rule 4(d), which

prohibits personal telephone calls without the specific approval of the Superintendent, DOC Department Head or designee.

The Appellant admitted that she brought the cell phone into the facility and used it to make telephone calls, send and receive text messages, surf the internet, and play games while she was on duty from December 6, 2010 until January 21, 2010. The Appellant's cell phone use was flagrant: between December 6, 2010 and January 21, 2011, there were *1,190 telecommunications*, including telephone calls and text messages, to or from the Appellant's cell phone to *ninety-three* different numbers - while she was on duty between 1:00 p.m. and 8:50 p.m. Based on the sheer volume of the telecommunications, the Appellant could not have been at optimal situational awareness while on the job. This is in violation of Rule 7(d), which prohibits distracting amusement or occupation of employees during working hours. At a minimum, the cell phone provided a distraction for the Appellant; at worst, inmates were aware that a correctional officer was carrying a cell phone.

Although the Appellant denied that she allowed inmates to use her cell phone while she was on duty, this is belied by the cell phone record details and the GTL database. Appellant did not present any evidence to challenge the accuracy of the GTL database; therefore, I treat it as I would any other business record. From December 6, 2010 until January 21, 2011, Lt. McCaw found that Appellant's cell phone had called/received telephone calls or sent/received text messages to ninety-three different telephone numbers. When he ran those ninety-three numbers, Lt. McCaw found that six of them matched telephone numbers in the GTL database. Those numbers were xxx-xxx-8116, xxx-xxx-8331, xxx-xxx-7970, xxx-xxx-5645, xxx-xxx-2313 and xxx-xxx-8623, and were on the preapproved PIN lists of seventeen different MCI-Concord inmates during the period from December 1, 2010 until January 27, 2011. It is thus very likely

that the Appellant allowed inmates to use her cell phone in order to contact family and associates outside the recorded GTL system.

In her December 13, 2011 Internal Affairs interview, the Appellant told Lt. McCaw that she had not discussed her MCAD matter with former Inmate G. This was belied by the recorded September 29, 2010 conversation that Lt. McCaw listened to on the GTL system. In this call, former Inmate G informed Inmate F that the Appellant had discussed the MCAD matter involving herself and Inmate H, and had showed him the relevant documentation. The Appellant's conduct was in violation of Rule 3(a), which encourages circumspection and discretion among Department employees and prohibits discussion of Department affairs outside of employees in or about the institution unless otherwise necessitated.

It is undisputed that the Appellant failed to inform the Department of her past association with former inmates, their families and associates upon her hire on September 5, 2005. The Appellant offered that everyone in her neighborhood had "done time."

The Appellant was already aware of the breakdown of discipline engendered by contact with inmates, even when it occurred before employment. The Appellant filed a confidential incident report with the Department, as required, detailing her past sexual relationship with Inmate H after seeing him at MCI-Concord on October 21, 2008. On December 4, 2008, the Appellant heard inmates gossiping about her, and had to leave work due to stress. While she was at home, she received obscene phone calls from the facility, ostensibly made by fellow correction officers. Other correction officers called her and told her not to return to work because correction officers were gossiping with inmates and "eating her alive." The gossip included very personal details that most likely came from inmate H. Findings of Fact 12-29.

It is undisputed that after her hire, the Appellant violated Rule 8(c) when she continued to associate with, accompany, correspond and consort with Department inmates while on duty, and with a federal inmate and with former DOC inmates outside of chance meetings, both on duty and outside of working hours. The Appellant testified that she did not seek specific approval of the Superintendent, DOC Department Head or the Commissioner of Correction before contact with the current and former inmates although she was aware of her obligation to do so under Rule 8(c). The Appellant's preference for certain inmates lead to partial treatment, the evidence shows that her preferred inmates received the use of her cell phone while she was on duty.

The Appellant testified that she saw childhood friends every one or two months throughout her tenure at MCI-Concord, but never informed the Department. The Appellant had cared for Inmate K's children when she worked in child care, and in her own words, was friends with everyone he ever dated. However, when he was housed at MCI-Concord beginning on February 9, 2009, the Appellant never informed the Department of their past association. Again, the Appellant did not inform the Department of this association. This is yet another example of the Appellant's failure to obey Rule 8(c) and to exercise good judgment according to General Policy I. Inmate O was the father of the Appellant's best friend's oldest children. The Appellant never informed the Department of her past association with Inmate O, who was incarcerated at MCI-Concord on four separate occasions while she was working there. The Appellant's relations with inmates such as Inmates K and O, their relatives, or friends were such that the Appellant was less than truthful in her December 13, 2011 internal affairs interview with Lt. McCaw.

The Appellant admitted that she used her cell phone to contact Parolee C while she was on duty, including thirty-nine text messages. The Appellant admitted that she was friends with

former Inmate HH and his family and had regular contact with them. Again, she did not seek specific approval from the Department for this contact, in violation of Rule 8(c) and failed to exercise good judgment pursuant to General Policy I.

The Appellant never reported the twenty-six telephone calls she received from federal Inmate B. The calls which came in from Fort Dix Federal Prison were branded, announcing that each call was from a federal penitentiary. Each call lasted for at least fifteen minutes. The Appellant admitted that she considered the federal inmate a friend, and it is likely that she spoke at least a few words to him. In the light most favorable to the Appellant, she knowingly served as an intermediary contact with a federal inmate on more than one occasion.

In his October 15, 2011 interview with the IAU, Parolee C informed Lt. McCaw that the Appellant had told him that she had a case against the jail. The Appellant had indeed filed a complaint against the Department at MCAD on September 16, 2009. In discussing the MCAD matter with parolee C, the Appellant failed to be circumspect and discreet, pursuant to Rule 3(a)

The Appellant admitted being in the same social circles as inmates and former inmates. She was a former girlfriend of an inmate, a childhood friend of inmates or their associates, participated in inmates' relatives' weddings, knew inmates' girlfriends, cared for inmates' children when she used to work in child care and encountered friends who were now inmates often at MCI-Concord while on duty. The Appellant never reported these associations to the Department or sought approval to maintain them as required by Rule 8 (c) and Department Rule 1. The Appellant's admitted friendships, communications and socializations with current and former inmates reflected failure to give dignity to her position and failure to be circumspect in her personal relationships.

The Appellant violated Rule 19(c) when she failed to tell the truth or be forthcoming during the Department investigation about her contact with parolee C and federal Inmate B. During her December 13, 2011 IAU interview, the Appellant was unaware that the Department had interviewed parolee C. The Appellant recalled being at night clubs and weddings with parolee C, but denied having a sexual encounter with him after his release from prison. When Lt. McCaw asked her about the March 2011 sexual encounter, the Appellant said, "I can't ... answer that because I don't really recall." Parolee C was a recidivist, as was Inmate O, who was later arrested and returned to custody at MCI-Concord on December 21, 2011. Findings of Fact 76-81, 147.

During the same interview, the Appellant denied receiving calls from federal Inmate B. Given the fact that there were twenty-six branded calls coming in from the federal penitentiary and lasted at least fifteen minutes in length, the Appellant denial is not credible.

The Department has proven by a preponderance of the evidence that the Appellant's actions were in total disregard of the safety and security of other staff, inmates, and the institution in general. The Department has consistently terminated employees for engaging in unreported contact with former inmates, and the Civil Service Commission has taken notice of the inherent security risks prohibited contact with inmates and former inmates involves. *Poirier v. Massachusetts Department of Correction et. al.*,[8] 532 F.Supp.2d 275 (1st Cir. Feb. 27, 2009) (recently released inmates may seek to maintain contact with current inmates and use friendship with a correction officer to facilitate those contacts for illicit purposes, such as the introduction of contraband); *Davis v. Department of Correction*, 22 MCSR 213 (2009) (overly friendly corrections officers or those engaged in romantic relationships with former inmates may be

[8] Kathleen M. Dennehy, individually and in her capacity as Commissioner of the Massachusetts Department of Correction.

persuaded to introduce contraband into a Department facility or induced into sharing confidential security and policy information with inmates); *Tina Jones v. Department of Correction*, 23 MCSR 89 (2010) (employee terminated due to friendship with former inmate); *Cuff v. Department of Correction,* 23 MCSR 762 (2010) (candidate's bypass justified due to security risk posed by her children's father's incarceration in a Department facility).

The Department of Correction has proved by a preponderance of the evidence that the Appellant compromised the safety of the facility when she violated the Department's Rules and Regulations. The Appellant's misconduct cannot be understated and demonstrated an incredible lack of good judgment, common sense and maturity. The inmates who had access to her cell phone were aware that a correction officer who had authority over them, and who ordered them to adhere to DOC rules, was herself in violation of them. The Appellant's cell phone could have been used to plan an escape, plan crimes on the outside, or plan a prison riot because it bypassed the Department's GTL recorded system. The Appellant risked her safety, the safety of the inmates and the safety of her fellow corrections officers and other DOC employees, not only at MCI-Concord, but in the entire Department system.

The Department is a paramilitary organization, where order and respect for authority is prized. The Appellant was a young, attractive woman in a prison where inmates were deprived of the company of women. Thus, inmates' knowledge about her sexual favors, whether real or imagined, whether with former or current inmates, added to the rumor mill and was particularly volatile. The Appellant was aware that current inmates were communicating with former inmates that she was associating with on the outside. It is likely that the inmates' knowledge of the Appellant's previous and current relationships with former inmates and her present relationships with them or their fellow prisoners prevented them from seeing her as an authority

figure. It is likely that the corrections officers' knowledge of the Appellant's previous and current relationships with former inmates affected their ability to respect her as a peer or work with her effectively in a team setting.

Based on testimony given and evidence presented, the Appellant failed to conduct herself in a manner befitting a correction officer. The Department had just cause to terminate the Appellant and has stated sound and sufficient grounds for doing so. The extent of cell phone usage while on duty, the unreported contact with former Department inmates, inmates and a parolee are all more than sufficient reasons to warrant termination. The core mission of the DOC remains the safe keeping and custodial care of the inmate population. Retaining the Appellant as a correction officer would impose too great a risk for the Department.

There is no evidence that the appointing authority's decision was based on political considerations, favoritism or bias. Thus the Department's decision to terminate 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 the Department of Correction had just cause to terminate the employment of the Appellant Ariana Rivera. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Angela McConney Scheepers
Administrative Magistrate

DATED: OCT 23 2013