

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ERNIE B. SILVA,
Appellant

v.

CASE NO: D-07-352

DEPARTMENT OF CORRECTION,
Respondent

Appellant:

Ernie B. Silva, Pro Se
913 Maple Street
Fall River, MA 02720

Department of Correction Representative:

Kerry A. Rice
Department of Correction
P.O. Box 946, Industries Drive
Norfolk, MA 02056

Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Ernie B. Silva, acting pursuant to G.L.c.31, §§42 & 43, duly appealed a decision of the Department of Correction ("DOC"), the Appointing Authority, to suspend him for three days. The DOC has moved for summary decision on the grounds that the DOC recently reduced the discipline of the Appellant to a written warning and restored all benefits and lost wages which resulted from the suspension. Mr. Silva opposes the motion on grounds that any discipline is unwarranted and prejudicial.

A hearing on the DOC Motion for Summary Judgment was held on June 19, 2008. One tape recording was made of the hearing. The record was kept open to permit the DOC to submit additional documentation confirming the consummation of the change in discipline and restoration of benefits. The DOC submitted additional documents on July 10, 2008. The Appellant responded on August 1, 2008.

FINDINGS OF FACT

I find there is no genuine dispute as to the following facts:

1. At the times relevant to this appeal, the Appellant, Ernie B. Silva, worked for the DOC as a Correction Officer (CO) III. The Appellant has since retired.
2. On June 19, 2006, the DOC imposed a three day suspension (two days held in abeyance) upon CO Silva.
3. CO Silva served his one day suspension on July 14, 2008.
4. On September 28, 2007, the Appointing Authority, through its Acting Commissioner, James R. Bender, issued a written notice to Mr. Silva finding just cause for disciplinary action and denying his appeal of the three-day suspension imposed on him.
5. CO Silva received notice of the September 28, 2007 decision by letter postmarked October 5, 2007.
6. CO Silva's appeal to the Commission was filed in a timely manner on October 15, 2007.
7. On December 5, 2007, the Commission notified the parties to appear at a full hearing of the appeal, scheduled for June 19, 2008.
8. On June 17, 2008, the DOC filed a Motion for Summary Judgment.
9. At the hearing on June 19, 2008, CO Silvia asserted his objection to the motion and refused to accept the reduced discipline. CO Silva claims that his on-going efforts in a custody dispute will be adversely affected even by a letter of reprimand.
10. On July 10, 2008, the DOC issued a Memorandum of that date from Jeffery Bolger, its Director of Employee Relations, to which was attached a copy of a Non-Tort

Settlement/Judgment Payment Authorization Form and Settlement Agreement, submitted to the Commonwealth's Office of the Comptroller.

11. The aforesaid documentation reflects DOC's authorization to the Comptroller to pay CO Silva the sum of \$254.76, which represents the DOC's calculation of the full amount of lost pay and benefits suffered on account of CO Silva's one-day suspension.

CONCLUSION

The Commission's jurisdiction in discipline cases is limited to appeals by tenured civil service employees who have been "discharged, removed, suspended . . . laid off [or] transferred from his position without his written consent . . ." G.L.c.31,§41. The Commission may dismiss any appeal brought before it for lack of jurisdiction or other proper grounds, either on its own motion or on the motion of any party. 801 CMR 1.01(7)(g)(3).


The Commission was clearly vested with jurisdiction over CO Silva's appeal when it was filed. The DOC argues, however, that, since the discipline has now been reduced to a written reprimand and the pay and benefits CO Silva lost as a result of the suspension restored to him, the appeal now must be dismissed for lack of jurisdiction.

As a general rule, if one of the conditions for exercise of original jurisdiction later change, the tribunal may continue to hear the matter or dismiss it. See generally, Sperounes v. Farese, 449 Mass. 800, 805-808, 873 N.E.2d 239, 243-45 (2007) (construing the \$25,000 threshold under the Massachusetts "one-trial" statute as non-jurisdiction and can be waived; unless objection is made at the inception of the case, the statute "permits a judge discretion to determine whether to retain or dismiss [such] a

complaint”; Arbaugh v. Y & H Corp., 546 U.S. 500, 514, 126 S.Ct. 1235, 1244-45 (163 L.Ed.2d 1097 (2006) (Federal court supplemental jurisdiction over pendant state law claims).

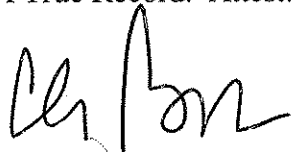
The case of Centeio v. Department of Correction, Case No. D-3961, 5 MCSR 220 (digest) (1992), to which the DOC refers, is consistent with this result. In Centeio, the DOC had offered to “rescind the suspension” of the Appellant and the Commission dismissed the appeal as “moot”, although the Commission also found for the Appellant on the merits, because the evidence showed that the Appellant had already been fully reimbursed for all lost compensation and the Commission could not grant him any relief that he had not already received.

In the present case, the Commission concludes similarly that retaining jurisdiction of this appeal is unwarranted. The Commission finds that the DOC’s unilateral reduction of the discipline below the Commission’s original jurisdictional amount was a good faith effort to resolve the dispute and such efforts at settlement must be encouraged. The Commission also considered the Appellant’s concern about the impact of a reprimand on his pending custody dispute, but does not believe that inchoate concern justifies retaining jurisdiction of a case that is otherwise moot. Accordingly, this appeal hereby is *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on August 21, 2008.

A True Record. Attest:



Commissioner

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

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

Notice to:

Ernie B. Silva (Appellant)
Kerry A. Rice (Appointing Authority)
John Marra, Esq (HRD)