

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**DARRELL RIVERA,**  
*Appellant*

v.

**Case No.: D1-12-98**

**DEPARTMENT OF  
CORRECTION,**  
*Respondent*

**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.

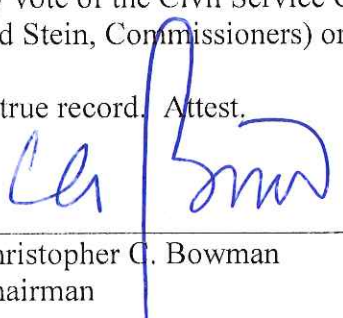
The Commission received and reviewed: 1) the Tentative Decision of the Magistrate dated September 3, 2013; 2) the Respondent's Objections to the Recommended Decision; and 3) the Appellant's Response to the Respondent's Objections.

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 reversed and the Appellant's appeal is *allowed*. Consistent with the conclusion of the Magistrate, the Department of Correction may require the Appellant to undergo a further medical examination before he is returned to duty. The Appellant shall not be entitled to any back pay or benefits for the time period preceding the date upon which a further medical examination determines him fit for duty.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on November 14, 2013.

A true record. Attest.

  
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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:

Joseph Padolsky, Esq. (for Appellant)

Julie E. Daniele, Esq. (for Respondent)

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss

Division of Administrative Law Appeals

**Darrell Rivera,**  
Appellant

v.

DALA Docket No. CS-12-553  
Civil Service Docket No. D1-12-98

**Department of Correction,**  
Appointing Authority

**Appearance for Appellant:**

Joseph Padolsky, Esq.  
Louison, Costello, Condon & Pfaff, LLP  
101 Summer Street  
Boston, MA 02110

**Appearance for Appointing Authority:**

Julie E. Daniele, Esq.  
Department of Correction  
PO Box 946, Industries Drive  
Norfolk, MA 02056

**Administrative Magistrate:**

**James P. Rooney, Esq.**

**Summary of Recommended Decision**

The Department of Correction's decision to terminate a correction officer for inability to perform the seven essential functions of the position is reversed for lack of reasonable justification.

**RECOMMENDED DECISION**

Appellant Darrell Rivera timely appealed, under M.G.L. c. 31, § 43, a March 5, 2012 decision of the Respondent, the Department of Correction, terminating his employment for being

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unfit for duty. I held a hearing for the Civil Service Commission on October 4, 2012 at the offices of the Commission, One Ashburton Place, Room 503, Boston, Massachusetts.

I admitted 23 documents into evidence. (Exs.1-23.) The parties submitted eight stipulated facts. The hearing was digitally recorded. The Department of Correction presented the testimony of Department employees Kelley Correia, its Director of Worker's Compensation, Kieran Sullivan, a Hearing Officer, and Monserrate Quinones, its Director of the Office of Diversity and Equal Opportunity. Mr. Rivera testified on his own behalf and presented the testimony of Department employees Captain Raymond Turcotte, Captain Jason Lanpher, and Lieutenant James Murphy. Per the Department's request, the hearing was public. The record closed on November 20, 2012 with the filing of post-hearing briefs.

### **FINDINGS OF FACT**

Based on the testimony and exhibits presented at the hearing, I make the following findings of fact:

1. Darrell Rivera was hired by the Department of Correction as a Correction Officer I on September 17, 1995. He was promoted to Sergeant (Correction Officer II) on September 25, 2005, and is a tenured civil service employee in this position. He had passed the test to become a Lieutenant (Correction Officer III), but was bypassed after he was injured in 2008.

(Stipulation ¶ 1; Rivera testimony.)

2. Since 1997, Mr. Rivera has been a member of the Department's Tactical Response Team, a unit that is responsible for inmate movement, crowd control, and for handling any potentially lethal situations. Membership in this unit is by application; members must meet demanding physical standards, and a doctor must find them to be fit. (Rivera and Murphy testimony.)

3. On May 6, 2008, Mr. Rivera was awarded a "Certificate of Recognition, Professional Excellence" by the Department. (Ex. 21; Rivera testimony.)

4. On June 5, 2008, Mr. Rivera, while escorting a disruptive inmate back to his cell, was assaulted by the inmate and injured his right wrist, right hand, and back. As a long term consequence of these injuries, he cannot fully close his little finger and the two adjoining fingers of his right hand. (Stipulation ¶ 2; Rivera testimony.)

5. Mr. Rivera was out of work due to his injuries from June 5, 2008 until March 2009 and received workers' compensation benefits during that time. (Correira and Rivera testimony.)

6. Mr. Rivera had two surgeries to repair his injuries. In July 2008, Dr. Marco Dirks performed surgery to repair Mr. Rivera's displaced right little "mallet finger." In November 2008, Mr. Rivera underwent surgery to repair his TFCC (triangular fibrocartilage complex in the wrist). (Exs. 11 and 12; Rivera testimony.)

7. On March 3, 2009, Mr. Rivera returned to work under the terms of a "Voluntary Temporary Modified Work Program Agreement." Under this agreement, Mr. Rivera's work was to be restricted to incidental inmate contact and he could not lift, carry, push or pull more than ten pounds. He also could not work more than eight hours per day. Such modified work programs are available to injured correction officers if they are medically cleared for incidental inmate contact and if it is likely they will be able to return to full duty within 120 days. (Ex. 13; Stipulation ¶ 3; Rivera and Correira testimony.)

8. Full duty would encompass the ability to perform the seven essential duties of a Correction Officer I, II and III. These duties are as follows:

1. Maintain custodial care and control of inmates by escorting or transporting them under restraints; patrolling facilities; making

- periodic rounds, head counts and security checks of building, grounds and inmates quarters; monitoring inmates movements and whereabouts and guarding and directing inmates during work assignments to maintain order and security in a correctional institution.
2. Observes conduct and behavior of inmates, noting significant behavioral patterns, to prevent disturbances, violence, escapes or other crises such as suicides.
  3. Notes and investigates suspicious inmate activity relative to contraband by searching individuals, vehicles, packages, mail and inmate quarters for weapons or other forbidden devices/objects to maintain prison security.
  4. Develops working relationships with inmates by referring individuals to appropriate supportive services (e.g. medical, psychiatric, vocational, etc.) as needed to aid in rehabilitation and to foster an atmosphere for cooperation between inmates and staff.
  5. Prepares reports on such occurrences as fires, disturbances, accidents, security breaches, etc., prepares monthly evaluation reports on inmates; makes entries into unit log of daily activities and reviews daily activity reports in order to have accurate and up-to-date information available for reference by authorized personnel.
  6. Responds to emergency situations such as threats, assaults, medical emergencies, fires, escapes, etc., by having the ability to properly use firearms, use force/restraints, CPR/First Aid, and fire safety techniques.
  7. Performs related duties such as screening visitors, operating two-way radios, carrying and operating firearms, inspecting fire extinguishers, sprinkler systems, alarms and other safety apparatus, serving food to inmates and assigning housing areas to inmates.

(Ex. 4.)

9. There are three pieces of equipment that correction officers may be required to use in the performance of the essential functions of their position. Officers routinely use handcuffs and a two-way radio. When officers are assigned to armed posts, they are required to be capable of using a firearm. (Turcotte testimony.)

10. The following assignments in a correctional facility are classified as appropriate for an officer who is on full duty: housing units/cell block, corridor staff, yard staff, gym staff and segregation units. Sergeants do not typically work in housing units. Assignments classified as appropriate for an officer who is restricted to incidental inmate contact are segregation units,

control room, tower, loading dock, class boards, parole hearings, "eyeball" watchers and gallery. Assignments classified as appropriate for an officer who is barred from any inmate contact are tower and gallery. (Turcotte and Rivera testimony.)

11. Despite being on modified duty status beginning in March 2009, Mr. Rivera was given full duty assignments. Mr. Rivera worked as a relief officer and was sent wherever he was needed each shift. Mr. Rivera performed hospital trips during which he served as the armed officer; he worked at the loading dock, vehicle trap, gallery, tower, and segregation units. Throughout these assignments, he had incidental inmate contact. He also helped subdue an inmate and put him on the floor. (Rivera testimony.)

12. The agreement expired in July 2009. Mr. Rivera applied for a sixty-day extension, but the Department denied his request because he did not submit medical documentation stating that he would be able to return to full duty at the end of the extension period. (Ex. 13; Stipulation ¶ 3; Rivera and Correira testimony.)

13. After learning from a co-worker that he might be eligible for an accommodation, Mr. Rivera applied for and received a six-month reasonable accommodation on July 27, 2009 through the Office of Diversity. This accommodation was supported by a June 23, 2009 letter from Dr. Dirks. Mr. Rivera's work was again supposed to be restricted to incidental inmate contact and he was not to lift more than ten pounds with his right hand or use a firearm. (Ex. 15; Stipulation ¶ 3; Quinones and Correira testimony.)

14. While working under this accommodation, Mr. Rivera again worked as a relief sergeant and performed whatever work was assigned to him. (Rivera testimony.) He also took and passed numerous trainings, including an annual firearms qualification and the Tactical Response Team's physical fitness evaluation, as well as trainings in the use of chemical agents,

firearms, batons and defensive tactics. His shift commanders and training coordinators were not told of any problems with his performance. (Ex. 10; Rivera, Turcotte, Murphy, and Lanpher testimony.)<sup>1</sup> The Department did not seek an evaluation of Mr. Rivera's performance from his superiors. It looks only to whether an injured correction officer has been medically cleared to return to work. (Correira testimony.)

15. Mr. Rivera was notified by letter on January 27, 2010 that his reasonable accommodation expired on that day. He was asked to provide additional medical documentation to extend his reasonable accommodation. He had been told by fellow correction officers that officers could come back to work only twice on restricted duty. This advice was erroneous; a reasonable accommodation can be permanent if, with it, a correction officer can perform the essential duties of the position. But relying on this advice, Mr. Rivera made no attempt to seek an extension. He continued to work until January 30, 2010, when, while working the tower armed with a sidearm, he was sent home by the Department in the middle of his shift. (Ex. 2; Stipulation ¶ 3; Rivera, Correira, and Quinones testimony.)

16. On July 2, 2009, Mr. Rivera had a repeat EMG.<sup>2</sup> The study showed no evidence of cervical radiculopathy or right ulnar or median nerve neuropathy. (Ex. 12.)

17. On August 31, 2009, Dr. Henry S. Urbaniak of the Orthopedic Group in Pawtucket, Rhode Island, conducted an independent medical examination of Mr. Rivera. Dr.

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<sup>1</sup> The Department objected that Mr. Rivera should not have agreed, and his supervisors should not have allowed him, to undertake assignment or trainings that went beyond the scope of activities he was permitted to undertake while working on modified status or under a reasonable accommodation. This objection is irrelevant because the sole concern here is whether Mr. Rivera is fit to perform the functions of his job.

<sup>2</sup> Electromyography is a "diagnostic procedure to assess the health of muscles and the nerve cells that control them (motor neurons)." <http://www.mayoclinic.com/health/emg/MY00107>.



Urbaniak diagnosed Mr. Rivera with mallet finger, open reduction and internal fixation,<sup>3</sup> TFCC injury, status post-surgery and residual pain and numbness in the distribution of the ulnar nerve with negative EMGs. Dr. Urbaniak opined that Mr. Rivera's prognosis was poor for further recovery and that he had reached maximum medical improvement. He also stated that Mr. Rivera could return to work without inmate contact. Dr. Urbaniak noted that performing physical restraints on inmates would "not be appropriate for this individual." (Ex. 12.)

18. Once Mr. Rivera's period of work under the reasonable accommodation ended, he reapplied for and workers' compensation benefits. Although Mr. Rivera and the Department agreed that he should receive partial disability benefits, he sought more extensive benefits, including treatment benefits, and litigation ensued. His pain management doctor, Dr. Pradeep Chopra, Director of the Interventional Pain Management Center in Pawtucket, Rhode Island, recommended intravenous infusions of ketamine (an anesthetic used in pain management), which Mr. Rivera paid for himself when the Department would not. (Rivera and Correia testimony.)

19. Acting under the impression that the Department was not going to allow him to return to work, and in the face of mounting financial needs (a new baby and a wife who needed surgery) Mr. Rivera applied for accidental disability retirement benefits in January 2011. At some point during the dispute over workers' compensation or accidental disability retirement, Mr. Rivera was put under surveillance, which he knew about.<sup>4</sup> (Rivera and Correia testimony.)

20. On April 28, 2011, Dr. Stanley Hom conducted an independent medical examination of Mr. Rivera. In his report Dr. Hom opined that Mr. Rivera "could return to work

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<sup>3</sup> Dr. Urbaniak does not specify in his report which fingers he was referring to, but I presume he was referring to the same three fingers that Mr. Rivera cannot close fully.

<sup>4</sup> It is not clear from the record who was following Mr. Rivera.

as a corrections officer with some modifications.” He further opined that restrictions should include those on “heavy lifting, pushing, pulling, chronic/repetitive and strenuous right hand activities” and a “pound limitation . . . of approximately twenty-five pounds.” (Ex. 23.) It is not clear that the workers’ compensation unit received a copy of this report before the decision was made to terminate Mr. Rivera. (Correira testimony.)

21. On May 19, 2011, Mr. Rivera applied for temporary total disability benefits and medical benefits. This worker’s compensation application was supported by a letter from Dr. Pradeep Chopra dated May 16, 2011. Dr. Chopra opined that Mr. Rivera was “permanently and totally disabled from all forms of employment due to his work-related injury he sustained on June 5, 2008.” (Exs. 8 and 9; Correira testimony.)

22. In May 2011, Mr. Rivera was examined by a regional medical panel appointed to evaluate the medical aspects of his application for accidental disability retirement benefits. In their reports of these examinations, at least two of the panelists concluded that Mr. Rivera was permanently disabled. The panelists were subsequently provided with surveillance videotape showing Mr. Rivera holding a flashlight in his right hand and turning it on and off with that hand, holding keys in his right hand, and driving a car while steering with both hands. Each panelist then prepared a new report in September or October 2011. Dr. Eduard Vaynberg, an anesthesiologist, opined that the videotape showed routine movements, but not the “full use of the hands . . . as may arise in restraining a combative inmate,” and thus he did not change his earlier conclusion that Mr. Rivera was “fully disabled.” Dr. Fereshteh Sharonah Soumekh, a neurologist, stated that the videos show that Mr. Rivera has “no clear functional limitation or any difficulty in right hand dexterity” and is “physically capable of performing the essential duties of his job.” Dr. Mark Lebovitz, an internist, declared that Mr. Rivera’s case was unlike

the situation of a person with “true complex regional pain syndrome [who] often avoid use of the effected extremity,” as the video showed him “performing all activities of daily living with no evidence of inhibition of his activity.” He thus concluded that Mr. Rivera was physically capable of performing the essential duties of his job. (Ex. 18.)

23. On August 29, 2011, Dr. Chopra wrote to Dr. Todd Handel of the Handel Center for Spine, Sports & Rehabilitation in Pawtucket, Rhode Island, regarding Mr. Rivera’s medical condition. He noted that Mr. Rivera had a diagnosis of “complex regional pain syndrome type 2 to the right upper extremity” and “fixed flexion deformity of the right upper extremity to the third, fourth and fifth fingers.” Dr. Chopra recommended that Mr. Rivera undergo intravenous ketamine infusion and to continue mirror box therapy. In addition, he stated that Mr. Rivera’s condition was “permanent and he is totally disabled from all form of employment due to his work-related injury of June 5, 2008.” (Exs. 4 and 11.)

24. On November 7, 2011, after learning from a disabled co-worker that he might still be eligible for an accommodation, Mr. Rivera contacted Monserrate Quinones, Director of the Office of Diversity and Equal Opportunity, to request another reasonable accommodation. Ms. Quinones sent Mr. Rivera forms to fill out and instructed him to return them along with medical documentation. He told her he had an appointment to see Dr. Chopra in February 2012. (Exs. 7 and 15; Quinones and Rivera testimony.)

25. On December 7, 2011, Karen Hetherson, Assistant Deputy Commissioner, sent a letter to Commissioner Luis Spencer requesting that he hold a hearing to separate Mr. Rivera from his position as a correction officer because of his inability to perform his position’s essential functions. Kelley Correira, the Department’s Director of Worker’s Compensation, after consulting with the Department’s industrial accidents attorney, recommended that Ms. Hetherson

make this request because the Department did not have, to her knowledge, any medical evidence that Mr. Rivera could return to work and perform the seven essential functions. She based her recommendation on Dr. Chopra's August 29, 2011 letter, in which he stated that Mr. Rivera was permanently disabled, on Mr. Rivera's filing for accidental disability retirement and workers' compensation benefits, and on her belief that Mr. Rivera did not intend to return to work.

(Correira Testimony) Ms. Correira did not have any of the reports from the regional medical panel. (Ex. 4; Correira testimony.)

26. On January 26, 2012, the Department hearing officer, Kieran Sullivan, held a hearing under M.G.L. c. 32, § 41 to determine whether Mr. Rivera should be terminated as unfit for duty (Stipulation ¶ 4; Ex. 6; Sullivan Test) and therefore out of compliance with Rule 17(a) of the Rules and Regulations of the Department of Correction, which provides that:

Correctional service demands that you be in fit physical and mental condition during the official performance of your duty. You must permit and give your cooperation to a physical and/or mental examination if adjudged necessary by the Superintendent or Commissioner of Correction.

(Ex. 1.)

27. Mr. Rivera testified at the hearing that he performed the seven essential functions of a corrections officer from March 2009 until his last day of work on January 30, 2010, despite the restrictions imposed by his physician and agreed-to by the Department. The Department submitted one medical report, Dr. Chopra's August 29, 2011 report. Mr. Rivera did not supply any additional medical documentation at the hearing. (Ex. 6; Rivera and Sullivan Testimony) Mr. Rivera told the hearing officer that he was scheduled to see Dr. Chopra on February 13, 2012 and could secure medical documentation from the doctor at the appointment. He testified that he was able to perform the essential functions of his job. Ms. Sullivan gave Mr. Rivera until

February 14, 2013, the day after his appointment with Dr. Chopra, to submit the medical documentation to her. (Stipulation ¶¶ 5 and 6; Ex. 6; Rivera and Sullivan testimony.)

28. On February 13, 2012, Mr. Rivera saw Dr. Chopra as planned. Dr. Chopra issued a letter addressed "To Whom it May Concern" on that date regarding Mr. Rivera's condition. Dr. Chopra opined that Mr. Rivera could perform the seven essential duties of his position, provided that he was given a reasonable accommodation in the form of intermittent use of a right hand brace. (Ex. 19; Rivera testimony.)

29. On February 13, 2012, Mr. Rivera left Dr. Chopra's office with multiple copies of Dr. Chopra's letter regarding his ability to work. He mailed a copy of the letter and a completed "Medical Inquiry Form in Response to an Accommodation Request" that he received from Ms. Quinones in November 2011 to the Office of Diversity rather than to Ms. Sullivan as he did not recall Ms. Sullivan asking that the information be sent to her. Mr. Rivera did not realize that Ms. Sullivan and Ms. Quinones operated out of different offices at Department headquarters. He further believed that Ms. Sullivan, Ms. Quinones, and Ms. Correia all shared documents relating to his case. (Rivera testimony.)

30. On the same day, Dr. Chopra wrote to Dr. Handel regarding Mr. Rivera's status. Dr. Chopra noted that Mr. Rivera was continuing to experience some pain in his hand and had "fixed flexion deformity to the third, fourth, and fifth fingers of his right hand," but Dr. Chopra opined that "he may return to work at this time considering that he can perform most of his functions at work using his left hand as well as his right hand. He needs to wear a wrist brace intermittently when he is at work." He also recommended a triple phase bone scan, medication and an intravenous ketamine infusion. (Ex. 11.)

31. As of February 15, 2012, Ms. Sullivan had not received any further medical documentation from Mr. Rivera. She called Ms. Correira (who then called Ms. Quinones) to find out if she had received any medical documentation from Mr. Rivera. Since neither Ms. Correira nor Ms. Quinones had received anything, Ms. Sullivan prepared a "Hearing Officer's Report" for Deputy Commissioner Luis S. Spencer. In her draft report, anticipating receipt of an update from Dr. Chopra, Ms. Sullivan wrote that she had received medical documentation on February 14, 2012. Her final report mistakenly left this line in, but also correctly reported that she did not receive the medical documentation. Ms. Sullivan concluded that Mr. Rivera was unable to perform the essential functions of a correction officer, and was therefore unable to return to full duty in that position. (Ex. 6; Sullivan testimony.)

32. On March 5, 2012, Department Commissioner Spencer issued a separation letter to Mr. Rivera. (Stipulation ¶ 7; Ex. 5.) The Department's workers' compensation unit received one of Dr. Chopra's February 13, 2012 reports the following day. (Ex. 17.)

33. On April 26, 2012, the State Retirement Board notified Mr. Rivera that it had denied his application for Accidental Disability Retirement because the majority of the regional medical panel did not find that he was mentally or physically incapable of performing the essential duties of his job. (Ex. 20.)

34. Mr. Rivera timely appealed his termination to the Civil Service Commission. (Stipulation ¶ 8.)

35. At the Civil Service Commission hearing on October 4, 2012, Captain Turcotte brought handcuffs, a two-way radio, and a training firearm for demonstration purposes. Mr. Rivera demonstrated the proper use of each item at the hearing, and was able to use his right

hand when demonstrating use of each item. Captain Turcotte verified that Mr. Rivera used each item properly. (Rivera and Turcotte testimony.)

### DISCUSSION

The Department of Correction's decision to terminate Darrell Rivera as a correction officer because he is unfit for duty should be reversed. The evidence establishes that Mr. Rivera has a permanent injury to his right hand, but that, more likely than not, he is fit for duty.

The role of the Civil Service Commission is to determine whether the appointing authority has proven by a preponderance of the evidence that there was "reasonable justification" for the action it took. *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923, 925 (1997); *Sargent v. Mass. Accident Co*, 307 Mass. 246, 250, 29 N.E.2d 825, 827 (1940). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Id.* at 304, 926 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427, 430 (1928)); *Comm'rs of Civil Serv. v. Boston Municipal Ct*, 259 Mass. 211, 214, 268 N.E.2d 346, 348 (1971).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, 445 (1983). In making this determination, however, the commission does not simply "view a snapshot of what was before the appointing authority;" instead, it "hears evidence and finds facts anew." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727, 792 N.E.2d 711, 712-713 (2003). It holds a "hearing de novo upon all

material evidence” and renders a decision “upon that evidence;” it does “not merely . . . review . . . the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer.” *City of Leominster*, 58 Mass. App. Ct. at 727, 792 N.E.2d at 713 (quoting *Sullivan v. Roxbury Dist. Municipal Ct.*, 322 Mass. 566, 572, 78 N.E.2d 618 (1948)).

The *City of Leominster* case illustrates the breadth of the Commission’s authority to consider material evidence. The city had terminated a police officer for sexually abusing his daughter and stepdaughter. The principal evidence before the appointing authority at the time this decision was made came from grand jury minutes that included the lurid testimony of the two young women. But at later hearings before the Division of Administrative Law Appeals, the daughter recanted her earlier testimony, which appeared to have been procured by her mother in the course of a divorce, and the police officer testified and his testimony was credited. The Commission’s decision that the officer should be restored to his position was affirmed by the Appeals Court. 58 Mass. App. Ct. at 727-733, 792 N.E.2d at 712-717.

An appointing authority may terminate an employee who is medically incapable of performing his position. See *Bracket v. Gloucester Housing Authority*, 10 Mass. Civ. Serv. Rept. 127 (1997) (termination of maintenance worker who had stopped reporting to work because of back problems) and *Hilton v. Dept. of Employment and Training*, 10 Mass. Civ. Serv. Rept. 247 (1997) (termination of employee who stopped working because of chronic fatigue). Here, when the Deputy Commissioner of the Department of Correction made the termination decision in March 2012, Mr. Rivera had not worked since January 2010, he had been out of work receiving worker’s compensation because of a hand injury suffered from an inmate assault, and the



Department officials who participated in the decision to recommend his termination had seen only medical evaluations suggesting that Mr. Rivera could not resume all the duties of his job.<sup>5</sup>

The evidence upon which the Department relied at the time furnished a plausible basis for concluding that Mr. Rivera could no longer function as a correction officer. The body of evidence it considered did not reflect, however, all that was available at the time. The reports of the independent medical examinations of Dr. Hom and Dr. Urbaniak prepared as part of the workers' compensation process, in which each concluded that Mr. Rivera could work with restrictions, had already been prepared; and by September and October 2001, the revised reports of the medical panel evaluating Mr. Rivera's disability retirement application been prepared, with two of the doctors having concluded that Mr. Rivera was not disabled.<sup>6</sup>

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<sup>5</sup> The Department acknowledges having received the opinions of Dr. Dirks and Dr. Urbaniak and Dr. Chopra's earlier reports, none of which it submitted to the hearing officer. Both Dr. Dirks and Dr. Urbaniak stated that Mr. Rivera could resume his work, but with limitations.

<sup>6</sup> The Department knew of Dr. Urbaniak's report. Someone in the Department may also have known of the other reports; undoubtedly, Mr. Rivera did. I accept Ms. Correia's testimony that in her particular role in handling worker's compensation cases, she did not see Dr. Hom's April 2011 report of his independent medical examination, in which he concluded that Mr. Rivera could return to work with some job modifications, or the revised reports of the medical panel in September and October 2011, in which two of the doctors concluded that Mr. Rivera was not disabled, because retirement board's do not routinely send such reports to the Department. I would be surprised, however, if the Department's workers' compensation counsel had not seen copies of the independent medical examination of Mr. Rivera by Dr. Hom.

As for Mr. Rivera, when asked at the Department hearing whether he had any documents to support his claim that he was fit for duty, he replied that he did but that the documents arose in a different case and because he was represented by a different attorney, his present counsel had "recommended that any documents related to that case should remain private as they may be subject to attorney-client privilege." (Ex. 6.) The privilege would not apply to any of the reports of Dr. Hom, Dr. Urbaniak, or the medical panelists. I can think of no reason why they should not have been introduced at the Department hearing.

The Department could also have obtained Dr. Chopra's February 13, 2012 reports before it finalized its decision. It knew that Mr. Rivera was going to see the doctor and obtain a new opinion as to his fitness. Asking him to provide a report within one day of that appointment was a recipe for failure, which inevitably occurred.

But because this is a *de novo* hearing, I am not limited to consideration of the facts known to the Department's decisionmakers, and, instead, I may consider whether the facts presented to me show whether the Department's decision was reasonably justified. Those facts include Dr. Hom's report and his conclusion that Mr. Rivera could work with some modifications to his duty, the reports of the two medical panelists who concluded that Mr. Rivera has "no clear functional limitation," does not show any reluctance to use his right hand, and is "physically capable of performing the essential duties of his job," and Dr. Chopra's two reports of February 13, 2012 in which he stated that Mr. Rivera could perform all seven functions of a correction officer so long as he was allowed to make intermittent use of a right hand brace. These reports cast substantial doubt on the Department's basis for its decision, particularly in light of the Department's position that what it needed to allow Mr. Rivera to return to work was medical clearance, which Mr. Rivera had obtained by the time the Department terminated him.

I therefore conclude that the Department of Correction lacked reasonable justification for its decision to terminate Mr. Rivera as being unfit for duty. I do not, however, direct it to return him to duty. The record is replete with conflicting medical evidence concerning whether Mr. Rivera is fit, including seemingly contradictory reports from Dr. Chopra. Per Rule 17(a), the Department is entitled to evaluate that evidence further or ask Mr. Rivera to undergo a physical exam to determine if he is fit.

I note, however, that the evidence here has established certain matters relevant to any further evaluation of Mr. Rivera. First, he is interested in resuming his career as a correction officer. His effort to pursue accidental disability retirement does not detract from this. He has repeatedly expressed an interest in returning to work, but when he appeared to meet resistance from the Department to his return, he took what would appear to be the logical step for an

employee injured on the job when his employer does not think him capable of returning to work and he has substantial financial needs. Second, the doctors, on whose reports the Department relies in evaluating an employee's fitness for duty, when they have evaluated Mr. Rivera, focused on whether he suffers pain in that hand that would interfere with normal functioning, rather than on whether he has the capacity to completely close three of the fingers of his right hand. The live demonstration that Mr. Rivera performed at the hearing, and the videotape that was shown to the medical panelists, show that Mr. Rivera is capable of using his right hand to perform normal daily activities and use the standard equipment correction officers must use on the job without evident restriction, and without evidence that pain is interfering with his functioning. There is no real question that Mr. Rivera can perform most of the activities listed in the seven essential functions of a correction officer, many of which deal with observation, communication and the preparation of reports. The only substantial question is whether he could respond to an emergency situation, something he already did when he returned to work temporarily.

Mr. Rivera comes across as a dedicated, highly competent correction officer. He deserves a fuller, more complete consideration of his situation. For these reasons stated, I recommend that the Commission reverse the decision made by the Department of Correction to terminate Mr. Rivera.

**DIVISION OF ADMINISTRATIVE LAW APPEALS**

*James P. Rooney*

James P. Rooney  
First Administrative Magistrate

Dated: **SEP - 3 2013**