THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL SUAREZ,
Appellant

v.

Docket No.: D-08-5

DEPARTMENT OF CORRECTION,
Respondent

Attorney for the Appellant:

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Attorney for the Respondent:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L c. 31, s. 43, the Appellant Michael Suarez (hereinafter, “Suarez” or "the Appellant") is appealing the decision of the Respondent, the Massachusetts Department of Correction (hereinafter, “”DOC” or “Department”), as the Appointing Authority, to suspend him for five (5) days without pay from his employment as a Correction Officer I for violating Rule 12(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction.

Appellant filed a timely appeal. A Full Hearing was held at the Commission on August 27, 2008 and on November 6, 2008. As no written notice was received from either party, the hearing was declared private. The Appellant made an oral motion to sequester witnesses, which was allowed and the witnesses so instructed. The Appellant subpoenaed two witnesses: CO Brian Boisse and Sgt. Peter Peladeau to testify at this hearing. Theses witnesses were served on 6/27/08 for a hearing date of 7/02/08 and were subsequently notified by telephone of today's (8/27/08) hearing date. They did not appear at the hearing. The hearing was recorded on two (2) audio cassettes. Thirteen (13) exhibits were entered into evidence.

FINDINGS OF FACT

Based on the documents entered into evidence, (Exhibits #1 through #13) and the testimony of DOC Director of Security Osvaldo Vidal, DOC Captain Edward Hammond, (Lt. Hammond at the time of incident) and the Appellant;

I make the following findings of fact:

1. The Appellant, Michael Suarez has been a Correction Officer I since 1996. He was posted to the Souza Baranowski Correctional Center (hereinafter "SBCC"), a maximum-security of Level 6 Facility. (Testimony of Appellant)
2. His regularly scheduled shift at SBCC was from 3:00 PM to 11:00 PM.
3. On July 26, 2006 an investigation was initiated by the DOC Office of Investigative services due to a complaint and allegation by an injured inmate, "Inmate B", claiming that he had been injured by another assailant inmate, "Inmate A", on May 4, 2006, due to a cell door being purposely left open by certain DOC staff. (Exhibit 7, testimony of Hammond and Vidal)

4. On May 4, 2006, the day of the incident, the Appellant reported to his regularly scheduled shift. The Appellant was on medically restricted duty and assigned to the Control Room of the South Special Management Unit (hereinafter "SMU"), a special segregated area for inmates who cannot be housed with the general prison population due to their very high risk for violence or escape. The Control Room for the South SMU is an enclosed command center with windows that look out over two "tiers" or corridors. (Exhibit 7, testimony of Hammond and Vidal)
5. The inmates in this SMU unit are in isolation or "segregation" being "locked down" for twenty-three (23) hours per day. They leave their cells for showers, recreation, medical or other appointments. The inmates are individually and separately escorted in hand and leg restraints by two Correction Officers to and from the shower stall and locked therein during the shower. The hand restraints are to hold the inmates' hands behind their back. This and other protective procedures are followed by the two escorting Officers due to the high level of danger. (Exhibit 7, testimony of Hammond and Vidal)
6. Director of Security Vidal described the inmates in the SMU unit as "the worst of the worst". Inmate A the assailant in this incident was a "level A" inmate which is the highest risk for escape or violence. (Testimony of Vidal)
7. Inmate B, the victim of the attack by Inmate A, claimed in his (May 23, 2006) letter of complaint to the DOC Commissioner that he had been under constant death threat by the other inmates of the DDU and SMU unit. He also said that his requests to be transferred had been ignored. He also claimed that his status as a specific sexual offender had caused him to be singled out by both inmates and staff and thereby placed in a vulnerable and dangerous position. Inmate B's claim that his status as a particular type of sexual

offender lead to his attack, is born out by statements made by Inmate A as determined during a review of the surveillance video of the attack. (Exhibit 7)

8. The Control Room for the South SMU is an enclosed command center with windows that look out over two "tiers" or corridors. To the left is tier K, consisting of cells K3-1 through K3-32, plus four numbered (1-4) showers, while to the right is tier J, consisting of cells J3-1 through J3-32, plus four numbered (1-4) showers. (Exhibit 7, testimony of Hammond and Vidal)
9. In the Control Room, there are two computer terminals for the operation of the Graphic User Interface ("GUI") system that controls. The GUI system is a touch screen mechanism that controls access to the cell doors, showers, and various other doors within the SMU. **One GUI terminal controls the K tier, while a second GUI controls the J tier.** The GUI system also permits the computer terminal operator to access or call up live view transmitted by the various video cameras located in SMU. The live video view appears as a pop-up overlay, covering part of the GUI screen. (Exhibits 7 & 9, testimony of Hammond and Vidal)
10. On the GUI system computer screen, the doors to the various cells appear as icons. When a door is closed and secured, the icon is **gray.** When a door is open and the alarm is activated, the icon is **red**. When a door is open and the alarm has been acknowledged, the icon is **orange**. An orange icon means that the door is not secured and the alarm is deactivated. It appears to be the routine and accepted practice at the SMU to leave a cell door in the orange or open and unalarmed-acknowledged mode while the inmate is escorted to the shower, until his return to the cell.(Exhibits 7, 9, & 11 testimony of Appellant, Hammond and Vidal)

11. When an inmate is moved for showers, recreation or other reasons, the escorting corrections officers—there must always be two—first cuff the inmate's hands through the food slot in the door. The corrections officers then notify the GUI operator by radio to open the door. The GUI operator opens the door, usually after viewing live video pop-up, by first highlighting the particular cell door on the computer terminal and then touching another "open" icon to open the door. The reverse procedure is employed when an inmate is returned to his cell. The inmate's cell door remains open in the acknowledged (orange) mode when the inmate is in the shower. The various shower stalls are also open and closed at successive steps in the process for each inmate. Around 4:00 PM on May 4, Showers were being conducted on both the J tier and the K tier during this time, (2 GUI's). With up to three inmates showering at a time, as many as six officers would be conducting the shower escort process. (Exhibits 7 & 9, testimony of Hammond and Vidal). Although only one Inmate on each tier should be on actual movement escort at any time. (Exhibit 11, testimony of Hammond and Vidal)
12. At exactly 4:43:30 PM on May 4, Correction Officers Thomas Fisher (hereinafter "Fisher") and Scott Laverdure (hereinafter "Laverdure") escorted Inmate B from his cell K3 #28 to K3 shower No. 4 and secured him inside. (Exhibits 7-report-page 10 & 9, testimony of Hammond and Vidal)
13. At exactly 4:44:45 PM, Correction Officers Fisher and Laverdure escorted Inmate A from his cell K3 #29 to K3 shower No. 3 and secured inside. The cells of Inmates A and B are contiguous.(Exhibits 7-report-page 10, & 9, testimony of Hammond and Vidal)
14. A review of the surveillance video reveals that: "during the escort[4:44:45 PM] it appears that [Inmate A] has a magazine or a newspaper in his hand that Officer Laverdure takes

from him and discards somewhere to his left." (Exhibit 7- report -page 11). It was not explained how Inmate A could have something in his hand since he had just been handcuffed behind his back. Neither Fischer nor Laverdure testified at this hearing. Laverdure was not interviewed by Lt. Hammond and had not returned to work from the time of the incident, up to the time of the report. Although both Fischer and Laverdure wrote reports regarding this incident; neither report was included in the evidence at this hearing. (Exhibits and testimony, reasonable inferences)

15. The time referred to at various points in the investigative report as when Inmate A is returned by escort from the shower to his cell is 5:06 PM. However, the report also states that the surveillance video establishes the time at 5:08:25 PM and the time Inmate B is escorted back from the shower at 5:33:25 PM. (Exhibit 7- report -page 11).
16. Although, Inmate A is escorted to the shower at 4:44:45 PM, approximately 1 minute after Inmate B; he is escorted back to his cell at 5:08:25 PM, **approximately 25 minutes ahead of Inmate B,** who is escorted back at 5:33:25 PM. There was no evidence presented to show whether this much shorter shower time by Inmate A was unusual or whether there was any time limits placed on shower time. The investigation and reports failed to address this obvious contrast in shower time. However, if this shorter shower time was unusual for Inmate A, the escorting officers should have been alerted and cautious regarding some untoward potentiality. Inmate A may have been in a hurry to get back to his unlockable cell, before Inmate B could be safely locked in his own cell, ahead of him. (Exhibits and testimony, Exhibit 7- report –pages10- 11, reasonable inferences).
17. During most of the relevant time period, the Appellant was in the control room performing his duties, which included answering telephones, logging in rounds and

operating both GUI machines, but also arranging for take out delivery for the entire institution's staff dinner period. This involved taking orders from various staff over the phone, placing the order, and collecting money. The Appellant had permission from his supervisor, Sgt. Peter Peledeau, to perform this task of ordering take-out for the facility. (Testimony of Appellant)

18. Director of Security Vidal testified that normally four (4) officers are assigned to operate the two (2) GUI terminals at the SMU. Yet, the Appellant was the only person assigned to operate the two GUI terminals on the day and shift of the incident. Although only the Appellant was assigned according to the roster to operate the two GUI's on the day of the incident; anyone on the shift had access to the GUI's and could operate them during the shift, as needed. (Testimony of Vidal)
19. Director of Security Vidal also testified that although it was not a requirement for the escorting officers to physically check the door after they have returned the inmate to the cell, it is a "good practice" and a subsequent policy change has made it a requirement. (Testimony of Vidal)
20. Sgt. Peter Peladeau, the SMU supervisor at the time of the incident told Investigator- Lt. Hammond that "he always ensures that he has two staff in the control room to operate the GUI's. Sgt. Peladeau could not recall who was operating the K3 GUI on May 4, 2006, when [Inmate A] was returned to his cell following his shower." (Exhibit 7)
21. Any of the other officers assigned to that shift at the SMU had access to the two GUI terminals and any other officer could operate either of two GUI's during the shift. (Testimony of Vidal and Hammond)

22. Lt. Hammond testified to the following: that he was not sure whether the Appellant was "tasked with the operation of both GUI's for that shift; There are supposed to be two (2) staff in the control room to operate the two (2) GUI's; He observed the surveillance video and the shift staff are all continually in and out of the control room during the shift; The staff are allowed a break to eat, "chow" during the shift; Other people could have been the GUI operator when Inmate A was returned from the shower to his cell. (Testimony of Hammond)
23. The Appellant said other Officers on the shift, including Officer Boisse were also operating the two GUI stations that day, helping out. (Testimony of Appellant)
24. The Appellant was not in the control room at the time of the incident. It was determined by the DOC-IPS investigation "that [Officer Brian Boisse] was the GUI operator when [Inmate B] was escorted from the shower" at the time of the incident on May 4, 2006. "Boisse had entered the control room to wash his hands when he heard a request to open K3 shower #4. Boisse proceeded to the GUI station when he observed no other staff in the area." And unlocked the door to K3 shower #4 to allow Inmate B to exit the shower. Boisse made a visual confirmation that Fischer and Laverdure were in front of shower #4 and then utilized the GUI system to open the door." (Exhibit 7, testimony of Hammond)
25. However, Officer Boisse should have looked at the GUI screen and observed that the two contiguous cell doors were unsecured and not just one. Those two cells were in the unsecured or open and acknowledged mode (orange). The two open cells were K3 #28-Inmate B's cell and K3 #29-Inmate A's cell. Officer Boisse should not have opened K3 shower #4 to allow Inmate B to exit the shower, without first securing or locking the cell door to K3 #29-Inmate A's cell. Boisse's act or omission was the direct or proximate

cause of the two inmates coming into contact during this attack-incident, while Inmate B was being escorted in restraints. This was a lack of care, caution or vigilance and possibly negligence by Boisse. However, in Boisse's defense the two cell door orange icons could have been blocked on the GUI screen by the video pop-up; an acknowledged problem with the GUI system.(Exhibit 7, testimony of Hammond, reasonable inferences)

26. At approximately 5:08 PM, Officers Fisher and Laverdure removed Inmate A "from the shower and escort him back towards his cell out of view of the video camera." (Exhibits 7 & 9, testimony of Hammond and Vidal)
27. Officer Fischer told Lt. Hammond that after Laverdure placed Inmate A in his cell and removed his leg restraints; Laverdure closed the cell door and removed Inmate A's hand restraints through the food slot in the door. **"Fischer could not recall if he or Laverdure actually conducted a physical check of the door, but acknowledged that it is a common practice to do so."** Hammond testified that it was **"common sense"** for an Officer to physically check a cell door by pushing on it to ensure it is locked. (Exhibit 7, testimony of Hammond). Acting Deputy Commissioner Timothy Hall acknowledged in his Executive Review and Comment, that the failure to manually check cell doors and to ensure that the door is secured and locked was a **"poor security practice".** (Exhibit 7)
28. The Video surveillance was reviewed by the DOC Investigators for that shift of the incident. Although, the return of Inmate A to his cell is out of view of a camera; other shower escorts by Fischer and Laverdure are on camera. Neither of these two officers ever physically checks the cell door on any occasion of returning an inmate from the shower and securing him in his cell. The surveillance video clearly contradicts Fischer's

claim of his **"common practice"** to physically check the cell doors. (Exhibit 7-page 12, testimony of Hammond)

29. After Fischer and Laverdure placed Inmate A in his cell, the door on the GUI icon apparently remained orange, thus indicating that it was not secured. However, if either Fischer or Laverdure had physically pushed on the door to check if it was secured, after placing Inmate A in the cell, they would have discovered it was unsecured and then notified the GUI operator in the control room to secure the door again. Fisher and Laverdure's failure to physically check the cell door to see if it was secure and their failure to notice and remove the unpermitted door "dust collector" could each be described as a concurrent or contributing cause of the inmate contact. The unidentified GUI operator's failure to notice and act on the orange icon for Inmate A's cell could also be described as a concurrent or contributing cause of the two inmates coming into contact in the attack. (Exhibit 7-pages 7, 8 & 12, Exhibit 11 testimony of Hammond, reasonable inferences)
30. It has not been determined who the actual GUI operator was at the time that Inmate A was returned to his cell (K3#29) after his shower at 5:06 PM. Although, the Appellant was assigned to operate both GUI's that shift; he was not always present in the control room or not unoccupied and available to operate one or the other of the two GUI's. Other staff on the shift, including CO Boisse helped out and filled in on the GUI's when needed. The Appellant and the unit supervisor Sgt. Peladeau could not remember who had been the actual operator (at 5:06PM), when they were first asked by Investigator Hammond eight plus months after the incident. (Exhibit 7-pages 7 & 9, testimony of Hammond and Appellant, reasonable inferences)

31. It was later determined that Inmate A's door had remained open, because he had placed a rolled up gray "scrub" in the bottom track of his door in order to prevent the cell door's locking mechanism from engaging after he was returned to his cell after showering. (Exhibits 7, 9 & 10, testimony of Hammond and Vidal)
32. After the investigation and a video taped experimentation, it was determined by the DOC that as little as a 1/4 inch thick material, including paper of a small dimension, placed anywhere along the height of the U-shaped, door track jamb, could prevent the door locking mechanism from locking. (Exhibit 10, testimony of Hammond and Vidal)
33. It is a **written DOC policy** that Inmates are not allowed to cover any part of the cell door including the cell door window with any kind of material. (Testimony of Hammond)
34. However, despite this written DOC policy, it apparently became a practice of **allowing inmates** to lay scrubs or other cloth across the cell door threshold to act as a **"dust collector or breeze block"**. This was a **"bad practice"**. The scrubs dust collector was used by Inmate A to jam the door locking mechanism.(Testimony of Hammond) However, it is noted that the duty to enforce this particular policy falls mainly on the escorting officers or other officers who regularly come into physical contact with the cell doors and their respective supervisors. (Exhibits , testimony and reasonable inferences)
35. The cell doors close and lock with a distinct mechanical sound. The escorting officers who are physically present at the cell door should be alert and listening for that distinct and familiar sound. They should also physically check the door by pushing on it to verify that it is locked and secured. The GUI system is only a confirmation that the cell door is locked and secured. (Testimony of Hammond)

36. At approximately 5:25 PM, the Appellant was given permission by Sgt. Peter Peladeau (hereinafter, “Sgt. Peladeau”) to leave the Control Room to retrieve the take-out food order for the staff. (Testimony of Appellant, Exhibit 7)
37. At approximately 5:33 PM, Fisher and Laverdure were returning Inmate B to his cell from the shower when Inmate A exited his cell and advanced down the tier toward Inmate B and the escorting corrections officers. Escorted Inmate B was restrained by behind the back hand restraints and leg restraints was attacked by Inmate A and severely injured. Fisher and Laverdure were ineffective in their efforts to protect Inmate B from injury. Inmate A proceeded to attack B, slashing him with razor blades that he apparently had taped to his hands. It is noted that the DOC investigative report (Exhibit 7) refers in a sentence to the “assaulting” of Inmate B while also stating “caused injuries” to Officers Fischer and Laverdure. However, the Xeroxed photographs attached to the report, (Exhibit 7), although of poor quality show numerous significant slashing injuries to Inmate B and only a small cut on one finger of one of the two officers, (apparently Laverdure). (Exhibits 7, 9 & 10, testimony of Hammond and Vidal, reasonable inference)
38. The corrections officers then initiated an alarm and an emergency response ensued, a number of uniformed officers responded to the tier, eventually Inmate A did separate from Inmate B, and the DOC staff arranged for Inmate A to return to his cell. (Exhibits 7, 9 & 10, testimony of Hammond and Vidal)
39. Inner Perimeter Security Commander Michael Mellen conducted an investigation as a result of the assault on Inmate B by Inmate A. Mellen interviewed Sgt. Peledeau, Inmate B, and witnesses Officer Benjamin McGinnis and Officer Anthony Pacheco. (Exhibit 7)

40. Inmate A and all of the other twenty-five or so inmates of the SMU-K3 unit refused to be interviewed by any of the DOC investigators. (Exhibit 7, testimony of Hammond)
41. In the 5/04/06 report from IPS Donald Perry to Michael Mellen it is stated: **"Sgt. Peladeau stated that [Inmate A] would not relinquish his weapons but did agree to go back to his cell."(**Exhibit 7)
42. After Inmate A voluntarily returned to his cell, the door could not be closed; **the Inmate pointed out to Sgt. Peladeau why the door would not close.** He then removed the rolled up scrub from the bottom of the door track. (Exhibit 7)
43. The report of Michael Mellen, dated 6/05/06, states that **Sgt. Peladeau stated that after Inmate A was in his cell, the Inmate was observed removing tape or a similar material from his fingers and throwing it in the toilet. The toilet was then heard flushing. That tape or similar material was not recovered by the DOC.** (Exhibit 7)
44. **A search of Inmate A's cell on 5/04/06 resulted: "excessive contraband was found and confiscated, including sugar, 2 blankets and passing lines etc."** (Exhibit 7)
45. The Department of Corrections initiated several investigations as a result of the incident. A team headed by **Jeff Quick, DOC Director of Resource Management** responded to the SMU on the evening of the incident and conducted an investigation of the GUI system. Quirk concluded that the GUI system had been working properly. "Additionally, Quirk explained that the GUI system is dependable but **Security Staff should manually check the doors to ensure that they are secured.** Quirk said that if the Security Staff had physically checked the K3 #29 cell door when Inmate A was returned from the shower at 5:06 PM, they would have found the cell door was unsecured." (Exhibit 7-report -page 8, testimony of Hammond)

46. Inmate B filed a complaint with the DOC, in which he alleged, among other things, that SBCC staff had intentionally left Inmate A's cell door unsecured. As a result of that complaint, the Office of Investigative Services initiated an investigation, to complement then-Lieutenant Edward Hammond's investigation. (Exhibit 7, testimony of Hammond)
47. Lt. Hammond conducted an investigation that included a review of Captain Mellen's investigation, review of the videotape and other documentary evidence, and interviews of staff. Lt. Hammond's report concluded that the Appellant's actions in failing to confirm that Inmate A's cell door was secure; while not intentional, did violate Rule 12(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction.(Exhibits 5, 7)
48. Rule 12(a) provides: "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." (Exhibits 2-5 & 7)
49. Lt. Hammond made Findings and Conclusions as a result of his investigation. They are as follows: The allegation that Officers Thomas Fischer and Scott Laverdure conspired with Inmate A and intentionally left his cell door open is **UNFOUNDED.** The allegation that Officer Michael Suarez conspired with Inmate A and intentionally left his cell door open in **UNFOUNDED.** However, he found that Suarez **did violate Rule 12(a)** of the DOC Rules and Regulations. The allegation that Officer Richard Peterson made an inappropriate comment to Inmate B is **UNFOUNDED.** The allegation that Officer Marlo Dupont made a bragging or boasting comment to Inmate B is **NOT SUSTAINED**. It is

noted however, that only Suarez was investigated for or charged with violation of DOC Rule 12(a). Sgt. Peter Peladeau, the supervisor present and in charge and Officer Brian Boisse the person who actually opened K3 shower #4 for Inmate B, while Inmate A's cell K3 #29 was also open as shown on the GUI screen in orange; were not investigated for, nor charged for violation of Rule 12(a). Officers Fischer and Laverdure were not investigated for, nor charged with Rule 12(a) violations despite their repeated violation of the DOC Rule prohibiting allowing any material covering any part of the cell door. The prohibited "dust collector" here actually caused the lock mechanism to be unsecured. These two officers also repeatedly failed to physically check the cell door to verify it being securely locked each time they returned an Inmate to his cell from the shower. These admitted and repeated failures were also admitted to be clearly contrary to "common sense" and "common practice". (Exhibits 7, 10-13, testimony of Hammond, Vidal, Appellant and reasonable inferences)

50. The Department sent the Appellant a notice for a hearing on November 1, 2007. The DOC alleged that the Appellant had violated DOC Rule 12(a). (Exhibits 2-5 & 7, testimony of Hammond)
51. On November 1, 2007, pursuant to M.G.L. c. 31, § 41, a hearing was held before Labor Relations Advisor Joseph S. Santoro to consider disciplinary action against the Appellant. On December 4, 2007, Mr. Santoro issued his finding that the Appellant had violated Rule 12(a). Santoro recommended to the Department that the Appellant be suspended for five (5) days. (Exhibit 3)
52. The DOC Commissioner, Harold Clark, accepted Santoro's recommended action and suspended the Appellant for a period of five (5) days on December 11, 2007. (Exhibit 2)

53. The Appellant had previously complained that the amount of time required for responding to the GUI prompts had been recently reduced from 6-8 seconds down to 2-3 seconds. This shorter window caused haste and mistakes being made. This rush with a computer screen freeze or not registering on the screen of 2-3 seconds and a double touching or touching the screen again caused a false read or confusion regarding the opening or closing of a cell door. When covering both GUI stations, haste is exacerbated and mistakes made by running back and forth between the two stations. On April 11, 2006 he filed a written complaint over this issue. His Captain was angry with him for filing the complaint and told him that the Superintendant was also not happy about the complaint. His Captain suggested to him that he "could go home" if he didn't like the change. The Captain also said it was "a union issue" to be resolved that way. (Exhibits 11&13, Testimony of Appellant and Hammond)
54. The Appellant also pointed out another common problem with the GUI system. That problem is "camera pop-ups" or screen overlays which block part of the original screen. This problem could have caused an oversight on the day of the incident. (Exhibit 11, testimony of Appellant)
55. Lt. Hammond agreed that the pop-up, screen overlay blocking of the original screen is a problem with the GUI system operation. (Testimony of Hammond)
56. The **DOC GUI expert, Resource Management Director Jeffrey Quirk** clearly acknowledged these problems and made recommendations for a solution in his memo of 5/05/06. If an Inmate as here Inmate A, had been returned to his cell and the door closed and the two escorting officers did not physically check to see that it was secured; a blocked or unsecured door would continue to register orange or acknowledged, no GUI

alarm would be set-off. **The GUI operator may not have noticed it, since he was "operating both sides of the unit (two GUI's at one time)". Also, the Appellant as the operator "may not have known that cell K29 was still in the acknowledged mode if the camera pop-up was covering the door or if he moved off screen to another screen prior to the door closing."** (Exhibit 11)

57. The **DOC GUI expert, Resource Management Director Jeffrey Quirk** made a series of recommendations for these recognized problems, Those **Recommendations: 1.** Secure the cell door after the inmate is secured in the shower and before you move to the next inmate. Verify with control that the GUI shows secure. **2.** Inspect each door prior to number one. **3.** If showers are occurring on both sides of the unit, allocate an officer for the second GUI to eliminate the need to jump from one GUI to another. **4.** Reinforce with staff that they need to physically check that the door is secure when closed and that no obstruction are present. **5.** Similar to CJ DDU, GUI operation staff needs to physically slow down when performing GUI operation. They become so proficient and fast that they can begin to overlook errors that may occur. (Exhibit 11)
58. On August 14, 2007, Acting Deputy Commissioner Timothy Hall issued a memo revising the post orders for the SBCC segregation unit to require the staff to physically check cell doors to ensure they are secure after an inmate is electronically locked in. Immediate implementation and staff training on this requirement was called for. (Exhibit 12)
59. The Appellant or any other GUI operator is unable to see the bottom of the cell door on the video pop-up on the screen and therefore would be unable to see any obstruction such as a "dust collector". It would therefore be the responsibility of the two escorting officers to see and remove such obstruction and their supervisors to be aware of and enforce the

DOC rule prohibiting the use of any material covering any part of the cell doors. (Testimony of Appellant, reasonable inference)

60. **The DOC administration made a number of revisions and changes in its policies and practices in the SMU as a result of this event, its investigation and recommendations regarding it. These changes include:** retraining of Staff on the GUI system; cautioning Staff to slow down and pay attention to the details of operation of the GUI; assigning two (2) staff to operate the two (2) GUI stations per shift; and enforcement of the existing policy of not allowing any material covering any part of the door, including "duster collectors or breeze blocks". Acting Deputy Commissioner Timothy Hall acknowledged the **"poor security practice"** of failing to manually check cell doors and ordered a revision of post orders to require such physical and manual check to ensure that the door is secured and locked. (Exhibits 7, 11 & 12, testimony of Hammond, Vidal and Appellant)

61. The Appellant, Michael Suarez was the only DOC employee disciplined for the events of May 4, 2006, following the recommendation by Acting Deputy Commissioner Timothy Hall. (Exhibits and testimony) Acting Deputy Commissioner Timothy Hall also recommended that Officers Fischer and Laverdure each receive "commendation letters". (Exhibit 7)

62. Captain, then Lt. Hammond and Director of Security Vidal were responsive and forthright in their answers. They did not try to embellish or testify beyond their memories. They were clear, unhesitant and confident in their testimony. In testimony, they admitted to mitigating or exculpating circumstances which benefitted the Appellant. They have the presentation and demeanor of professionalism and experience. I find them

to be accurate, reliable and credible witnesses despite the previously referenced unaddressed issues of this investigation. (Exhibits and testimony, demeanor and testimony of Hammond and Vidal)

63. The Appellant was also responsive and forthright in his testimony. Neither he nor his supervisor Sgt. Peladeau could remember who was operating that GUI at the time, (5:06 PM) that Inmate A was returned to his cell. However, they were only first asked about it more than eight (8) months after the incident and their lack of memory is understandable. I found that the Appellant offered numerous plausible explanations for any possible mistakes regarding the GUI operation. He was consistent in his testimony and his answers rang true. He made good eye contact and his demeanor and body language appeared appropriate and compatible with truthful responses. I find him to be a credible witness. (Exhibits and testimony, demeanor and testimony of Appellant)

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)

Both parties admit that the Appellant was not the operator of the GUI which opened the locked shower door to release Inmate B; while the cell door to Inmate A's cell was also open. The operator was determined to be CO Boisse, who opened the shower door (at 5:33 PM) while two cell doors showed orange, (open and acknowledged) on the GUI screen. Officer Boisse's act of opening the shower door while another inmate's cell was also open was the direct or proximate cause of the two inmates coming into contact and the escorted and restrained Inmate B being attacked and injured by the armed and dangerous Inmate A. The Complaint filed by the injured Inmate B prompted the DOC investigation of this incident.

The Appellant was not the operator at the critical time which allowed the inmate contact and assault. The Appellant left the control room at approximately 5:25 PM, with the permission of his supervisor, Sgt. Peladeau to pick-up the staff's take-out dinner order. Although, the Appellant was the only staff specifically assigned to operate both GUI's for that shift, other staff had access to and routinely filled in as operators of both GUI's during the shift. It was never determined whether the Appellant was the actual GUI operator at 5:06 PM, when Inmate A had been returned the shower to his cell. Apparently Inmate A's cell door was left unsecured at that time and the icon on the GUI screen continued to show orange, (open and acknowledged), up until the

time of the attack, at 5:33 PM. The Control Room was understaffed, as admitted to by Security Director Vidal, who testified that there should have been four (4) operators for the two (2) GUI's in that unit. The Supervisor Sgt. Peladeau informed Lt. Hammond that "he always ensures that he has two staff in the control room to operate the GUI's". Peladeau was not asked why he did not have two staff assigned to operate the two GUI's on the day of the incident. The Appellant was the only assigned GUI operator for the two GUI's for that shift. The Appellant at times had too much to manage between two GUI's and his other duties and did rely on other available staff to help out, as was the common practice. In addition to his regular duties, the Appellant was also arranging by telephone for the take-out order and delivery for the entire facility's staff dinner. This involved taking individual orders, placing the orders and collecting money. He had his supervisor's permission to perform this service. The Appellant was not shown to be the GUI operator when Inmate A was returned to his cell from the shower. The Appellant definitely was not the GUI operator when Inmate B was unlocked from his shower and escorted back to his cell by officers Fischer and Laverdure. CO Brian Boisse was the officer who operated the GUI releasing Inmate B from the locked shower while both inmates' cell doors were unlocked with orange icons showing on the GUI screen. This act or omission by Boisse's could have been determined to be negligent and caused the two inmates to come in to contact, resulting in the injuries. Yet Boisse was not investigated for nor charged with a Rule 12(a) violation. Sgt. Peladeau was the supervisor in the control room for the eight (8) or so minutes from when the Appellant left the control room at 5:25 PM, with permission, to the time Boisse released Inmate B from the locked shower. Peladeau was not investigated nor charged with a failure to properly supervise or a Rule 12(a) violation. Correction Officers Laverdure and Fisher were not investigated for nor disciplined for any DOC Rules violation including Rule 12(a). On the

contrary they both were recommended for letters of commendation by Acting Deputy Commissioner Timothy Hall. Deputy Commissioner Hall made his recommendation despite knowing that they had failed to protect Inmate B from attack and injury and that they had repeatedly violated the written DOC rule prohibiting "dust collectors on the floor of the cell door track (the cause of the jammed cell door) and also repeatedly committed the "poor security practice" of not manually checking the cell doors to ensure they were locked and secured. This repeated failure to check the cell doors was described as a failure of common sense, by the two DOC witnesses. Officer Fischer referred to this manual check of the door as a "common practice"; yet he and Laverdure each failed to perform this common practice each time they escorted an inmate back to his cell that day.

The Appellant was not treated equitably by the DOC in this investigation and discipline when compared to the other referenced staff members on that shift. The Appellant received disparate treatment in the DOC investigation and discipline regarding this incident. The other referenced shift-staff members were in a position of greater first hand knowledge and responsibility; yet received more lenient or more favorable treatment. It was never explained why the other referenced staff members received only a cursory investigative review and were not charged with a Rule 12(a) violation despite more culpable acts or omissions, sometimes repeatedly during that shift. Clearly, and admittedly, Officers Fischer and Laverdure were guilty of repeated acts or omissions in violation of DOC rules and/or practices of common sense or common practice. The failure of Officers Fischer and Laverdure to observe and remove Inmate A's cell door "dust collector" and to manually check and verify that his Cell door was secured were each concurrent or contributing causes of the two inmates coming in to contact. They were present at the cell doors and could see and hear the cell doors close, with the opportunity of confirming it manually.

Officer Boisse committed the act or omission which was the direct and proximate cause of the two inmates coming in to contact and the resulting injuries. However, Boisse might have also had the relevant cell door icon blocked by the video pop-up at that time, an admitted problem with the GUI system. Sgt. Peladeau could have been investigated for and possibly charged with a failure to properly supervise, given the repeated subordinates' failure to manually check the cell doors and the repeated failure to observe and remove the prohibited "dust collectors". All four of these named, uncharged staff members were clearly in violation of Rule 12(a) given its' broad obligatory language; Rule 12(a) provides: "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." The other staff members identified in the investigative report were investigated for and left uncharged with willful or intentional offenses only; certainly such offenses are much more difficult to prove, if denied. The DOC engaged in selective enforcement by only investigating for and charging the Appellant with a Rule 12(a) violation, under the totality of the circumstances and facts of this incident. Some of the uninvestigated and uncharged staff engaged in repeated rules violation and more culpable behavior (Fischer and Laverdure). The Appellant showed facts and circumstances in mitigation, if indeed he had been the GUI operator when Inmate A was returned to his cell. However, this fact was not shown by the DOC, by a preponderance of the credible evidence in the record.

The two GUI stations in the control room were understaffed by all accounts. The Appellant was the only person assigned to operate both GUI's for that shift, in addition to the other duties and tasks he was performing. Lt. Hammond and Sgt. Peladeau believed that there should have been two (2) GUI operators assigned. Director of Security Vidal testified that there should have

been four (4) operators assigned for the two GUI's. Indeed, the DOC did subsequently change its policies and practice and did begin mandating two operators be assigned. The DOC also required further staff training and more caution and care in the operation of the GUI stations, as a result of this incident. The DOC GUI expert, Resource Management Director Jeff Quirk reported that the video pop-ups on the GUI screen is a problem and could have blocked the cell door orange icon, at the time Inmate A was returned to his cell. Both Lt. Hammond and the Appellant testified that the video pop-ups were a problem by blocking part of the GUI screen.

The Appellant also pointed out that the recent reduction in the time allowed to react to the touch GUI screen from 6-8 seconds down to 2-3 seconds caused haste and mistakes being made. He had complained about this change and his written complaint was not well-received by his DOC senior supervisors.

The Appellant was not operating the GUI system at the time of the attack. The parties agree that with the permission of Sgt. Peladeau, he left the control room at 5:25 PM, approximately 8 minutes before the attack began. The Department failed to show by a preponderance of the credible and reliable evidence in the record that the Appellant was the operator of the GUI system at 5:08 PM, when Inmate A was returned to his cell. The Appellant himself acknowledges that he was in the control room taking telephone food orders and collecting money for it, answering other telephone calls, sometimes operating one or both of the GUI's and performing other duties, and did not leave until 5:25 PM. However, all of the other staff, including Sgt. Peladeau also had access to and could operate either GUI at any time during the shift as needed.

The Appellant, the two DOC witnesses, supervisor Sgt. Peladeau and the DOC GUI expert Jeff Quirk all agreed that at least two (2) operators should have been assigned to operate the two

GUI stations for that shift. The two GUI stations are located on opposite sides of the control room and at times require haste and bouncing quickly between the two. Indeed, the DOC made a change in practice subsequent to this incident, mandating two operators and general caution and retraining for the operators. It appears that the Appellant was also busy during the shift with the taking of the facility shift's take-out dinner order. The Appellant however, had permission to perform this dinner-order function and neither party placed much evidentiary or argumentative emphasis on this accepted practice.

The Appellant, the two DOC witnesses, his supervisor Sgt. Peladeau and the DOC GUI expert Jeff Quirk all agreed that it was a common sense or a common and recommended practice for the escorting corrections officers to forcibly check the cell doors after placing an inmate in the cell, in order to make sure the locks were engaged. The subsequent measures and policy changes taken by the Department to solve the problems discovered in its investigation included a policy requiring escorting corrections officers to manually check the cell doors upon returning an inmate to his cell. CO's Fisher and Laverdure should have seen the rolled up scrubs on the floor of the cell door and removed it as against the DOC policy. The GUI operator is unable to see the bottom of the cell door and the GUI is only a secondary verification that the door is secured. The officers present at the cell door have the unique opportunity to see and hear the cell door lock properly and then physically check it for confirmation.

For all of the above stated reasons, the Commission determines that the Department has failed to establish by a preponderance of the evidence there was just cause for the discipline it imposed on the Appellant. The only nexus established between staff member's action or omission and the two inmates contact and resulting injury is that of officers Fischer, Laverdure and Boisse. Even if the Department had established sufficient cause for some discipline of the

Appellant; it would fail as the treatment of the Appellant is disparate; given that the Department selectively enforced Rule 12 (a) only against him, while ignoring repeated and more culpable acts or omissions by other staff at the time of this incident.

WHEREFOR, for all the above stated reasons, the Appellant's appeal, Docket No. D-08-5 should be allowed and he should be returned to his position without the loss of pay or any other benefit.

Civil Service Commission

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Daniel M. Henderson
Commissioner

CONCLUSION OF THE MAJORITY (BOWMAN, MARQUIS AND McDOWELL)

We respectfully disagree with the conclusion of the hearing officer, listed above as the Conclusion of the Minority.

The Appellant's primary responsibility on the day in question was to serve as the operator of the "GUI System", a system that allows DOC to electronically monitor when cell doors have not been properly secured.

There was more than sufficient evidence to support DOC's reasonable conclusion that the Appellant was the operator of the GUI system at the time an inmate was returned to his cell and that it was thus the Appellant who failed to observe that the inmate's cell door was not properly secured, permitting him to subsequently exit his cell and injure two correction officers and attack a fellow inmate who sustained lacerations requiring 110 sutures.

The record clearly establishes that the Appellant, as the GUI system operator, had the primary responsibility for ensuring that cell doors were secure. He failed to complete this essential duty

and DOC was reasonably justified in suspending him for five (5) days for his failure to perform this duty.

For the Majority:

_____
Christopher C. Bowman
Chairman

By a 3-2 vote of the Commission (Bowman, Chairman – Yes; McDowell, Commissioner – Yes; Marquis, Commissioner – Yes; Henderson, Commissioner – No; Stein, Commissioner – No), the Appellant's appeal is hereby ***dismissed.***

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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 C. Pfaff, Atty.
Earl Wilson, Atty.