COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

SCOTT STEEVER and
MICHAEL GORE,
Appellants

Docket Nos.: D-05-160
D-05-164

v.

DEPARTMENT OF CORRECTION,
Respondent

Attorney for the Appellant:

Stephen Pfaff, Atty.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

Representative of Respondent:

Jeffrey S. Bolger
Director of Employee Relations
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L c. 31, s. 43, the Appellants, (hereinafter "Gore" and "Steever") filed appeals with the Civil Service Commission (hereinafter "commission") on claiming that the Department of Corrections

(hereinafter "DOC") did not have just cause for suspending them for three (3) days without pay, for failure to make adequate rounds, in violation of DOC Rules and Regulations. The Appellants filed timely appeals at the Commission. A hearing was held on June 26, 2008 at 10:30 a.m. at the offices of the Commission. Since neither party requested a public hearing, the hearing was declared private. One (1) tape was made of the hearing and is retained by the Commission.

FINDINGS OF FACT:

Twelve (12) exhibits were entered into evidence. Exhibit 12, Shift Roster for November 25, 2004 was filed by the DOC post hearing, per order. Based on these exhibits and the testimony of,

For the Respondent

- Captain Paul Barbosa (hereinafter "Barbosa")

For the Appellants

- Correction Officer Scott Steever (hereinafter "Steever")[1]

I make the following findings of fact:

1. Steever has been employed as a Correction Officer, ("CO") by the DOC since July 21, 1996.
2. Mathew Gore (hereinafter "Gore") has been employed as a CO by the DOC since October 4, 1998.
3. The Appellants are subject to the Rules and Regulations Governing All Employees of the Massachusetts, Department of Correction. (Exhibit # 7 and Testimony of Barbosa)
4. All DOC Correction Officers are given a copy of the Rules and Regulations upon appointment. (Testimony of Barbosa)
5. Both Appellants received and signed for a copy of the DOC Rules and Regulations (Exhibit #8). Mathew Gore on 10-6-98; Scott Steever on 7-22-96.
6. The Appellants were tenured civil service employees and were assigned to Old Colony

[1] Mathew Gore did not testify per agreement of the parties; as his testimony would be repetitive, DOC waived any cross-examination.

Correctional Center (hereinafter "OCCC") as Correction Officers I, (CO-I) at the time of the alleged incident, November 25 and 26, 2004, 11 to 7AM shift for which they were disciplined. (Testimony of Barbosa)

7. The duties of Correction Officers on the 11 to7 shift, assigned to Attacks I, II, III, IV, Dawes I, II, OU, MPU and Sampson Units are detailed in the Post Order. (Exhibit 11 and Testimony of Barbosa)

8. 11 to 7 shift Unit Officer specific duties read as follows:

   - Conduct a first round of the unit to ensure the accountability and wellness of all inmates. Also check all security doors (rear stairwell exit doors, courtyard doors, and cell doors, etc). Ensure not to enter the unit without **a second staff member present** to maintain observation from inside the control room with the sallyport door secured and retain the keys to said housing unit.
   - Ensure to take counts utilizing IMS at 12:00 p.m., 3:00 a.m., and 6:00 a.m.
   - Rounds shall be made at non routine intervals at least every hour. These rounds are to be noted in the housing unit log. Rounds made by the area supervisor will also be logged in the log book twice nightly.
   - Upon completion of the first major count, complete a block inventory sheet logging any discrepancies found within the unit log and completing an Incident Report before the end of your tour of duty. Complete the unit 504 security inspection as close to the start of your shift as practical. Unit staff is responsible for completely filling out the 504 Sheet upon issuance from the Corridor OIC.
   - When a cell door is to be opened between 11:00 p.m. and 7:00 a.m. for

anything other than workers, **a minimum of three officers will be present**. The unit sallyport door will be closed, one officer in the control room and two officers at the cell door. This will be done only with the prior approval from the Shift Commander.

- Ensure that inmate workers are up and ready for work.
    a. Ensure cell door(s) are secured upon the inmate leaving.
- Notify the corridor Lieutenant or Sergeant of any major problems or unusual occurrences.
- Notify Upper Control of any count changes such as receiving new commitments or inmates moved from unit to unit due to problems or disruptive behavior. Unit cell changes must also be reported to Upper Control.
- When notified the MPU officer will assist Correction Officer Cook on the taking of the utensil count and ensure to initial the Appendix A Tool Inventory.
- If notified provide coverage for the taking of the major count at 6am count in the kitchen.
- The MPU Officer will escort the Seg. Food cart from the Kitchen to the Seg. Unit.
- Comprise a list of A/A medication and A/A diet meals for the morning meal.
- Conduct a final round of the unit at 6:45 a.m. and call Upper Control via 6836.
- During your tour of duty, you are responsible to search (shakedown of the

common area, showers, closets, etc.) the unit you are assigned to. Any contraband found, or discrepancies noted, shall be immediately reported to the Corridor OIC and documented with an Incident Report on IMS.

9. The Shift Roster for November 25, 2004 shows that the Appellant (Gore) was assigned to the Sampson Housing Unit and does not indicate that he was reassigned during the Shift. (Exhibit 12)
10. The Shift Roster for November 25, 2004 shows that the Appellant (Steever) was assigned to the Dawes I Housing Unit and does not indicate that he was reassigned during the Shift (Exhibit 12)
11. **On the 11-7 shift there is only one (1) Officer on duty per unit.** (Testimony of Barbosa)
12. The uniformed Staff on duty rise in rank from Correction Officer, then Sergeant, then Lieutenant, then Captain, then GPO then Superintendant as highest ranking at the facility. (Testimony of Barbosa)
13. During their eight (8) hour tour of duty, 11 to 7 shift, Shift Officers are required to perform not less than nine (9) rounds at intervals of one every hour. Supervisors are required to perform two (2) rounds per shift. (Testimony of Barbosa)
14. All Rounds made in the Unit are supposed to be noted in the Unit/Activity Log. (Testimony of Steever)
15. Sometime prior to January 11, 2005 Captain Paul Barbosa (hereinafter "Barbosa") received a verbal order from Deputy of Operations Donald Levesque to review the surveillance video tapes of the November 25, 2004-11-7 shift, because the

rounds had not been done. Barbosa did review the video tapes as ordered. Barbosa only reviewed the units he was ordered to review for that shift. He was only ordered to review four (4) units and found that three (3) Officers had not made the proper number of rounds, including these two Appellants. That third Officer was also disciplined. (Testimony of Barbosa)

16. Barbosa reviewed the "camera surveillance system on his computer" for the date he was instructed to review. The video tapes, (evidence) were created by the IPS people. He does not know when or who created them. (Testimony of Barbosa)
17. Captain Barbosa conducted an investigatory hearing on January 11, 2005 and wrote a report, dated the following day, regarding his findings. (Testimony of Barbosa, Exhibit 5)
18. Captain Paul Barbosa (hereinafter "Barbosa"), who is the Appellants' supervising officer at OCCC testified that his review of the security screen on his computer for the Dawes I revealed that the Appellant (Steever) had made only five (5) rounds: 12:15 a.m., 1:27 a.m., 2:14 a.m., 3:07 a.m. and 6:28 a.m. (Exhibits 5 & 9)
19. The Appellant Steever made entries into the Unit/Activity Log indicating that nine (9) rounds were made when in fact only five (5) were made. (Testimony of Barbosa, Exhibits 5 & 9)
20. Barbosa testified that his review of the security screen for the Sampson Unit revealed that the Appellant (Gore) had made only five (5) rounds: 11:00 p.m., 12:02 a.m., 1:30 a.m., 3:05 a.m. and 6:07 a.m. (Exhibit 9)
21. Gore made entries into the Unit/Activity Log indicating that ten (10) rounds had been made when in fact only five (5) were made.

22. Appellants were suspended by written notice with the violation of the Rules and Regulations Governing All Employees of the Massachusetts, Department of Correction. Specifically, General Policy I and Rule 7(c), 11(a) and 12(a) and the Post Order 11 to 7 shift Shift.

23. General Policy 1 reads as follows:

> "These rules and regulations are general directions and do not attempt to cover each and every contingency which may arise during the performance of your duties or while employed by the Department of Correction. 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 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. All persons employed by the Department of Correction are subject to the provisions of these rules and regulations…"

24. Rule 7(c) reads in part as follows:

> "Any Department of Correction or institution employee who is found… flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge..."

25. Rule 11(a) reads in part as follows:

> "You shall be responsible for the whereabouts of all inmates assigned under your charge at the start of your work shift, and must check the whereabouts of such inmates each hour through personal observation or through contact with another employee, unless the charge of such inmate is transferred to and accepted by another employee. Head counts for inmate census must be taken and computed at hours stipulated by the Superintendent. You must see living, breathing flesh in taking all major inmate head counts..."

26. Rule 12(a) reads in part s follows:

> "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."

27. The Unit/Activity Log for the Dawes I Unit reflects a round by Lt. Silva at 11:30

p.m. and a round by Cpt. Barbosa at 5:45 a.m. (Exhibit 6)

28. Barbosa claims that any rounds conducted by Lieutenants or Captains are to be logged per the Post Order but do not substitute for the nine rounds required to be performed by the Unit Officer. However, Steever who has been on the 11 to 7 shift for five years testified that the supervisors' rounds do count as part of the nine required by the unit officer. The Captain or supervisor would even sometimes comment: "I'm making this round for you". Steever also testified that he has always made the log entries the same way and has never been reprimanded or corrected by a supervisor, right up to the time of this hearing. (Testimony of Barbosa and Steever)

29. Barbosa admitted that situations develop where an assigned unit officer is physically unable to make all of the required rounds and therefore excused. Sometimes there is an emergency or an officer is also assigned to cover other units. Barbosa admitted that both Gore and Steever could have been assigned other units on the shift in question. There have been times when Captains and other supervisors help out the unit officers in making their rounds. It is a command decision for the Captain to make, to join in and help out the unit officers to make their rounds. It is a command accommodation or ability to have flexibility for the command staff due to the particular circumstances that come up. (Testimony of Barbosa)

30. Barbosa did not make a complete round of the Dawes I Unit on November 25 and 26, 2004. Therefore, Barbosa claims that his round 05:45 would not have fulfilled the hourly round requirement of the Post Order. (Testimony of Barbosa)

31. Steever had an investigatory hearing on January 11, 2005. (Exhibit 5)
32. Steever admitted at the investigatory hearing that he was aware that he was required to make a total of nine (9) rounds for that shift. However, Gore said that he was not fully aware of nine (9) round requirement. (Exhibit 5 and Testimony of Barbosa)
33. Steever had no recollection at the January 11, 2005 investigatory hearing for why he did not fulfill that requirement and yet documented otherwise on the night in question November 25 and 26, 2004. (Exhibit 5 and Testimony of Barbosa)
34. Gore had an investigatory hearing before the DOC on January 13, 2005. (Exhibit 5)
35. Steever had no memory of whether he was responsible for any other units or had extra details or assignments beside Dawes I, on the shift in question. However, he said that having extra units to cover was not an unusual occurrence in his experience. He also said that it was not unusual to make less than nine rounds per shift, depending on the circumstances. The rounds made by the Captain and the supervisor have always been counted as also being unit officers' rounds. (Testimony of Steever)
36. Sometimes unit officers are assigned to do "zone" or "perimeter" checks or patrols. These "details" may be due to particular weather conditions such as wind or fog which affect the microwave sensors outside the buildings. If a unit officer is detailed to do these patrols or checks, or some other unexpected assignment, he is unable to make his mandated rounds in the unit. (Testimony of Steever)
37. Steever received notice of suspension by a letter dated April 20, 2005. (Exhibit 2)

38. Gore received notice of suspension by a letter dated April 20, 2005. (Exhibit 2)

39. DOC General Policy 1 mandates in part that: "All persons employed by the Department of Correction are subject to the provisions of these rules and regulations…" Rule 7(c) reads in relevant part: "Any Department of Correction or institution employee who is found… **flagrantly, wantonly, or willfully neglecting the duties and responsibilities** of his/her office shall be subject to immediate discipline up to and including discharge..." (Exhibit 7)

40. All of the DOC command staff right up through Captain to Superintendant were under the continuing obligation and responsibility to routinely supervise and monitor all of the staff and employees under their command. (DOC General Policy 1) In theory, if not in practice, any routine inadequate performance of the subordinate staff is attributable to a lack of sufficient monitoring, supervision or oversight by the command staff. Steever testified that he has been performing the same number of rounds and making the same log entries for the entire five years he has been assigned to that shift at that location, right up to the Commission hearing. He was never counseled, reprimanded or otherwise notified that his routine practices were erroneous. (Exhibits and testimony and reasonable inferences)

41. Neither of the Appellants are found to have acted as or possessed the state of mind that qualified so as to "… flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge..." . Therefore neither Appellant is found to have violated DOC Rule 7(c) as they were charged. (Exhibits and testimony

and reasonable inferences) (Exhibits and testimony and reasonable inferences)

42. Of the other three rules violations for which the Appellants are charged, namely: General Policy 1, Rule 11(a) and Rule 12 (a); two are general descriptions of the duties and responsibilities regarding the safe-keeping and custodial care of inmates and the third Rule 11(a) is a very specific description of a head count, each hour consisting of actually seeing "living, breathing flesh". The two general rules are in essence duplicative as applied to the Appellants here. The specific rule, Rule 11(a) is incorporated into and subsumed by one of the two general rules and not considered a separate and distinct violation. The Appellants therefore are considered to have possibly violated one or at the most two of these three rules. (Exhibits and testimony, reasonable inferences)
43. Both Captain Barbosa and Steever are straight forward witnesses. They didn't try to embellish. Neither tried to mislead or misdirect by their answers. They both had the presentation and demeanor of honest witnesses. They reasonably disagreed on whether the rules allowed for the Captain or supervisors' rounds to be included in the unit officer's round count. However, this disagreement in interpretation only accounted for some of the missing rounds. I find them to be credible witnesses. (Testimony and demeanor of Barbosa and Steever)

CONCLUSION OF THE MINORITY (HENDERSON, STEIN):

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission has the duty to determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken.

G.L.c.31, §43. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, (2006); 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. 331,334, rev.den.,390 Mass. 1102, (1983).

An action is "justified" if "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 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 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 Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The Appointing Authority's burden of proof 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including

whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic 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) (where live witnesses gave conflicting testimony 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)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'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.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant's perjury and willingness to fudge the

truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

> "It is well to remember that the *power to modify is at its core the authority to* review and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service'*."

Id., 39 Mass.App.Ct. at 600. (emphasis added). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact,

the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. [Citation] Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether if "the circumstances found by the commission" vary from those upon which the appointing authority relied, there is still reasonable justification for the penalty selected by the appointing authority. "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

The DOC did show by a preponderance of the evidence that the Appellants did not make the required nine (9) rounds on the shift in question, and yet did make entry on the log that all of

the rounds had been made. Although, particular circumstances do arise that justifiably prevent the completion of the required rounds; the Appellants failed to produce sufficient evidence to establish such excusing circumstances.

The explanation given for not performing the required rounds was that Unit Officers are frequently assigned to cover more than one Housing Unit as well as being reassigned to other duties such as zone checks or some other circumstance. However, the Appellants had no personal recollection that it happened on November 25, 2004 and the Shift Roster (Exhibit 12) does not indicate any extra housing unit assignment. However, there does not appear as if there is a place on the computer generated Shift Roster for notation of zone checks or other unusual circumstances during the shift, requiring unit officers' time. This shift roster is not conclusive on this issue. The Appellants' lack of a particular memory of circumstances, a month and one-half after the shift occurred, at the investigatory hearing, is not unexpected.

Although there might be a reasonable and acceptable explanation for not being able to make all of the required rounds on a particular shift, logging-in justifiably missed rounds as actually having been made is more problematic. Even if you credit the two rounds entered by the Lieutenants and the Captains, it still does not equal the required nine (9) rounds. These actions violate the precise requirements of the rules contained in the handbook. Both Appellants were made aware of Rules when they were initially hired by the Department of Corrections. Subsequently, falling into a practice of not fully complying with the precise requirements, whether due to comfort, convenience or recognized practice, even if abetted by the apparent long term acquiescence of the DOC, is an insufficient excuse. The DOC had a right to expect full compliance, and the Appellants' remedy was to note a justification in the log for any missed round and/or seek approval from their supervisor for any missed round. Routine violation of these rules could have been dealt with by the DOC periodically issuing a general notice or reminder of what was expected and that discipline would follow for non compliance. The DOC command staff should have discovered this practice on the particular shift and informally addressed it then,

(counsel, caution), not a month and a half later at a formal hearing. This was a supervisory omission on the part of the command staff. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The inmates of the housing units under the Appellants' supervision were substantially monitored and not endangered during their shift. The Appellants did not abandon their posts. They could maintain video monitoring from their location. The inmates were asleep and the Appellants made most of their rounds while supervisors made some other rounds. Neither of the Appellants had any prior discipline for this type of rules or policy violation. Neither of the Appellants has been found to have violated the most seriously charged DOC rule. Rule 7(c), which reads in relevant part: "Any Department of Correction or institution employee who is found… flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge...". Two of the charged Rule violations were general in language and in essence duplicative and a third very specifically charged rule violation was incorporated into and subsumed into one of the two general rules. The Appellants violations were closer to partial omissions of performing their duties fully. The Appellants' rules violations here were not substantial misconduct and not of a nature that could not have been addressed and remedied in a more timely informal fashion. Some discipline is called for but under the totality of the circumstances suspensions of three (3) days each without pay seems severe. The issue becomes whether the lesser found misconduct, under the circumstances here warranted suspension without pay and if so for what period.

For all of the above stated reasons the Appellants' appeals should each allowed in part and the discipline should be modified and reduced from the three (3) day suspension from employment without pay to a one (1) day suspension without pay.

For the Minority:

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Daniel M. Henderson
Commissioner

CONCLUSION OF THE MAJORITY (BOWMAN, MARQUIS, MCDOWELL)

We concur with the conclusion of the hearing officer (noted above as the Conclusion of the Minority) to the extent that there was reasonable justification to discipline the Appellants. We disagree, however, that the Commission's intervention is warranted in the form of an order reducing the Appellants' 3-day suspensions to 1-day suspensions.

Both of the Appellants failed to complete the rounds required of them and then put false information on official logs stating that the rounds had been completed. Both of these offenses are rather egregious within a paramilitary organization such as the Department of Correction and a reduction in their penalties is not warranted.

For the Majority:

_____

Christopher C. Bowman
Chairman

The Appellant's appeals under Docket Nos. D-05-160 & D-05-164 are hereby ***dismissed.***

By vote of the Civil Service Commission (Bowman, Chairman – Yes; McDowell, Commissioner – Yes; Marquis, Commissioner – Yes; Henderson, Commissioner – No; Stein, Commissioner – No) on September 23, 2010.

A true record. Attest:

_____

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Stephen Pfaff, Atty.
Jeffrey Bolger, DOC