

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 1/29/10  
Civil Service Commission CB

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

**TONY A.  
RODRIGUES,**  
*Appellant*

v.

**DEPARTMENT OF  
CORRECTION,**  
*Respondent*

Case No.: D1-09-296

**DECISION**

After careful review and consideration, the Civil Service Commission voted at an executive session on January 28, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated November 10, 2009. The Commission received comments from the Appellant on December 10, 2009. The Commission received comments from the Respondent on December 22, 2009. By a 3-2 vote, the Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein.

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

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner - No; Marquis, Commissioner - Yes; Stein, Commissioner - Yes; and Taylor, Commissioner - No) on January 28, 2010.

A true record. Attest.



Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Frank J. McGee, Esq. (for Appellant)  
Heidi D. Handler, Esq. (for Appointing Authority)  
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
ACTING CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060  
FAX: 617-727-7248

November 10, 2009

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

Re: *Tony A. Rodrigues v. Department of Correction*  
*DALA Docket No. CS-09-517, ~~10~~-09-296*

RECEIVED  
2009 NOV 12 A 9:43  
COMMONWEALTH OF MASS.  
CIVIL SERVICE COMMISSION

Dear Chairman Bowman:

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

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections

Sincerely,

Judithann Burke  
Administrative Magistrate

Enclosure

cc: Frank J. McGee, Esquire  
Heidi Handler, Esquire

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Tony Rodrigues,**  
Appellant

v.

Docket No. <sup>PJ</sup>09-296  
DALA No. CS-09-517

**Department of Correction,**  
Appointing Authority

**Appearance for Appellant:**

Frank J. McGee, Esquire  
1952 Ocean Street  
Marshfield, MA 02050-3424

**Appearance for Appointing Authority:**

Heidi Handler, Esquire  
Administrative Prosecutor  
Department of Correction  
Division of Human Resources  
P.O. Box 946, Industries Drive  
Norfolk, MA 02056

**Administrative Magistrate:**

Judithann Burke

**CASE SUMMARY**

The Appointing Authority, Department of Correction, proved that there was just cause to terminate the employment of the Appellant, a Correction Officer I. The Appellant retaliated after an assault by an inmate by throwing a food tray at the inmate. A week later, the Appellant failed to perform his duties adequately in the Departmental Disciplinary Unit, and he threatened the life of the Superintendent.

RECEIVED  
2009 NOV 12 A 9:43  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

### **RECOMMENDED DECISION**

Pursuant to G. L. c. 31, §§ 41-45, the Appellant, Tony Rodrigues, is appealing from the June 22, 2009 action of the Appointing Authority, Department of Correction (DOC), discharging him from his position as Correction Officer I (CO I) in the DOC. (Exhibit 1). The appeal was timely filed. (Exhibit 2). A Section 43 hearing was held on September 2, 2009 at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington Street, Boston, MA.

At the hearing, eleven (11) exhibits were marked, including two discs of audio recordings (Exhibit 5) and two discs of video recordings (Exhibit 6). The Appointing Authority presented the testimony of the following witnesses: CO Captain Edward Hammond, then-Investigator in the DOC Department of Investigative Services; CO Lieutenant Michael Dantuono and CO I Wayne Sweet. The Appellant testified in his own behalf. The Appellant also presented the testimony of CO Sergeant Sergio Servello. Three (3) AUDIO tapes were made of the proceedings.

The record was left open for the filing by the parties of post-hearing memoranda of law and proposed findings of fact. The last of these was received on October 8, 2009, thereby closing the record.

### **FINDINGS OF FACT**

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Petitioner, Tony A. Rodrigues, 31 y.o.a., began employment as a

CO I in the Department of Correction on July 8, 2001. He was assigned to MCI Norfolk through August 2008 and was transferred to MCI Cedar Junction in August 2008. The Appellant made the move to Cedar Junction in order to obtain a more desirable shift. (Testimony and Exhibit 4).

2. The Appellant has one instance of prior discipline in the DOC. On October 2, 2008, he received a letter of reprimand for failing to provide satisfactory medical evidence regarding an absence. (*Id.*).

3. The “ten-block” at MCI Cedar Junction houses some of the most volatile inmates in DOC custody. They are all fed in their cells and remain in the cells twenty four hours a day except when being escorted to the shower, recreation cage or court appointments by one of the DOC guards. Inmate A is one of those difficult inmates. He was housed in the “ten-block” during December 2008 because of an earlier assault on a DOC staff member. (Testimony).

4. At approximately 8:25 AM on December 22, 2008, the Appellant approached Inmate A’s cell with two breakfast food trays, a hard tray and a soft tray. Disruptive inmates receive soft trays. The Appellant asked the inmate if he was going to be disruptive. The inmate indicated that he would be cooperative. The Appellant started to pass him the soft tray. At the same time, the inmate hurled a container of urine and other body waste at the Appellant. The Appellant responded by uncovering the food tray and throwing the contents into the cell toward the inmate. The Appellant then closed a solid door across the inmate’s cell and walked away. The incident was captured on

video. It had been witnessed by then CO-Sergeant (Sgt.) William Roach, the Appellant's supervisor on that date. (*Id.* and Exhibit 6).

5 After the incident with the inmate, the Appellant left his post and sought medical treatment. He remained out of work for one week. (Testimony and Exhibit 4).

6. Some time after he arrived home on December 22, 2008, the Appellant called Sgt. William Roach at the DOC. The Appellant asked Sgt. Roach to stop at his house after work in order to pick up his industrial accident (IA) paperwork. Sgt. Roach went to the Appellant's home that evening and retrieved the paperwork. (*Id.*).

7. The next morning, CO Captain Raymond Turcotte telephoned the Appellant and ordered him to report to MCI Cedar Junction and write a report about the December 22, 2008 incident with the inmate. (*Id.*).

8. The Appellant called Sgt. Roach again on December 23, 2008 and asked him to utilize the IA paperwork and write an incident report on the Appellant's behalf. He gave Sgt. Roach his own password for the computer system and remained on the phone while Sgt. Roach accessed the system under the Appellant's profile and entered the Appellant's report. (*Id.*).

9. Both the Appellant and Sgt. Roach wrote reports concerning the December 22, 2008 incident with the inmate. Both reports very similar and neither report mentioned the Appellant's throwing the food tray at the inmate. (Exhibit 4, pp. 31-32).

10. Following the December 22, 2008 incident with the inmate, CO Investigator Sgt. Patrick Barrett obtained the documentation concerning the inmate assault on the Appellant in order to refer the matter to the District Attorney for

prosecution. When Sgt. Barrett reviewed the videotape of the assault, he observed the Appellant's retaliatory actions and noted that neither the Appellant nor Sgt. Roach had mentioned the throwing of the food tray. Sgt. Barrett learned that the District Attorney was reluctant to prosecute the inmate because the failure of the Appellant and Sgt. Roach to mention the Appellant's actions was suggestive of them being untruthful. (Exhibit 4, pp. 33-34).

11. The Appellant returned to work on December 29, 2008. As is routine DOC practice during an investigation into a CO's actions, he was transferred to another unit, the Departmental Disciplinary Unit (DDU). This unit houses the most disruptive and dangerous inmates within the entire DOC. Due to the dangerousness of the DDU inmate population, the DOC staff is often on high alert and needs to rely upon one another for safety and security. (Testimony).

12. On December 30, 2008, the Appellant was assigned to work in the DDU inner control room, or "bubble" because he was on "no inmate contact" status and that post did not involve inmate contact. On that date, he received approximately one hour of training from fellow CO Wayne Sweet on how to operate the doors in the "bubble." (*Id.*).

13. The Appellant was upset by the transfer to the DDU and his being placed on "no inmate contact" (NIC) status. (*Id.*).

14. On December 31, 2008, the Appellant was again assigned to work in the "bubble". CO Sweet trained him on the operation of the doors for another hour. The Appellant caught on quickly and learned how to operate the doors. However, throughout

the morning, the Appellant frequently and intentionally forced people to wait before he would open the doors for them. One of the people, a Rabbi, was forced to wait at least five (5) minutes before the Appellant would open the door to let him pass. A supervisory officer, CO Sgt. Rogers, also had to wait before the Appellant opened the door to allow him to pass through.

While Sgt. Rogers was waiting for the door to be opened, the Appellant stated, "he's a piece of shit, he can wait all day."

At another point, the Appellant spoke through the radio and told CO Sgt. Frattasio to "relax." (Exhibit 4, p. 37).

15. Later in the morning on December 31, 2008, CO Captain Fallon called the Appellant out of the "bubble" and spoke to him about his behavior in the "bubble" and his remarks over the radio. (Testimony).

16. Upon his return to the "bubble" following the conversation with Captain Fallon, the Appellant was extremely angry and hostile. This was apparent to the other COs in the "bubble", CO Sweet and CO Lt. Dantuono.

During a conversation with Lt. Dantuono about promotions and work conditions at Cedar Junction, the Appellant stated, "I'll show that mother-fucker what will happen. If I ever see that mother-fucker on the street, I'd fucking kill him."

Lt. Dantuono asked the Appellant to whom he was referring.

The Appellant responded, "the Saint."

Lt. Dantuono informed the Appellant that he should not act in that manner or he would end up in prison just like all of the inmates in custody in the DOC.



The Appellant responded, "I wouldn't do it myself. I'd have one of my boys on the street do it." (*Id.*).

17. "The Saint" is a reference to MCI Cedar Junction Superintendent Peter St. Armand. This nickname is commonly known and used by DOC staff. (*Id.*).

18. The Appellant made several other negative comments about work conditions at Cedar Junction including, "this place sucks," "I don't give a fuck about this place," and that he would call his "daddy."

When Lt. Dantuono asked the Appellant about his "daddy", the Appellant indicated that he meant Luis Spencer, former Superintendent of MCI Norfolk and current Deputy Commissioner for the Northern Sector. (*Id.*).

19. Notwithstanding the fairly common use of profanity and jocular name calling among COs, Lt. Dantuono and CO Sweet were both surprised and horrified by the Appellant's attitude and comments in the "bubble" that day. They felt that his lack of professionalism and concern was detrimental to the operation of the control center in the DDU. As such, Lt. Dantuono reported the Appellant's comments to Captain Fallon after the shift. Lt. Dantuono felt that the Appellant had been very agitated and he did not want to be responsible if the Appellant carried out any of his threats and anything happened down the line. (*Id.*).

20. On December 23, 2008, Captain Edward Hammond was assigned to investigate the December 22 incident with the inmate on the "ten-block." After the December 31, 2008 incident in the "bubble" was reported to the captain, that incident was incorporated into his already existing investigation. (*Id.* and Exhibit 4).

21. When Captain Hammond interviewed the Appellant in late January and early February 2009, the Appellant denied threatening the Superintendent. He stated that he may have called Peter St. Armand an "asshole" or a "piece of shit", but that his reference to seeing someone "on the street" was to the inmate involved in the December 22 assault. (*Id.*).

22. On May 1, 2009, the Appellant was notified that a disciplinary hearing had been scheduled later that month as a result of the investigation into his conduct on December 22 and December 31, 2008. The Appellant was charged with violating the following **Rules and Regulations Governing All Employees of the Massachusetts Department of Correction:**

**General Policy I:**..."Nothing in any part of these rules and regulations shall be construed to relieve an employee...from his/her constant obligation to render good judgment [and] full and prompt obedience to all provisions of law...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..."

**Rule 1:**..."Employees should give dignity to their position..."

**Rule 6(B):**..."Do not foster discontent or otherwise tend to lower the morale of any employee, and be particularly discreet in your interest in the personal matters of any co-worker, or when discussing personal matters of yourself or another."

**Rule 6(c):**..."The duties assigned to you should demand your entire attention. Prolonged conversations between employees should be kept at a minimum except for that which is necessary in the fulfillment of your duties...Be meticulous and circumspect in your conduct and manner within sight or hearing of an inmate."

**Rule 6(d):**..."...exhibit at all times, the kind of respect toward your superior which is expected and required in correctional service."

**Rule 8(a):**... "For those employees having job responsibilities which require inmate contact, your attitude toward inmates should be friendly, not familiar, firm not harsh, vigilant not unduly suspicious, strict not unjust. Your leadership ability may be enhanced by the professional image you project."

**Rule 10(a):**... "Employees shall not use profane or abusive language toward any inmate, nor reply in such language to what is perceived to be impudent or insulting words or actions by an inmate... Department of Correction regulations shall only permit an employee to use force against an inmate which is reasonable. Under no circumstances shall an employee use or permit the use of excessive force, or use force as punishment. (103 CMR 505 Use of Force)."

**Rule 19(c):**... "Since the sphere of activity within an institution or 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, visitor, another employee or yourself."

(Exhibits 2 & 3).

23. The Appellant was also advised that his conduct violated these

Department policies:

#### **Prevention and Elimination of Workplace Violence**

103 DOC 237:... "It is the policy of the Massachusetts Department of Correction to prohibit all employees, contractors and volunteers from engaging in workplace violence..."

103 DOC 237.01 & .02:... "Workplace violence includes but is not limited to any behavior 1) that communicates a direct or indirect threat of physical harm violence, harassment, intimidation, or other disruptive behavior....6) that causes a reasonable person to be in fear of their own safety or that of a colleague; or 7) causes disruption of workplace productivity."

#### **Policy on Information Technology Systems**

103 DOC 751:... "Authorized users are responsible for the security of their passwords and accounts. Under no circumstances will passwords be shared with another staff person or individual."

103 DOC 751.07(2)(A)(E) & (F):... "Prohibited activities include...Revealing your account passwords (network, IMS, email VPN or other) to others or allowing use of your accounts by others...soliciting another staff member's password."

### **Information Technology Security Policy**

103 DOC 756:... "The intent of this policy is to provide authorized access for personnel, dependent on their job assignment to any information technology system maintained by the department. To ensure the system security and integrity the following guidelines shall be adhered to:... (e)...under no circumstances will this password be shared with any other staff person or individual...(f) Under no circumstances should any staff member solicit another member's password or offer their own."

(Exhibits 2 & 7-9).

24. On June 22, 2009, DOC Commissioner Harold W. Clarke notified the Appellant that his employment with DOC was being terminated due to the regulatory and policy infractions set forth in Findings of Fact 22 & 23. (Exhibit 1).

25. The Appellant filed a timely appeal. (Exhibit 11).

26. Sgt. Roach was demoted as a result of his written report concerning the December 22, 2009 incident. He appealed that action to the Civil Service Commission. (Testimony).

### **CONCLUSION AND RECOMMENDED DECISION**

After a careful review of all of the testimony and documents in this case, I have concluded that the Appointing Authority had just cause to discharge the Appellant. The Appointing Authority has met its burden of proving that the Appellant violated Department rules, regulations, policies and procedures including: General Policy 1; Rules 1, 8(a), 10(a) and 19(c) as well as DOC Policies 103 DOC 751 and 756, all pertaining to inappropriate conduct with an inmate, on December 22, 2008. The

Appointing Authority has also sustained its burden of proving that the Appellant again violated General Policy 1 along with Rules 1, 6(b)&(c) and 103 DOC 237 through his disruptive conduct and threats to the Superintendent on December 31, 2008.

While the Appellant has contended that his action in tossing the tray toward the inmate on December 22 was reflexive and accidental, I do not find his account to be credible. After the assault by the inmate, which greatly angered and upset the Appellant, he clearly paused, took the covering off of the tray, then tossed the tray toward the inmate in the cell. The action appeared to be retaliatory. The Appellant's response to an inmate secured in the cell was excessive, unprofessional, lacking in good judgment, and in violation of the General Policy and Rules 8(a), 10(a), 19(c) and policies 103 DOC 505, 751 and 756.

In violation of policies 103 DOC 751.07(2)(A), 751.07 (E) and (F) and 103 DOC 756.07(e)and (f), the Appellant telephoned Sgt. Roach and provided the latter with his personal DOC password. He went on to write a report that did not include mention of his action in tossing the food tray toward the inmate. In so doing, he supplied a report that provided an incomplete picture of the actual incident, a picture that was meant to be depicted in his favor. The failure to write a true and complete report was in violation of Rule 19(c) and serves to detract from the Appellant's credibility in general.

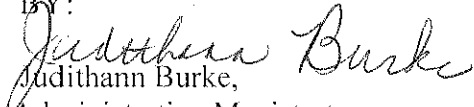
The Appellant failed to work in a cooperative manner with his fellow COs on December 31, 2008. He was upset about being placed on "no inmate contact" status. His behavior in the "bubble" was rude, hostile, disruptive and disrespectful to the other men in the "bubble" and to those individuals trying to pass through the gates on their way

around the institution. Those who were forced to wait included a Rabbi and a superior officer. Further, the Appellant's crass language and general insults regarding many other DOC staff were so excessive that those to whom he was spouting off his views felt uncomfortable and concerned for the safety of the Superintendent. A threat of bodily harm against a superior can never be tolerated in the workplace. It was quite clear to those around him that the Appellant truly did not care about the DOC or his fellow COs. His angry and unstable mien was tantamount to violations of the General Policy, Rule 1, Rule 6(b) and Rule 6(d).

Finally, the Appellant denied that he threatened "the Saint." Rather, he insisted that he had been referring to the inmate involved in the incident on December 22. He informed Captain Hammond of this during the latter's investigation. His explanation during the DALA hearing was not credible and Captain Hammond did not find his assertion truthful. In not being forthcoming about his more than boorish conduct on December 31, 2008, the Appellant violated Rule 19(c).

In conclusion, the Appointing Authority has proven each and every rule and policy violation that was attributed to the Appellant for his role in the incidents on December 22 and December 31, 2008. The Appellant has not conducted himself as either an employee who is willing to conduct himself with dignity on the job or one who is willing and able to abide by the rules, regulations and policies of the DOC. I recommend that the Civil Service Commission affirm the decision of the Appointing Authority terminating the Appellant's employment.

Division of Administrative Law Appeals,

BY:  
  
Judithann Burke,  
Administrative Magistrate

DATED: November 10, 2009