

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PHILLIP SLOAN,
Appellant
v.

D-12-255

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant

Phillip Sloan¹
Pro se

Appearance for Respondent

Jody A. Brenner, Esq.
Department of Correction
Division of Human Resources
One Industries Drive
P.O. Box 946
Norfolk, MA 02056

Commissioner:

Cynthia Ittleman²

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Phillip Sloan (hereinafter “Mr. Sloan” or “Appellant”), filed an appeal on September 7, 2012, regarding the decision of the Department of Correction (hereinafter “DOC” or “Respondent”), to suspend him without pay for one (1) day and reassign him from his position with the Central Division Community Work Crew Unit to Pondville Correctional Center. Mr. Sloan filed a timely appeal. A pre-hearing conference was held on October 1, 2012 and a full hearing was held on November 28, 2012 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was digitally recorded and the witnesses were sequestered. Post-hearing briefs were filed by Mr.

¹ Mr. Sloan appeared pro se but was assisted by his wife, who is also not an attorney.

² The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

Sloan and the Respondent on January 4, 2013, and January 7, 2013, respectively. On February 24, 2014, in response to my request, the parties submitted information concerning Mr. Sloan's allegation that he lost income coincidental with this matter.

Findings of Fact:

Seventeen (17) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Department of Correction:

- Captain Robert McGuinness, Office of Investigative Services, Department of Correction
- Gina Perez, Director, Department of Correction Community Work Central Division
- Cheryl Brannon, Department of Correction, Human Resources

For the Appellant:

- Frederick Yule, Department of Conservation and Recreation
- Robert Seery, Richmond Hardware
- Phillip Sloan, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, a preponderance of the credible evidence, and reasonable inferences therefrom, establishes the following findings of fact:

1. Mr. Sloan is a resident of Mansfield, Massachusetts. He began working with the DOC in 1997 and is a tenured civil service employee serving in the position of Correction Program Officer A/B (CPO). (*Stipulated Facts*)
2. Mr. Sloan was assigned to Pondville Correction Center (PCC) in Norfolk, MA from February of 1997 until being approved and transferred to the DOC's Community Work Crew (CWC) on March 16, 2008, that is based out of PCC. He then worked with CWC from 2008 to 2011. (*Exhibits 3 and 12*)

3. Mr. Sloan's prior discipline consists of a two-day suspension in 2005 for filing a false report and lying to the investigator. He did not appeal the 2005 discipline to the Commission. (*Exhibit 9, Testimony of Sloan*)
4. Besides the one disciplinary incident, Mr. Sloan has been shown to regularly "Meet" and "Exceed" in all of his progress and annual reviews. Mr. Sloan also received several letters from various departments personally commending him for his exceptional work including receiving PCC's Employee of the Year Award in 2001. (*Exhibits 10 and 13*)
5. The CWC consists of five officers and crews of approximately eight minimum security inmates supervised by one Correction Officer or one CPO. The work crews perform unskilled labor in the community for cities, towns, other state agencies and non-profit organizations. The work includes projects such as painting, beautification and landscaping. (*Testimony of Perez*)
6. Mr. Sloan received his daily assignments from Director Perez. (*Testimony of Perez*)
7. Mr. Sloan worked 6 a.m. to 4 p.m. Monday through Thursday. He would pick up the work crews at approximately 6 a.m. and return them at approximately 2:30 p.m. to minimize disruption to the institution during the 3 p.m. shift change. (*Testimony of Sloan and Perez*)
8. CWC Officers are required to report by telephone daily and leave a message confirming that they have arrived at their assigned locations. (*Testimony of Perez*)
9. Mr. Sloan's crew was based at PCC and his duties included picking up inmates, loading them into the van, driving to the worksite, calling the call-in number, direct care and custody of inmates, and checks at irregular intervals every hour. (*Testimony of Perez*)

10. Mr. Sloan habitually would use the time between 3 p.m. and 3:50 p.m. to take his lunch break. He preferred to not take his lunch with the inmates and so, after returning them, he would take his lunch off-site. (*Testimony of Sloan*)
11. In the time after Mr. Sloan returned the inmates until he clocked out at 4 p.m., he would often go to local athletic fields to complete paperwork and eat. At times, he walked the track at the fields. On at least three occasions, Mr. Sloan took his personal vehicle to hit golf balls, because you cannot put golf clubs in a state van after returning inmates in uniform. (*Exhibit 5: Sloan Interview*)
12. Mr. Sloan stated to DOC Capt. McGuiness that he would use the time after he dropped off his inmates to “go over everything for the next day, get everything all set, decompress, relax, kick back, do whatever.” (*Exhibit 5: Sloan Interview*)
13. Under Mr. Sloan’s previous direct, Robert Balfour, he had permission to go off-site to get supplies related to an assignment, fill out paperwork, and eat lunch in his van if necessary. (*Testimony of Sloan*)
14. When Director Balfour left, Director Perez replaced him, and Mr. Sloan did not ask whether Director’s Balfour’s allowance would continue. If he had she would not have given him permission. (*Testimony of Perez*)
15. Mr. Sloan had never been given permission to take a lunch break off-site after returning his crew to PCC. (*Testimony of Perez*)
16. On July 29, 2011, the Office of Investigative Services (OIS) conducted random spot checks of inmate community work crews. (*Exhibit 4, p. 20*)

17. OIS followed Mr. Sloan as he arrived at PCC at approximately 2:52 p.m. He left PCC at approximately 3:03 p.m. and OIS noted that he seemed to be heading towards no particular destination. (*Exhibit 4, p. 2, p. 20*)
18. OIS lost sight of Mr. Sloan for approximately twenty-two (22) minutes. Mr. Sloan returned to PCC at approximately 3:52 p.m. Upon returning he was asked to write a report about his whereabouts after dropping off his inmate crew and before he clocked out. (*Exhibit 4, p. 20, p. 23, Testimony of McGuiness*)
19. Mr. Sloan wrote in his report that he had gone to Home Depot in Mansfield to look for a palm sander as the inmates had burnt out two of them. He also wrote that he ate lunch in the Home Depot parking lot. (*Exhibit 4, p. 23*)
20. On August 1, 2011 OIS staff conducted two complete round trips from PCC to Home Depot in Mansfield using the most reasonably believed direct route. The travel took an average of 15 minutes each way. (*Exhibit 4, p. 23*)
21. On August 2, 2011, Mr. Sloan received notice of an “administrative transfer” to PCC pending the outcome of an investigation. (*Exhibit 2, Exhibit 8*)
22. On August 4, 2011, Mr. Sloan submitted an additional report after reflecting on events that transpired on July 29th. (*Exhibit 4, p. 21*)
23. In the additional report, Mr. Sloan admitted that while he had every intention of going to Home Depot he did not go there, but rather had an episode of Irritable Bowel Syndrome (IBS) that forced him to stop by his mother’s house in order to address it. As a result, he was extremely embarrassed and left it out of his report. (*Exhibit 4, p. 21, Testimony of Sloan*)

24. Mr. Sloan obtained a brief note from his Gastroenterologist stating that he has IBS, dated August 16, 2011 and gave it to DOC. (*Exhibit 15, Testimony of Sloan, Perez, and McGuiness*)
25. On April 3, 2012, DOC informed Mr. Sloan that a hearing had been scheduled for April 23, 2012 regarding the events of July 29, 2011. The hearing was to cover three (3) issues: driving a state vehicle in a manner that demonstrated no particular destination; filing a false incident report regarding his whereabouts that afternoon; and having a general practice of dropping off his inmates at PCC in the afternoon and leaving the institution during work hours to engage in non-business related activities until it was time to punch out at 4 p.m. (*Exhibit 1*)
26. The DOC found that Mr. Sloan's conduct violated the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, General Policy 1, Rule 7(d), Rule 12 (a). (*Exhibit 1*)
27. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, General Policy 1 states: "Nothing in any part of these rules and regulations shall be construed to relieve an 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 and 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." (*Exhibit 7*)
28. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, 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.” (*Exhibit 7*)

29. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, Rule 12(a) states: “Employees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities through presumption and, must familiarize yourself with assigned tasks and responsibilities including institution and Department of Correction policies and orders.” (*Exhibit 7*)
30. By letter dated August 20, 2012, Mr. Sloan was informed of DOC’s decision. Based on the hearing, it stated, “As a result of sufficient evidence to sustain the charges identified above, I find just cause to suspend you for one (1) working day without pay. ... In addition, you will be removed from your temporary Community Work crew assignment and assigned to Pondville Correctional Center.” (*Exhibit 3*)
31. Mr. Sloan continued to report to work at PCC both before and after the August 20, 2012 letter. His job title and commute did not change as a result of the discipline imposed. (*Testimony of Brannon and Sloan*) His pay rate did not change. (*Testimony of Brannon*)
32. Mr. Sloan filed an appeal at the Commission on September 7, 2012 regarding the DOC’s decision to discipline and re-assign him.

DISCUSSION

Applicable Civil Service Law

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of

law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the 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." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682, 923, *rev.den.*, 426 Mass. 1102, (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev.den.*, 440 Mass. 1108, (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477, (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev.den.*, 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, (1928). 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." School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "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).

"The commission's task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact ... the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 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" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev.den.*, 390 Mass. 1102, (1983) and cases cited.

Pursuant to G.L. c. 31, § 41, in part,

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, **transferred** from his position without his written consent if he has served as a tenured employee **since prior to October fourteen, nineteen hundred and sixty-eight**, lowered in rank or compensation without his written consent, nor his position be abolished

A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension

(Id.)(emphasis added)

The Civil Service Commission has defined the term "transfer" as a "change of employment under the same appointing authority from a position in one class to a similar position in the same or another class or a change of employ in the same position, under the same appointing authority, from one geographical location to a different geographical location, provided that a different geographical location shall be one which is both more than a commuting distance from the

employee's residence than its prior location and more distant from the employee's residence than his prior location..." Sullivan v. Dep't of Transitional Assistance, 11 MCSR 80 (1998).

A series of Commission decisions has established the difference between a transfer and a reassignment and that the Commission lacks jurisdiction over those appeals involving a reassignment:

In Appellant³ v. Department of Revenue, 1 MCSR 28, 29 (1985), the Commission dismissed the Appellant's appeal on the grounds that the action being appealed was a reassignment as opposed to a transfer. In that case, the employee's position in the Worcester DOR office was eliminated and he was reassigned to the Cambridge office. The employee claimed that this change in duty was effectively a transfer. The Commission found that the distances to Cambridge or to Worcester from the employee's home were approximately equal. It further found that that the reassignment did not affect the employee's job title, duties, grade or salary. Therefore, the appellant in that case was reassigned, not transferred.

In McLaughlin v. Registry of Motor Vehicles (CSC Case No. G-01-1461 (2004)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but a reassignment. In McLaughlin, the Appellant was not transferred to a different position, but merely relocated to a different branch office while keeping the same job title, duties and pay.

In Sands v. City of Salem, 21 MCSR 502, 504 (2008)), the Commission, citing Sullivan, determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Sands, the Appellant, a Hoisting Equipment Operator, was no longer able to perform some of the essential duties in his previously held position. Therefore, in order to make reasonable accommodations for his medically documented

³ Unfortunately, this is the manner in which the 1985 edition of the MCSR cites the decision (Docket No. D-2361).

permanent disability, he was reassigned to perform cemetery-related duties in the Cemetery Department. Although his distance of travel from his residence was greater than previously, the Commission concluded that the change in travel did not impose an unreasonable hardship on the employee.

In McQueen v. Boston Public Schools (21 MCSR 548, 551 (2008)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In McQueen, the Appellant was reassigned from one elementary school to another. In dismissing his appeal, the Commission considered that the Appellant retained the same position of junior custodian and retained the same rate of pay in his new position.

In Anderson v. Saugus Public Schools (CSC Case No. D-09-381) (2010), the Commission determined that it lacked jurisdiction to hear the appeal in that the action taken did not constitute a transfer, but, rather, a reassignment. In Anderson, the Appellant retained her title of Principal Clerk; she did not face any reduction in pay nor had she been assigned to a work location that resulted in a longer commute. While her functional duties had changed, those duties still fell clearly within the clerical series. Even if the functional duties were substantially different, as they were in the Sands case, the Commission concluded that this alone would not constitute a transfer that is reviewable by the Commission.

In Haye and Simone v. Methuen Public Schools, 23MCSR 122 (2010), the Commission determined that it lacked jurisdiction to hear appeals in that the action did not constitute a transfer, but, rather, a reassignment. In Haye and Simone, the Appellants were both permanent junior building custodians. They were reassigned to building custodian positions different from those in which they had been serving. Each of them continued to serve in junior building

custodian positions without any loss of compensation. Mr. May, who had previously worked in the functional title of “building custodian / store delivery person” and Mr. Simone, who had previously worked as building custodian / system-wide groundskeeper”, each had been reassigned to positions as junior building custodians in one of the elementary schools in the Methuen Public Schools.

In Breen v. Gardner School Department, 25 MCSR 154 (2012), the Commission determined that it lacked jurisdiction to hear the appeal in that the action did not constitute a transfer, but, rather, a reassignment. In Breen, the Appellant was a Senior Clerk / Typist. She was laid off, then reinstated to her permanent civil service title of Senior Clerk / Typist. A subsequent arbitration decision, related to another employee, addressed provisions of the collective bargaining agreement related to the assignment of clerks to various positions in the School Department. Although the Appellant was assigned to a different work location, her permanent title of Senior Clerk/ Typist was not disturbed.

In Bedard v. Marlborough Public Schools (CSC Case No. G-13-225 (2013)), the Commission determined that it lacked jurisdiction to hear the appeal in that the action did not constitute a transfer, but, rather, a reassignment. In Bedard, Ms. Bedard’s permanent civil service title was not disturbed, she continued to perform administrative duties that were consistent with the clerk series, she suffered no reduction in pay and her new work location was only a couple of miles away from her prior work location.

Respondent’s Argument

The Respondent avers that it is undisputed that Mr. Sloan filed a false report on July 29, 2011, and did so knowingly. Further, DOC asserts, had this been a criminal matter his conduct would have violated G.L. c. 268, § 6A, which states that a public official who knowingly files or

publishes any false written report shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year.⁴ This underlies the seriousness of Mr. Sloan's conduct in justification of his one day suspension and removal from the CWC. In addition, DPC states, as Mr. Sloan has been disciplined in the past for filing a false report and conspiring with other employees to deceive an investigator, the Department's discipline of Mr. Sloan was justified and reasonable.

The Respondent also argues that Mr. Sloan also engaged in non-work related activities while on duty. He admitted to repeatedly taking a state vehicle to the local athletic fields to eat lunch, "decompress, kickback, and relax." Ms. Perez testified that Mr. Sloan should have been taking his lunch break when the inmates had lunch and if he chose not to eat with inmates, he was not permitted to make up for it at the end of the day. DOC avers that if he had time to spare after fulfilling his daily responsibilities, he should have reported back to PCC until it was time to leave or used his own time to leave early.

Further, DOC argues, Mr. Sloan was "reassigned," not "transferred" and therefore the Commission lacks jurisdiction in regard to this aspect of the appeal. The Commission has required that for a transfer to have taken place the employee had to be moved from one position to a similar position and from one geographical location to a different geographical location. Here, as Mr. Sloan worked with the CWC which was based out of the PCC and reassigned to another position within the PCC, he does not meet the meaning of a transfer as defined by the Commission. Further, Mr. Sloan's allegation that his "transfer" resulted in a change in pay is not accurate. That he may have had more overtime opportunities at the CWC does not change his rate of pay and is, at a minimum, speculative.

⁴ There is no indication that the Appellant has been prosecuted in this regard.

Appellant's Argument

In regard to the alleged violation of rule 7(d), the Appellant argues that the DOC failed to interview Mr. Sloan's direct supervisor from March 2008 through June 2011, Robert Balfour, to confirm that Mr. Sloan was in fact instructed to take his meal break, complete his paperwork and prepare for the next day's assignment either in his van at PCC or off-site, depending on the needs of the assignment. Further, the Appellant avers, the testimony of current CWC Director, Gina Perez, confirmed that Mr. Sloan would order his own supplies and equipment off-site. Moreover, the Appellant states, DOC also failed to interview anyone who could substantiate his assertion that two of the palm sanders they use had burned out and needed to be replaced and that Mr. Sloan was seeking materials necessary for the proper performance of his duties on the date in question.

In regard to the rule 12(a) violation, the Appellant states that DOC failed to prove by a preponderance of evidence that Mr. Sloan had in any way failed to perform his duties with regard to the care and custody of the inmates on his crew on the day in question. The DOC admitted that no complaints had been made to either the Superintendent at PCC or the Director of CWC with regard to any lapse in Mr. Sloan's vigilance in his performance of his duties.

While Mr. Sloan filed an untruthful incident report, he states that he only did so because of the humiliating situation of his medical condition. Further, the Appellant states, he corrected his lack of good judgment reflected in his first report by submitting a second incident report with supporting documentation from his physician. Further, Mr. Sloan avers that the change in his assignment has resulted in a significant loss of income. Finally, the Appellant asserts, the facts used by DOC to justify suspending Mr. Sloan for one day and transferring/reassigning him from CWC to PCC are not substantiated by the evidence.

Credibility

It is the function of the hearing officer to determine the credibility of the testimony presented at a hearing. *See Embers of Salisbury, Inc. v. Alcohol Beverages Control Comm'n.*, 401 Mass. 526, 529 (1988); *Doherty v. Retirement Bd. of Medford*, 425 Mass. 130, 141 (1997). *See also Covell v. Dep't. of Social Services*, 439 Mass. 766, 787 (2003)(In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); *Connor v. Connor*, 77 A.2d 697 (1951)(the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

I find that the testimony of Ms. Perez, the current CWC Director, was credible. She has been at the DOC for approximately eighteen (18) years, she has worked for approximately ten (10) year at CWC, and she has worked in other parts of DOC at other times. She has a deep knowledge of the CWC's workings and the many details of its operations. She has known the Appellant for a number of years. Her testimony was direct, responsive and internally consistent.

Ms. Brannan, a Personnel Officer at the DOC Human Resources office, provided limited testimony concerning the Appellant's title, salary rate, and employment location before and after the events in this case. Ms. Brannan spoke knowledgeably, confidently and directly about these matters. Therefore, I find Ms. Brannan's testimony was credible.

Captain McGuinness testified at length concerning the investigation he conducted regarding the subject of this appeal. He has worked at DOC for more than three decades and has worked in Investigations for many years. He easily responded, in great detail, to inquiries regarding his investigation, including his interview of the Appellant. He described the many

steps of his investigation, stating clearly what he did and did not do during the investigation. For these reasons, I find Captain McGuinness' testimony was credible.

Mr. Yule, Director of the DCR Park Support Operation, testified about his contact with the Appellant during the work that the CWC inmates have done for DCR. DCR is one of a number of entities for which the Appellant and his crews have provided services. Mr. Yule has worked at DCR for approximately six (6) years and spoke highly of the Appellant and his crews. He worked with the Appellant and a supplier to ensure that the necessary supplies were available for the work CWC was performing for DCR. Mr. Yule testified that he made such supply arrangements with the Appellant after 2:30pm about fifty (50) percent of the time but there was little evidence to indicate how he could recall having that many calls specifically after 2:30pm. I find Mr. Yule's testimony credible generally but less credible with respect to his testimony regarding the times of his phone calls to the Appellant.

Mr. Seery, a salesperson at Richmond Hardware in Braintree, has worked there for approximately fifteen (15) years. Richmond Hardware is a state-approved vendor for all state agencies. Mr. Seery testified that he spoke primarily with Mr. Yule and a Mr. Moore at DCR with regard to ordering supplies. However, he also testified that it was "common" for the Appellant to order paint supplies directly from him, although not in writing. Lastly, he testified that he did not deal with the Appellant after 2:30pm, although it was not clear how he remembered whether or not he was in contact with the Appellant before that specific time. In view of the conflicts of some of Mr. Seery's statements and the lack of support for other statements, I find the credibility of Mr. Seery's testimony was impaired.

The Appellant testified in detail about the manner in which he performed his job at CWC. However, his responses to questioning were, at significant times, evasive, if not non-responsive.

While he described his practice of dropping of his inmate crew at 2:30pm and having lunch at that time and the origin of his practice with the prior CWC Director, Mr. Balfour, he could not explain how or why he interpreted his authorization to take a late lunch to also authorize him to repeatedly leave the PCC after he dropped off his crew to go to a track a couple of miles away from PCC to walk around the track or hit golf balls before he clocked out from his shift. In fact, it took repeated questioning on my part before the Appellant finally answered whether he ever told Director Perez what he was doing after he dropped off the inmates at 2:30pm and he admitted that he had not. Therefore, I find the Appellant's testimony had very limited credibility.

Analysis

It is undisputed that Mr. Sloan had filed a false report of the events that had taken place on July 29, 2011. Mr. Sloan has also admitted to repeatedly taking a state vehicle off-site after dropping off his inmate crew to go to the local athletic fields although Ms. Perez has never given him permission to do so. Nevertheless, Mr. Sloan alleges that DOC did not have just cause to suspend him for one day and transfer him and he asks the Commission to grant his appeal. In view of the facts found herein, which are supported by a preponderance of the evidence, and the applicable law, the Commission cannot do so.

It is true that Mr. Sloan has been diagnosed with IBS, as noted in the one sentence letter from his doctor. However, the note was not sent until August 16, 2011, and it did not state how long Mr. Sloan has had IBS, nor did it substantiate that Mr. Sloan had a bout of IBS on July 29, 2011. While Mr. Sloan submitted a second report stating the reason he had filed a false report regarding the events of July 29th, he only did so after DOC had sent him a letter stating it was going to investigate him for possible violations of the rules and regulations. Mr. Sloan also

alleges that his previous director, Robert Balfour, had allowed him to go off-site to get supplies related to an assignment, fill out paperwork, and eat lunch in his van if necessary. However, that does not authorize him to go to local athletic fields to walk the track or to play golf during his shift. In any event, when Director Balfour left and Director Perez became the Director of the facility, Mr. Sloan should have inquired whether Director Balfour's allowance would continue. That said, Director Perez testified that she would not have continued Director Balfour's allowance. Regardless, there is no question that Mr. Sloan's false report and taking of a state vehicle to local athletic fields to eat lunch, "decompress, kickback, and relax" constitute substantial misconduct and that such conduct adversely affects the public interest by impairing the efficiency of public service. That DOC had not received complaints regarding Mr. Sloan's taking of a vehicle to go to area athletic fields for his leisure does not authorize it. There can be no question that leaving the facility for his own leisure during his shift directly violated the DOC rules that provide that employees are under a "constant obligation to render good judgment," that they should not "engage in any distracting amusement or occupation during their required hours," and that employees "shall exercise constant vigilance" during work hours. *See* DOC Rule and Regulations, General Policy 1, Rule 7(d), and Rule 12(a), *supra*. Having filed a false report and engaged in the other misconduct cited here, the DOC had just cause to discipline the Appellant. There is no evidence of bias or other improper motive that warrant's the Commission's consideration of modification of the discipline. In addition, the Appellant has not served as a tenured employee since prior to October 14, 1968. Section 41 of G.L. c. 31 only grants procedural protections to employees who have been transferred without their written consent if they were a tenured employee on or before October 13, 1968, which the Appellant was not. Moreover, the Appellant was not transferred in violation of G.L. c. 31, s. 41.

With regard to Mr. Sloan's purported transfer, Mr. Sloan was reassigned from the CWC at PCC to another assignment also at PCC. Following the reassignment, Mr. Sloan retained his job title and salary rate and his commute was not changed. Therefore, Mr. Sloan was reassigned, not transferred, and the Commission has no jurisdiction over this portion of Mr. Sloan's appeal.

CONCLUSION

Based on the facts and the law herein, the Appellant's appeal under Docket No. D1-12-234 is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 6, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:

Phillip Sloan

Jody A. Brenner, Esq. (for Respondent)