

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

WILLIAM SCANLAN,
Appellant

v.

D-06-310

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Regina M. Ryan
Louison, Costello, Condon, and Pfaff
67 Batterymarch Street
Boston, MA 02110

Respondent's Attorney:

Andrew McAleen
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

John E. Taylor

DECISION

The Appellant, William Scanlan (hereinafter "Appellant"), pursuant to G.L. c.31 § 43, filed an appeal with the Civil Service Commission, (hereinafter "Commission") on November 13, 2006, claiming that the Department of Correction (hereinafter "DOC", "Department" or "Appointing Authority") did not have just cause to suspend him for three (3) days. The appeal was timely filed. A hearing was held on June 11, 2008 at the Commission. As no written notice

was received from either party, the hearing was declared private. The witnesses were sequestered. One (1) tape was made of the hearing and is retained by the Commission.

FINDINGS OF FACT:

Based on twenty (20) joint exhibits entered into evidence at the hearing, and based on the testimony of Lieutenant Al Saucier, Elizabeth Day, and the Appellant, I make the following findings of fact:

1. The Appellant has been employed by the Department of Correction as a Correction Officer since 1987. (Exhibit 19)
2. In 2005, the Appellant was disciplined by DOC for allegedly having knowledge that his supervisor had been smoking on the job, in violation of the DOC's employment policy. The Appellant appealed this action to the Commission and prevailed. (Scanlan v. DOC, CSC Case No. D-05-115)
3. On June 30, 2005, the morning of the pre-hearing conference regarding D-05-115, the Appellant and two other DOC employees, James Silvia and Laura Christie, were in the waiting area of the Commission. Also present in the waiting area was Elizabeth Day, counsel for DOC. (Exhibit 6).
4. On that morning the Appellant was experiencing great frustration from the pending disciplinary action and from difficulties he encountered on his commute to the pre-hearing conference held at the Civil Service Commission office. (Testimony of Appellant, Exhibit 6).
5. Upon his arrival at the Commission office, Appellant sat between Christie and Silvia, approximately 15 feet or 4 seats away from Attorney Elizabeth Day, who sat at the end of

the row of seats in the waiting area. Also present in the waiting area was the Commission receptionist, Medes Diaz. (Exhibit 6).

6. While seated in the waiting area, the Appellant was allegedly overheard saying something to the affect of "I hope this commissioner knows I'm dying a slow and painful death here." The Appellant also said something to the effect of "getting even" with his supervisor.

(Testimony of Christie & Silvia)

7. Christie and Silvia believed that the Appellant was referring to the Commissioner of Correction, in regard to that morning's disciplinary appeal. (Exhibit 6)

8. Appellant testified that his statement about "getting even" referred to the appeal process commencing that morning, which he anticipated would absolve him of the pending disciplinary action. The Appellant was a credible witness with a straightforward, professional demeanor. (Exhibit 6)

9. Attorney Day, who was also present in the Commission waiting area, recalled overhearing the Appellant state "This is just another reason why I hope this commissioner dies a slow and painful death," followed moments later by the comment that the Appellant would "not be happy until I get even." (Exhibit 6, Testimony of Elizabeth Day)

10. Day perceived these comments as threats made against the Commissioner of the Department of Correction. However, Day did not call the police or contact anyone at the DOC offices immediately. (Exhibit 6, Testimony of Elizabeth Day)

11. Attorney Day, remaining on alert, began taking notes of the conversation to document what was said. These additional comments included that the Appellant had a cousin in Florida who could offer them legal advice and a referral, and other personal information mentioned by the DOC employees. (Exhibit 6, Testimony of Lt. Saucier)

12. The day after leaving the Commission, Attorney Day notified her supervisor, General Counsel Nancy White, of what she had heard. White notified DOC Commissioner Dennehy and Deputy Commissioner James R. Bender. The Department of Correction then initiated an internal criminal investigation and an investigation by the Massachusetts State Police. (Exhibit 8)
13. Lieutenant Al Saucier of the DOC Internal Affairs Unit conducted the internal criminal investigation, and interviewed Day on July 19, 2005. (Exhibit 6)
14. Massachusetts State Police Trooper Kevin M. Condon commenced the criminal investigation on June 30, 2005 regarding the Appellant's statements. (Exhibit 6) Upon the conclusion of the investigation, Trooper Condon concluded that the comments made by the Appellant did not constitute a criminal act. (Exhibit 6 and Testimony of Appellant)
15. On July 18, 2006, Deputy Commissioner Bender sent a letter to the Appellant charging him with violating Rule 3(a), Rule 6(b), and Rule 6(d) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction and the Prevention and Elimination of Workplace Violence Policy. These rules state:

Rule 3(a): "In your discussion of the affairs of the institution and/or Department of Correction you must be circumspect and discreet..."

Rule 6(a): "Correctional goals can best be achieved through the united and loyal efforts by all employees. You should control your temper, exercise the utmost patience and discretion, and avoid all collusions, jealousy and controversies in your relationships with co-workers."

Rule 6(b): "Do not foster discontent or otherwise tend to lower the morale of any employee, and be particularly discreet...when discussing personal matters..."

Rule 6(d): "You...must exhibit at all times, the kind of respect toward your superior which is expected and required in correctional service" (Exhibit 2).

16. On August 22, 2006, DOC Commissioner Kathleen Dennehy sent a letter to the Appellant, notifying him of the charges and a scheduling of the Department's discipline hearing on September 26, 2006. (Exhibit 4)
17. On September 26, 2006, a hearing was held by the Department's Labor Relations Advisor, Susan E. Hertz, who found just cause to discipline the Appellant. (Exhibits 3 & 7)
18. On October 30, 2006, Deputy Commissioner Bender sent the decision to the Appellant.
19. The Appellant's appeal of this decision was timely received by the Commission on November 16, 2006 (Exhibit 1)

CONCLUSION

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common

sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). In reviewing an appeal under G.L. c. 31, § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Respondent has not shown by a preponderance of the evidence that it had just cause to suspend the Appellant from employment for a period of three (3) work-days, without pay. Both parties agree that the Appellant made comments including the phrases "a slow and painful death" and "get even" while in the waiting area of the Civil Service Commission on June 30, 2005. The factual dispute is regarding the context in which the comments were made, and whether they constituted a threat. The Appellant contends that he stated "I hope the commissioner knows I am dying a slow and painful death here" referring to his own frustration and that "getting even" referred to the appeal process that day. He described feeling "hot and sweaty," frustrated, and stressed out by the circumstances surrounding the pre-hearing that morning, in conformance with those comments.

The only witness for the Department of Correction, Attorney Elizabeth Day, disputes the Appellant's version of the facts. Day contends that the Appellant stated, "This is just another reason why I hope this Commissioner dies a slow and painful death," and "I won't be happy until I get even." Day testified that she understood these comments to be a direct threat against the Commissioner of the Department of Correction, Kathleen Dennehy. She also testified that she found it strange that he would make such threatening comments in such a public setting. She further testified that several minutes lapsed between the two comments and that immediately prior to the comment about getting even, the Appellant mentioned a civil suit against the DOC. None of the other witnesses who were present at the Commission on that day attested to any threats being made by the Appellant against Dennehy. Lt. Saucier testified that in the course of his investigation, both James Silvia and Laura Christie affirmed the Appellant's account of the conversation. They were sitting on either side of the Appellant when he made his comments, and both witnesses recalled the Appellant stating "I hope the commissioner knows I am dying a slow

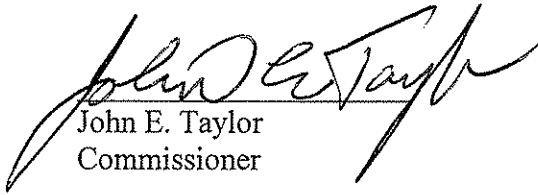
and painful death here” referring to his own frustration, and that “getting even” referred to the appeal process they had been discussing. Medes Diaz, who was sitting closer to the Appellant than Day, told Lt. Saucier that even though she did not pay close attention to the conversation, she did not overhear any threatening comments. She stated that had she heard threats, she certainly would have reported them.

In light of the circumstances surrounding the incident, including the distance between Day and the Appellant, the public nature of the forum and the lack of validating evidence, it is more likely than not that Attorney Day misunderstood the Appellant’s comments. A preponderance of the evidence demonstrates that the Appellant’s comments did not constitute a threat. The Appellant’s comments are consistent with the circumstances of being frustrated with Boston traffic and the difficulty in finding a parking spot.

If the Appointing Authority fails to prove its action was justified, the Commission “shall reverse such an action and the person concerned shall be returned to his position without loss of compensation or other rights...” G.L. c. 31, § 43. For all of the above stated reasons, the Commission determines that, by a preponderance of the evidence presented at the Civil Service Commission hearing, DOC did not have just cause for suspending the Appellant for three (3) days without pay. The Appellant’s suspension is hereby reversed.

The Appellant's appeal filed under Docket No. D-06-310 is hereby *allowed* and he shall be returned to his position without any loss in pay or benefits.

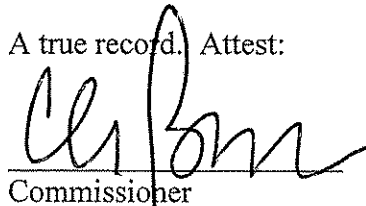
Civil Service Commission



John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on August 7, 2008.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), 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 sent to:

Regina M. Ryan, Esq. (for Appellant)

Andrew McAleen (for Appointing Authority)