

The Commonwealth of Massachusetts

Decision mailed: 11/13/09
Civil Service Commission
JS

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

JAMES SILVIA,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: D-05-119

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on November 12, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 17, 2009. The Commission received comments from the Appellant on September 17, 2009, and comments from the Respondent on October 26, 2009. 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 3-1 vote of the Civil Service Commission (Bowman, Chairman; Marquis and Stein, Commissioners [Henderson, Commissioner – No; Taylor, Commissioner - absent], Commissioners) on November 12, 2009.

A true record. Attest.

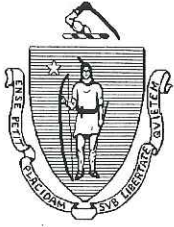
Christopher C. Bowman
Chairman

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:

Douglas I Louison, Esq. (for Appellant)
Carol A. Colby, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
98 NORTH WASHINGTON STREET, 4TH FLOOR
Boston, MA 02114

Tel: 617-727-7060
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August 17, 2009

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

Re: James Silvia v. Department of Correction
DALA Docket No. CS-07-1138

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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.

Sincerely,


Richard C. Heidlage
Acting Chief Administrative Magistrate

RCH/das

Enclosure

cc: Douglas I. Louison, Esq.
Robert Stewart, Esq.
Carol Colby, Esq.
Joel Posner, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

James Silvia,
Appellant

v.

Docket No. D-05-119
DALA Docket No. CS-07-1138

Department of Correction,
Appointing Authority

Appearance for Appellant:

Douglas I. Louison, Esq.
Robert Stewart, Esq.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

**Appearance for Appointing
Authority:**

Carol Colby, Esq.
Joel Posner, Esq.
Department of Correction, Legal Division
70 Franklin Street
Boston, MA 02110

Administrative Magistrate:

Maria A. Imparato, Esq.

RECOMMENDED DECISION

INTRODUCTION

Under the provisions of G. L. c. 31, s. 43, the Appellant, James Silvia, filed a timely appeal of the March 29, 2005 decision of the Appointing Authority, Department of Correction ("DOC"), to discharge him from his position of Lieutenant Shift Commander at the Northeastern Correctional Center ("NECC").

I held a hearing on December 17, 2007, and continued to March 24, 2008, May 1, 2008 and May 2, 2008 at the office of the Division of Administrative Law Appeals, 98

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North Washington Street, Boston, MA. I declared the hearing public on the written request of the Appellant.

I admitted documents into evidence. (Exs. 1 – 25)¹ The parties submitted Joint Stipulations of Fact on August 15, 2008 with appended documents relating to the DOC Smoking Policy. I marked the Stipulations of Fact as Exhibit 26.

The DOC presented the testimony of Deputy Superintendent Alvin Notice, formerly of NECC; Lieutenant Mark McCaw of the Internal Affairs Unit; and Superintendent James J. Saba.

The Appellant, James F. Silvia, testified on his own behalf, as did Lieutenant Steven Kennaway; Ellen I. Flaminio, Director of Treatment and Classification at NECC; Correction Officer (CO) John Sullivan; and Lieutenant William Scanlan.

The record closed on September 26, 2008 when the parties filed recommended decisions.

Mr. Silvia was discharged for:

- (1) violation of the General Policy set forth in the Rules and Regulations Governing all Employees which states, “Nothing in any part of these rules and regulations shall be construed to relieve any 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, 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;”

¹ Post hearing I marked the video tape presented by the Appointing Authority as Exhibit 25.

- (2) violation of Rule 4(d) which states in part, "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 designees;"
- (3) violation of Rule 7(c) which states, "Any Department of Correction or institution employee who is found sleeping at his/her post during the course of their official duties, or otherwise flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge;"
- (4) violation of Rule 7(d) which states, "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;"
- (5) violation of Rule 19(c) which states in part, "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, a visitor, another employee or yourself;" and
- (6) violation of 103 DOC 203, D.O.C. Employee Smoking Policy and the state prohibition on smoking in a state building.

FINDINGS OF FACT

1. James F. Silvia worked for the DOC from 1977 until he was detached from active duty without prejudice and without loss of pay in September 2004. He was discharged on March 29, 2005. He retired for superannuation effective March 30, 2005.
2. Mr. Silvia worked as a CO I at MCI Walpole from 1977 to 1984. In 1984 he transferred to MCI Warwick where in 1992 he became a CO II Sergeant. MCI Warwick closed in 1992 and Mr. Silvia was assigned to NECC. In or about 1999 he became a CO III Lieutenant. (Testimony, Silvia.)
3. NECC is a minimum-security, pre-release center with 240 inmates in West Concord called "The Farm." The inmates are permitted to go out and work normal jobs to earn money in anticipation of their release. They are transported to their jobs in vans driven by COs. (Testimony, Silvia.)
4. In or about 2004, Mr. Silvia became Shift Commander of the 3 – 11 p.m. shift at NECC. Mr. Silvia was the highest ranking officer in the institution on the shift because the Deputy Superintendent and the Director of Security worked on the 7 a.m.-3 p.m. shift. (Testimony, Silvia.) In the absence of the Superintendent, the Shift Commander is in charge of the institution. (Testimony, Saba; Ex. 10.)
5. "The Shift Commander shall always conduct himself/herself in a manner that will command the respect and confidence of all subordinates." The Shift Commander on the 3 – 11 shift shall ensure "that only those

visitors/volunteers that are properly cleared for admission to the institution are admitted.” (Post Orders for Shift Commander, Ex. 10, pp. 1 - 2)

6. NECC comprises five buildings over 5 – 10 acres. Gralton Hall is a two-story building that houses the Control Room, the record and files offices, the culinary area and the inmate library on the first floor. The second floor houses inmates. (Ex. 4; Testimony, Notice.)
7. The Control Room has a door to the building lobby, a sliding window to the lobby, and a back door to the outside. (Testimony, Notice.) The Control Room is a secure location where security equipment, radios, and telephones are stored. Keys are issued from the Control Room. The institution radio is located in the Control Room. (Testimony, McCaw.) In September 2004, the front and back door locks of the Control Room did not function. (Testimony, Silvia.)

The investigation

8. In or about July 2004, an inmate wrote several notes of complaint with respect to staff at NECC. The inmate claimed, among other things, that “it’s like a big party every week-end in the control office.” The inmate also alleged that for the previous six months a woman of about 25 years of age visited Mr. Silvia while he was on duty, was allowed to enter the Control Room, hung out in front of Gralton Hall while Mr. Silvia smoked cigarettes, and spent time in the records room with Mr. Silvia. (Testimony, McCaw; Ex. 14.)

9. As a result of the allegations, then-Superintendent Saba assigned then-Sergeant Mark McCaw of Investigative Services to investigate the allegations. (Testimony, Saba.)
10. Sgt. McCaw (who became a Lieutenant in 2005) was able to identify the civilian woman who visited Mr. Silvia by running her license plate number. She is Karen N[REDACTED], d.o.b. [REDACTED], of [REDACTED], MA. (Testimony, McCaw; Ex. 14.)
11. Sgt. McCaw learned that Ms. N[REDACTED] had been a vendor courier; she picked up blood and urine samples from a locked box outside the Control Room and delivered the samples to a location for analysis. Ms. N[REDACTED] had not been so employed since August 2004, but DOC did not issue notice that Ms. N[REDACTED] was no longer a vendor courier. (Testimony, McCaw; Ex. 14.)
12. Ms. N[REDACTED] came to visit Mr. Silvia on two or three occasions when she was not at NECC to collect samples. (Testimony, Silvia.)
13. Sgt. McCaw set up a surveillance video camera in the Inner Perimeter Security Office aimed at the windows and back door of the Control Room which is the area where the alleged misconduct took place. (Testimony, McCaw.)
14. The surveillance taping was done on three consecutive days: September 9, 10 and 11, 2004. (Testimony, McCaw.)
15. Sgt. McCaw was able to collect about 16 or 17 hours of videotape. From those tapes he compiled a one hour tape by fast-forwarding until he saw

smoking, cell phone use and the presence of Ms. Nadeau. (Testimony, McCaw; Ex. 25.)

16. The tape shows Mr. Silvia smoking numerous cigarettes, talking on what appears to be a cell phone, and engaging in inappropriate behavior with Ms. Nadeau in the Control Room and outside of the back door of the Control Room. On two occasions Ms. Nadeau is seen sitting on Mr. Silvia's lap. On one occasion Ms. Nadeau is seen passing in front of Mr. Silvia, pulling down her pants and exposing her underwear to Mr. Silvia. (Ex. 25.)
17. The tape shows Mr. Silvia smoking in the presence of staff and inmates, and shows other staff smoking in Mr. Silvia's presence. The tape shows other staff apparently talking on cell phones in Mr. Silvia's presence. The tape shows Mr. Silvia and Ms. Nadeau leaving by the back door together and moving out of range of the camera. A DOC van passes the camera in the direction of exiting NECC. The van is then seen returning in the opposite direction. Ms. Nadeau is then seen returning to the Control Room. Then Mr. Silvia is seen returning to the Control Room. (Ex. 25.)

Interview of Mr. Silvia by Sgt. McCaw

18. On or about October 4, 2004, Sgt. McCaw interviewed Mr. Silvia. Sgt. McCaw took notes of the interview which he has destroyed. Sgt. McCaw compiled an investigative report dated January 19, 2005 summarizing his investigation. (Ex. 13.)

19. During his interview with Sgt. McCaw, Mr. Silvia admitted that he smoked while on duty. He said that he was addicted to nicotine and had spoken with the superintendent about it in the past. (Testimony, McCaw; Ex. 13, p.17.)
20. Mr. Silvia said that he was aware of the institution's smoking policy. He said that he had not seen any staff smoking recently, but in the past he did and instructed those staff not to smoke. (Testimony, McCaw; Ex. 13, p.17.)
21. Mr. Silvia denied using a personal cell phone while on duty and said he had not seen other staff using a personal cell phone while on duty. (Ex. 13, p. 17.)
22. Mr. Silvia denied that a woman had visited him while on duty. He said that a vendor courier named [REDACTED] sometimes came and visited with the staff on duty in the Control Room. He denied that Ms. [REDACTED] came to visit with him specifically. (Ex. 13, p. 17.)
23. When asked if his relationship with [REDACTED] was intimate, Mr. Silvia said, "possibly after shift, yes." (Ex. 13, p. 18.)

Smoking Policy

24. In 1998, tobacco products were banned among inmates in all eighteen DOC institutions. Tobacco was considered contraband. (Testimony, Notice; Ex. 26 I.)
25. Effective July 1, 2001, employees of the DOC were prohibited from using or possessing tobacco products on DOC property and in DOC vehicles. (Testimony, Notice, Ex. 26I.)
26. The Collective Bargaining Agreement (CBA) between the Commonwealth and the Correction Officers' Union (MCOFU) in effect from January 1, 2001

- to December 31, 2003 contained a Memorandum of Understanding phasing out the use and possession of tobacco products by Unit 4 employees while on the premises of any DOC facility. (Exs. 6, 26B.)
27. The Memorandum of Understanding provided that from January 1, 2001 to June 30, 2001, the DOC would offer smoking cessation programs to all employees. From July 1, 2001 to December 31, 2001, "employees who are found in possession of tobacco products in violation of the tobacco prohibition shall receive a verbal warning if said possession was not with the intent to distribute. This provision, however, does not modify the current smoking prohibition set forth in M.G.L. Chapter 32, Section 94." (Exs. 6, 26B.)
28. The Memorandum of Understanding also provided that to "inaugurate this program, on January 1, 2002 employees will be given a one-time bonus of \$500.00." (Exs. 6, 26B.)
29. The Employee Smoking Policy effective July 1, 2001, set forth in 103 DOC 203, provides that the "prohibition does not apply to the otherwise lawful possession of tobacco products in an employee's personal motor vehicle in the parking lot of a DOC facility or their use while entering or exiting such a parking lot." (Ex. 7.)
30. Those in violation of the Employee Smoking Policy between July 1, 2001 and December 31, 2001 were subject to a verbal warning. "On or after January 1, 2002, employees who are found in violation of the tobacco prohibition may be disciplined for such possession." (Ex. 7.)

31. At the Unit 4 Labor Management Meeting on December 19, 2001, which Mr. Silvia attended in his capacity as Chief Union Steward, "Superintendent Fox reiterated that effective January 1, 2002, there would be no smoking or tobacco products authorized on state property. Progressive discipline will occur for violations of this directive." (Ex. 8.)
32. Mr. Silvia, on an undetermined date, told Superintendent Saba that he smoked and was trying to stop, without good result. Superintendent Saba did not warn or discipline Mr. Silvia. (Testimony, Silvia.)
33. Between February 19, 2002 and May 2007, fifteen DOC employees (not including Mr. Silvia) were disciplined for violating the smoking policy. Of the fifteen who were disciplined, ten were disciplined for smoking on duty, and five were disciplined for being in possession of contraband. (Ex. 18.)
34. Of the ten who were disciplined for smoking on duty, two were terminated (one was eventually reinstated); two were given ten day suspensions; one was given a thirty day suspension; three who were found smoking in the parking lot were given 3 day suspensions that were held in abeyance for one year; one retired before he was disciplined; and in one case no action was taken. (Ex. 18.)
35. Of the five who were disciplined for being in possession of contraband, one received a reprimand; one received a 5 day suspension; two received 10 day suspensions; and one received a twenty day suspension. (Ex. 18.)

Institution Security Procedures/Cell Phones

36. The NECC Security Policy effective in June 2003 appears in 103 DOC 501.
(Testimony, Notice; Ex. 9.)
37. Section 501.02 provides that the Control Room in Gralton Hall will be continually staffed. "The Control Room will remain locked at all times and access will be restricted to Administrative Staff, those staff members assigned to that post or directed to perform a function by the Shift Commander."
(Ex. 9.)
38. The inmate janitor is allowed into the Control Room once per shift to perform janitorial duties while being continuously monitored. "The general public and all visitors will be directed to the Control Room prior to being allowed access to the facility." (Ex. 9, 501.02.)
39. Under 501.04, "[a]ll visitors and employees entering the facility are subject to search. No weapons, ammunition, cuff keys, cell phones/Nextels, cameras, video/recording equipment, drugs, or alcohol are allowed on the facility's grounds. Tobacco products are not allowed inside of the facility." (Ex. 9, 501.04.)
40. Cell phones are banned inside the facility because of security. Cell phones can be used as a tool to communicate with a visitor in planning an escape. Cell phones are a distraction to the staff if used while working. (Testimony, Notice.)
41. There is, and was in September 2004, a public telephone in the lobby. There is, and was in September 2004, a desk phone mounted on the wall outside the

Control Room. Someone can call the Control Room by picking up the phone in the lobby. Someone inside the Control Room can dial the phone and speak with someone outside in the lobby. (Testimony, Notice.)

42. A vendor courier who picks up and drops off specimens from the locked box in the lobby has no reason to be in the Control Room. The vendor courier has a key to the box, and can speak to the Control Room, if necessary, on the phone outside of the Control Room. The Control Room is restricted to staff unless the Shift Commander allows another person in. (Testimony, Notice.)
43. The DOC issued Nextel phones so that shift supervisors could communicate with work crews that had been driven to their jobs in the community. Most of the work crews worked from 9 a.m. to 5 p.m., but some inmates worked as cooks after 5 p.m. The shift supervisor might have to speak with the transport team on a Nextel after 5 p.m. (Testimony, McCaw.)
44. A shift supervisor should stay in touch with all of his officers during a shift and can do so using a Nextel. A shift supervisor is required to make rounds of the facility during his shift. (Testimony, McCaw.)
45. A Nextel phone can be used as a walkie-talkie, held like a microphone in front of one's face. A Nextel phone can also be used as a cell phone. There is no way to tell from looking at the phone bills whether a Nextel has been used as a walkie-talkie or as a cell phone. (Testimony, McCaw.)

Discipline

46. On December 24, 2004, DOC Commissioner Kathleen Dennehy provided Mr. Silvia with a notice of contemplated action. (Ex. 1.)

47. After an Appointing Authority hearing on February 25, 2005, the Commissioner terminated Mr. Silvia by letter of March 29, 2005. (Ex. 2.)
48. Mr. Silvia appealed to the Civil Service Commission by letter received on April 4, 2005. (Ex. 3.)
49. Other COs who are seen on the videotape were disciplined for lying to investigators and failing to report instances of misconduct. (Testimony, McCaw; Ex. 13, pp. 39-40.)

CONCLUSION AND RECOMMENDATION

The Department of Correction has demonstrated just cause for the discharge of James F. Silvia. I recommend that the Civil Service Commission affirm the action of the Appointing Authority.

General Policy

The General Policy set forth in the Rules and Regulations Governing all Employees states, "Nothing in any part of these rules and regulations shall be construed to relieve any 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, full and prompt obedience to all provisions of law, and to all orders not repugnant to rule, regulations and policy issues by the Commissioner, the respective Superintendent, or by their authority."

The DOC has demonstrated, through its video surveillance, and through the testimony of the Appellant, that the Appellant did not render good judgment when he allowed a woman with whom he had an intimate relationship to visit him in the

Control Room while he was on duty, both when she was acting as a vendor courier, and when she was merely acting as his girlfriend.

The Appellant did not render good judgment when he smoked in the Control Room, in front of staff and inmates, and when he allowed others, including his girlfriend, to smoke in his presence, in view of the fact that tobacco is contraband.

Rule 4(d)

Rule 4(d) states in part: "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."

The DOC has not proven this charge.

The quality of the video tape is such that it is impossible to determine whether the Control Room staff is talking on personal cell phones or on DOC Nextel phones. Even if staff were talking on personal cell phones, the Appellant has the authority to authorize the use of a personal cell phone.

The Appellant testified at hearing that the tape shows CO Christy speaking on a personal cell phone, and that the Appellant authorized her to do so because she had a family emergency.

Furthermore, the Appellant as the highest ranking officer in the institution on his shift, and as the Superintendent's designee, has the authority to grant himself permission to use a personal cell phone, if that is what he was using.

It is impossible to tell from the DOC telephone bills whether a Nextel phone was used legitimately as a walkie-talkie to converse with staff, or whether it was used as a telephone to make personal calls.

Rule 7(c)

Rule 7(c) states: "Any Department of Correction or institution employee who is found sleeping at his/her post during the course of their official duties, or otherwise flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge."

The Appellant violated this rule by flagrantly neglecting his duty to keep the Control Room locked and to restrict access to the Control Room to those assigned there or directed to perform a function by the Shift Commander. The Appellant's girlfriend, Ms. Nadeau, was apparently not directed to perform a function in the Control Room; she was there to visit the Appellant. She could have performed her job as a vendor courier without entering the Control Room, since the locked box for samples is in the Galton Hall lobby.

Rule 7(d)

Rule 7(d) states: "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."

The DOC had demonstrated that the Appellant violated this rule by having his girlfriend in the Control Room while he was on duty, and on two or three occasions when she had no reason to be at NECC other than to visit the Appellant.

Furthermore, Ms. Nadeau sat in the Appellant's lap and pulled down her pants in front of him. This behavior rises to the level of a "distracting amusement."

Rule 19(c)

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."

The DOC has demonstrated that the Appellant was not truthful in his interview with Sgt. McCaw on several points. On October 4, 2008, the Appellant told Sgt. McCaw that he had not seen any staff smoking recently, but in the past he did and instructed those staff not to smoke.

In view of the fact that the videotape shows that the Appellant saw staff smoking in September 2008, the Appellant's assertion was not true.

On October 4, 2008, the Appellant told Sgt. McCaw that he had not seen other staff using a personal cell phone while on duty. In view of the fact that the videotape shows CO Christy using a personal cell phone in the Appellant's presence (albeit with permission), the Appellant's statement to Sgt. McCaw was untrue.

On October 4, 2008, the Appellant denied that Ms. Nadeau came to NECC specifically to visit him. In view of the Appellant's testimony at hearing that Ms. Nadeau did visit him while he was on duty on two or three occasions when she was not working as a vendor courier, the Appellant's statement to Sgt. McCaw was untrue. Furthermore, the fact that Ms. Nadeau is seen sitting in the Appellant's lap and pulling down her pants in front of him indicates that she was in the Control Room for no other reason than to visit the Appellant.

Smoking Policy

Under the DOC Smoking Policy in effect January 1, 2002, smoking tobacco and possession of tobacco products is not authorized on DOC property under the threat of progressive discipline.

The Appellant breached this prohibition blatantly and often in the Control Room, in front of staff and inmates. He also allowed other staff and his girlfriend to smoke in the Control Room.

The Appellant argues that he told Superintendent Saba, on an undetermined date, that he smoked and was trying without success to stop. He argues that because Superintendent Saba knew that the Appellant smoked and did not impose progressive discipline, Superintendent Saba condoned the Appellant's smoking.

I reject the Appellant's argument. It is not clear when the Appellant told this to Superintendent Saba, and it is not clear that he told Superintendent Saba that he smoked while on duty in the Control Room. There is no prohibition against the Appellant smoking when he is not on DOC property.

The Appellant also argues that according to the smoking policy, those found violating the policy will receive progressive discipline. The Appellant argues that he was not disciplined previously for smoking and should not now face termination.

I conclude, however, that the Appellant was not terminated merely for smoking. He was terminated for violation of the General Policy and the regulations cited above, as well as for violation of the smoking policy. Taken together, the Appellant's behavior in his position of Shift Commander was egregious enough to warrant termination. Under the Post Orders, "The Shift Commander shall always conduct

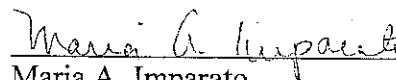
himself/herself in a manner that will command respect and confidence of all subordinates.” The Appellant’s blatant flouting of the smoking policy and allowing his girlfriend into the Control Room for no reason other than to visit with him is not behavior that commands the respect and confidence of his subordinates. To the contrary, the Appellant’s behavior sent a message to subordinates that the Appellant was free to flout DOC regulations.

Recommendation

I conclude that 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).

I recommend that the Civil Service Commission affirm the action of the Appointing Authority to discharge James Silvia from his job as a CO III Lieutenant at NECC.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Maria A. Imperato
Administrative Magistrate

AUG 17 2009