

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503

Boston, MA 02108

(617) 979-1900

BRIAN SYLVESTER,
Appellant

v.

D-19-210

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Brian Sylvester, *Pro Se*

Appearance for Respondent:

Joseph S. Santoro, Esq.
Labor Relations Advisor
Department of Corrections
PO Box 946, Industries Drive
Norfolk, MA 02056

Commissioner:

Paul M. Stein, Esq.

DECISION

The Appellant, Brian Sylvester, acting pursuant to G.L.c.1,§43, appealed to the Civil Service Commission (Commission), challenging the decision of the Respondent, the Massachusetts Department of Correction (DOC), to suspend him for five (5) days from his position of DOC Correction Officer I.¹ The Commission held a pre-hearing conference in Boston on October 29, 2019 and a full hearing on December 20, 2019 in Boston and on January 17, 2020 in Bridgewater, both of which were declared private and digitally recorded.² Both parties filed Proposed Decisions. For the reasons stated below, the appeal is denied.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Fourteen (14) exhibits were received in evidence by the Respondent and four (4) exhibits were received in evidence by the Appellant. Post-hearing proposed decisions were submitted.

Based on the documents submitted and the testimony of the following witnesses:

For the Department of Correction:

- Captain Scott Plante, Department of Correction
- Captain Brian Purcell, Department of Correction
- Superintendent Stephen Kennedy, Department of Correction

For the Appellant:

- Brian Sylvester, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Brian Sylvester, has been a Department of Correction (DOC) Correction Officer I (CO) since February 7, 2007 and is assigned to the 7AM to 3PM shift at MCI Norfolk.

(Testimony of Appellant; Testimony of Purcell).

2. The Appellant’s Disciplinary History with the DOC includes the following entries:

• September 11, 2018	Three (3) Day Suspension	Failed to Provide Satisfactory Medical Evidence
• June 27, 2018	Five (5) Day Suspension ³	Arrest for Domestic Assault and Battery (AB) and AB Dangerous Weapon
• September 30, 2016	One (1) Day Suspension	Failed to Provide Satisfactory Medical Evidence
• May 10, 2016	Letter of Reprimand	Failed to Report to Work, Did Not Have Enough Benefit Time to Cover Absence, Unauthorized Leave
• May 13, 2015	Letter of Reprimand	Absent from Work Illness w/ No Benefit Time
• November 14, 2011	Letter of Reprimand	Tardiness
• October 13, 2010	One (1) Day Suspension	Failed to Submit Satisfactory Medical Evidence
• September 28, 2009	Letter of Reprimand	Failed to Provide Medical Documentation
• August 31, 2009	One Day Suspension	Failed to Provide Medical Documentation
• December 24, 2008	Letter of Reprimand	Failed to Provide Satisfactory Medical Documentation
• November 21, 2008	Letter of Reprimand	Failed to Provide Satisfactory Medical Evidence

(Respondent Exhibit 6).

³ The Appellant testified that this discipline was reduced from five (5) days to three (3) days.

3. On September 23, 2018, Mr. Sylvester was scheduled to work his typical 7AM to 3PM shift at MCI Norfolk. He was expected to report for duty at 6:50AM. (*Testimony of Appellant; Testimony of Plante; Testimony of Purcell*).

4. Captain Scott Plante, a (15) fifteen-year veteran of the DOC, was the Shift Commander at MCI-Norfolk that morning. At 6:55 AM, Captain Plante advised Outer Control at MCI Norfolk to contact Mr. Sylvester via telephone since he had not arrived at work. Outer Control was unable to reach Mr. Sylvester. (*Testimony of Plante; Respondent Exhibit 9*).

5. By 8:30 AM, now one (1) hour and forty (40) minutes after roll call, Captain Plante gave Outer Control an order to try to make telephone contact again with Mr. Sylvester. The facility was unable to reach Mr. Sylvester and voice mail messages were left on his phone. (*Testimony of Plante; Respondent Exhibit 9*).

6. Captain Plante informed his supervisor, Deputy Superintendent Bennett, that Mr. Sylvester was a “No Call/No Show” for his shift that day. Deputy Bennett told Captain Plante to give Mr. Sylvester more time to contact the facility and to let her know if he had not done so in an hour. (*Testimony of Plante; Respondent Exhibit 9*).

7. At 9:30AM, Captain Plante informed Deputy Superintendent Bennett that Mr. Sylvester had still not contacted the facility. At that time, Deputy Superintendent Bennett authorized Captain Plante to contact the Braintree Police, the city in which the Appellant lived, to conduct a wellbeing check of Mr. Sylvester.⁴ (*Testimony of Plante; Respondent Exhibit 9*).

8. Braintree Police Sergeant Cohoon informed Captain Plante at 11:30AM that he had made contact with Mr. Sylvester at his home and that he was safe. Sergeant Cohoon told Mr. Sylvester

⁴ Just one year prior, an officer for the DOC had not reported for duty and was later found deceased in his vehicle. Additionally, another officer who worked at Cedar Junction did not report for duty and was found to have had passed away in his home. Such is the reason why Captain Plante requested a well-being check. (*Testimony of Plante*)

to contact the facility where he worked. The Braintree police sergeant's call did not constitute notification that Mr. Sylvester would be tardy or not reporting to work at all that day. Mr. Sylvester was required to contact the facility on his own. (*Testimony of Plante; Respondent Exhibit 9*).

9. The Department of Correction's Rule 18(a) specifies that an employee is expected to notify the facility in which he is assigned of any delayed arrival or anticipated absence at least one (1) hour prior to a scheduled shift. The Appellant's Collective Bargaining Agreement (CBA), as described by the witnesses, indicates that the employee must notify the DOC facility at the first available opportunity. (*Testimony of Plante; Testimony of Appellant; Testimony of Purcell; Testimony of Kennedy; Respondent Exhibit 12*).

10. Mr. Sylvester finally contacted MCI Norfolk at 1:02 PM, an hour and a half after Braintree police encountered the Appellant at his home at 11:30 AM. His eight (8) hour shift was set to end in two (2) hours. Mr. Sylvester spoke directly to Captain Plante and said that he would not be in for his shift. (*Testimony of Plante; Respondent Exhibit 9*).

11. When Mr. Sylvester spoke to Captain Plante at 1:02 PM that day, he did not state that he was sick. The DOC Incident Report makes no mention that Mr. Sylvester indicated he was calling in sick for the remainder of his shift. The Duty Roster was never changed to indicate a change of status to SL (sick leave). (*Testimony of Plante; Respondent Exhibits 9 & 10*)⁵

12. Mr. Sylvester's phone call at 1:02 PM is not a satisfactory notice of absence, either under Department Policy Rule 18(a) or the Appellant's CBA. All Correction Officers are aware that they are required to notify the facility of their expected absence for their shift. The DOC provides all employees with a "Blue Book" which entails the Rules and Responsibilities of the Department.

⁵ The DOC disputes Mr. Sylvester's claim that he called in sick at 12:15PM. I credit the DOC's Incident Report and the testimony of Capt. Plante, and find that Mr. Sylvester did not contact the facility until 1:02PM and made no mention of his illness to Capt. Plante.

This document is given to all recruits at their training and they are required to sign and acknowledge receipt. Rule 18(a) of this document requires all employees to be punctual for their regular hours of duty. This rule does not allow an absence for duty and/or tardy without permission or proper notification. (*Testimony of Plante; Respondent Exhibits 5, 11, 12*).

13. It is important for officers to call in before their shift if they are going to be absent or late, since the DOC needs to backfill the absence and hire others for overtime. They are expected to call one (1) hour before their shift or no later than the “first opportunity”. The DOC needs notice ASAP to fill the vacancy. (*Testimony of Kennedy*).

14. If someone is in a motor vehicle accident or similarly incapacitated and unconscious, that can excuse the officer for non-notification. Falling asleep, however, “it is not a good excuse”. If an employee oversleeps, he is to call the institution *as soon as he wakes up* and indicate when he will be in or that he is out sick. According to Captain Purcell, when asked at the Commission hearing if he could think of any reason why a delay of three (3) hours (after having been woken up) to notify the facility is justified, Captain Purcell could not think of one. (*Testimony of Purcell; Respondent Exhibits 7; Respondent Exhibit 12*).

15. At no time was Mr. Sylvester in the hospital on September 23, 2018. (*Testimony of Appellant*).

DOC Investigation Hearings and Discipline Imposed

16. On September 25, 2018, (then) Deputy Superintendent Stephen Kennedy requested a fact-finding hearing to be conducted relative to Mr. Sylvester’s absence from work on September 23, 2018. (*Testimony of Kennedy; Respondent Exhibit 8*).

17. Stephen Kennedy is a twenty-eight (28) year veteran of the DOC, having been a CO, a Sergeant, Lieutenant, Director of Security, Deputy Superintendent and a Special Investigator

assigned to Internal Affairs. At the time of this incident, Kennedy was the Deputy Superintendent of Operations at MCI Norfolk, wherein he was the second in command with oversight of the facility, the physical plant, security, operations, and food services. (*Testimony of Kennedy*).

18. The Appellant's fact-finding hearing was conducted on October 10, 2018 and October 11, 2018. Captain Brian Purcell presided. Captain Purcell is a thirty-one (31) year veteran of the DOC, rising through the ranks from Officer, to Sergeant in 2005, Lieutenant at MCI Norfolk, and Captain in 2018. (*Testimony of Purcell; Respondent Exhibit 7*).

19. Mr. Sylvester and his union representative, Officer Peter Hopgood, were present at the fact-finding hearing. During the hearing, Mr. Sylvester was asked why he failed to report for duty on the day in question. Mr. Sylvester indicated that he used his phone as his alarm clock and he forgot to put the phone on the charger and the battery died. He then stated that he woke up when the Braintree Police arrived for a wellness check and that the Braintree sergeant told him that he would notify MCI Norfolk that he was okay. Mr. Sylvester said that he put his phone on the charger and then fell back to sleep. He then stated that he realized he had not called and contacted the facility at and told Deputy Kennedy that he was calling in sick for the rest of his shift.⁶ Mr. Sylvester acknowledged to Captain Purcell at the fact-finding hearing that he knew it was wrong not to immediately notify the institution of his intentions. (*Respondent Exhibit 7*).

20. Captain Purcell found that Mr. Sylvester violated the Department Blue Book, specifically Section 18(a). (*Testimony of Purcell; Respondent Exhibits 7; Respondent Exhibit 12*).

⁶ As indicated in my findings above, the DOC Incident Report makes no mention that Mr. Sylvester indicated he was calling in sick for the remainder of his shift. The Duty Roster was never changed to indicate a change of status to SL (sick leave). (*Testimony of Plante; Respondent Exhibits 9 & 10*)

21. On November 19, 2018, MCI Norfolk Superintendent Brad Cowen accepted Captain Purcell's finding that Mr. Sylvester violated Section 18(a) of the Blue Book and issued a five (5) day suspension without pay to be served February 17 through 21, 2019. (*Respondent Exhibit 5*).

22. Mr. Sylvester's union, Massachusetts Correction Officers Federated Union (MCOFU), duly appealed the discipline of Mr. Sylvester to Step II and a hearing was held on January 15, 2019 before Deputy Commissioner Grant. Present at the hearing were the Appellant, his MCOFU Steward Peter Hopgood who spoke on Appellant's behalf, and (then) Deputy Superintendent Stephen Kennedy. By memorandum dated August 26, 2019 from Deputy Commissioner Grant to DOC Commissioner Mici, he concluded that *just cause* had been established and the discipline would be upheld. (*Respondent Exhibit 3*).

23. On September 17, 2019, DOC Commissioner Mici adopted the conclusion of Deputy Commissioner Grant and upheld the 5-day suspension of Mr. Sylvester for violation of DOC Rule 18(a), No Call/No Show. (*Respondent Exhibits 2, 12 & 14*).

24. Mr. Sylvester duly appealed the discipline to the Commission. (*Respondent Exhibit 1*).

Appellant's Civil Service Appeal

25. At the Commission hearing, Mr. Sylvester said he was not a No Call/No Show and it was just "an honest mistake." Mr. Sylvester admitted that he missed the beginning of his 7AM-3PM shift, that a Braintree police sergeant awakened him at 11:30 AM, and after the sergeant left, the Appellant fell back asleep. He admits he notified his employer of his absence well after the 11:30 police visit. He admits that he did not call in one (1) hour prior to his shift, as is Department policy, but claims that he was within his CBA rights to "notif[y] the facility at the first available time that day I called in as soon as possible on the first day of absence." He also admits that he was never in the hospital on that date. (*Testimony of Appellant*).

26. Mr. Sylvester reiterated his claim that he should be excused from the absence because he provided a chiropractor note to the DOC purportedly indicating he was sick that day. However, when asked a direct question what physical complaint had caused him to allegedly call in sick for the rest of the shift and what complaint he had when he saw the chiropractor two days later.⁷ Mr. Sylvester initially said that it was “confidential” and then, when pressed, he stated that he “did not remember” what caused him to call in sick for the remainder of the shift, but that he “got a note.” (*Testimony of Appellant; Exhibit 15*).

27. An employee who is a No Call/No Show for his shift, and then brings in a sick note, is not necessarily exonerated from the duty to give prior notice to the DOC of his tardiness or absence. A sick note only substantiates an *authorized* medical absence.⁸ Mr. Sylvester’s absence had been deemed *unauthorized* by the DOC. He did not need a sick note and the DOC was not required to accept it. This was already an *unauthorized* absence because there was no notice. (*Testimony of Kennedy*).

28. The DOC looks to the totality of the circumstances surrounding any employee’s failure to report to work or call in. There are true emergency situations, where an employee may have been in an accident, was having a crisis with a child, or was hospitalized. At the fact finding hearing, the employee is given the chance to explain the details and a sick note *may* corroborate the

⁷ Mr. Sylvester provided the DOC with a Sick Leave Slip (Attachment A) from a chiropractor, dated September 25, 2018, which stated that he was unable to perform his duties on September 23, 2018. (Appellant Exhibit 15). Mr. Sylvester claims the DOC did not consider this Sick Leave Slip when it disciplined him for this matter. The DOC disputed this claim, pointing out that the medical documentation was included in the disciplinary file, but not introduced into evidence by DOC because the issue was the failure to call in, not the legitimacy of the medical excuse. Even if I were to credit the medical note, which I do not, that would not change my decision on the Section 18(a) violation.

⁸ Pursuant to DOC sick leave policy (103 DOC 209, Section 5), if an employee has accrued over 48 hours of sick time in one year, the employee is required to present a sick leave slip (Attachment A) upon the first day back to work after the absence. Section 6 notes that if an employee is over his 48 hours of unsubstantiated sick leave he is then responsible to provide satisfactory medical evidence within seven (7) days using the proper form (Illness Certification Form). (*Email from Respondent to Commission, dated December 23, 2018; Exhibit 13*)

employee's testimony as to why they were absent or tardy and unable to give prompt notice. Had the DOC been presented with evidence of a "true emergency", which I find was not the case, the DOC would have taken that into consideration. (*Testimony of Kennedy*).

29. Superintendent Kennedy never considered Mr. Sylvester's discipline to be "harsh", or told Mr. Sylvester he could win the appeal on disparate treatment grounds, as Mr. Sylvester alleged. On the contrary, Kennedy never said anything of that sort and is aware of the Appellant's disciplinary history. What the Appellant alleges (i.e., encouragement to appeal) "would be the furthest from what my recommendation" would be if he (Kennedy) were the person imposing the discipline. (*Testimony of Kennedy*)

30. This discipline imposed by DOC in this case was based solely on Mr. Sylvester's failure to notify DOC promptly of his absence, i.e. a No Call/No Show. (*Testimony of Kennedy*).

APPLICABLE LEGAL STANDARD

G.L.c.31, §41-45 allows discipline of a tenured civil servant for "just cause" after due notice, a hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of the decision that states "fully and specifically the reasons therefor." G.L.c.31, §41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31, §42 and/or §43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. As prescribed by G.L.c.31, §43, ¶2, the Appointing Authority bears the burden of proving "just cause" for the discipline imposed by a preponderance of the evidence.

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the

employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.” (*Emphasis added*)

The Commission determines just cause 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. See also Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) (appointing authority must provide “adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law” for discharge of public employee), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (justification for discharge of public employee requires proof by a preponderance of evidence of “proper cause” for removal made in good faith) It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “[only] separating employees whose inadequate performance cannot be corrected.” G.L. c.31, §1.

Section 43 of G.L.c.31 also vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct.

594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

The preponderance of the evidence in this appeal establishes that the Department of Corrections had just cause to impose discipline upon Correction Officer Brian Sylvester for failure to notify the DOC of his absence for his shift at MCI Norfolk on September 23, 2018, in violation of Blue Book Rule 18(a). Mr. Sylvester was due to report for duty at 6:50 AM on September 23, 2018 for his 7 AM to 3 PM shift. DOC policy requires an employee to notify the facility he works one (1) hour before his shift is set to begin that he will be absent or tardy for his PM shift. Mr. Sylvester’s CBA required that he notify DOC “as early as possible”. He did neither.

Mr. Sylvester called into MCI Norfolk and spoke directly to Captain Plante at 1:02PM, six hours (6) and twelve (12) minutes after his shift began. The DOC determined Mr. Sylvester to be a No-Call/No-Show for his shift, even after receiving the phone call. The shift was 75% over. Even using the CBA standard of notifying the institution “as early as possible” there is no way that Mr. Sylvester notified the DOC as early as possible. Mr. Sylvester claims that his cell phone was dead; therefore, his cell phone alarm clock never went off. Such is an understandable predicament; however, even if Mr. Sylvester had overslept right through the entire morning and never, once, awaked until the Braintree police arrived (almost 5 hours after his shift began), he still did not contact the facility at 11:30AM once the police left his home. He admits that he went back to sleep.

I do not credit the Appellant's testimony that he called at 12:15PM, nor would even that have been "as early as possible."⁹

Mr. Sylvester claims that he provided the DOC with adequate medical documentation to completely excuse his absence, even despite his lack of notification. Captain Plante, whose testimony I credit, rejected this excuse. When Mr. Sylvester called the facility to report that he would not be in for his shift, at no time during that conversation did Mr. Sylvester claim to be sick. Mr. Sylvester presented the DOC with a note from a chiropractor he went to see two days after his No Call/No Show. At the Commission hearing, Mr. Sylvester refused to state why he saw a chiropractor on September 25, 2018 or from what ailment he suffered.

on September 23, 2018, stating, initially, that it was confidential and then claiming he could not remember. If he were involved in an emergency situation or had been in the hospital, for instance, the DOC would have regarded this medical documentation as corroboration of such an emergency. Mr. Sylvester does not claim to have been hospitalized nor does the evidence presented show any type of emergency. The DOC considered the medical note the Appellant provided yet was unpersuaded (as am I) by its contents to change the conclusion of misconduct – that being a No-Call/No-Show on the date in question.

I find that the DOC's discipline was imposed for just cause upon adequate reasons and sufficiently supported by credible evidence. Specifically, the DOC proved that that Mr. Sylvester's was guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service by his inexcusable neglect to provide DOC with proper and prompt

⁹ The credibility of live testimony lies with the hearing officer. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (assessment of conflicting testimony cannot be made by someone not present at the hearing).

notice of his absence on September 23, 2018. 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). This absence was unauthorized. A sick note only substantiates an authorized absence. The chiropractor's note did not exonerate the Appellant's unjustified delay in providing proper notice to the DOC of his absence.

Having concluded that discipline was warranted, I have also considered whether the Commission should modify the discipline imposed. I conclude that a modification is not warranted.

As part of its review, the Commission must consider whether there is any evidence of political considerations, favoritism, or bias in a public employer's decisions. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). Here, I have found none. Captain Plante, Captain Purcell, Deputy Superintendent Kennedy, are all solid witnesses who acted in accordance with DOC rules and regulations. Mr. Sylvester violated DOC rules and failed to notify the DOC that he would not be reporting to work. I find no evidence to support the Mr. Sylvester's allegations that (then) Deputy Superintendent Kennedy targeted the Appellant. (Then) Deputy Superintendent Kennedy did not impose the five (5) day suspension on Mr. Sylvester. Initially, the MCI Norfolk Superintendent, did and the decision was affirmed by Deputy Commissioner Grant and Commissioner Mici, who followed all procedures required under G.L. c. 31, Sections 41-45.

Nor did Mr. Sylvester present any reliable proof of disparate treatment. At the Commission hearing, he provided copies of purported comparative discipline of DOC employees who have been disciplined for No Call/No Show from 2015-2018. The DOC objected to this document being entered into evidence, since the DOC had never seen this document before, it had not been authenticated, and the DOC could not assess whether the data within it were accurate or complete. I allowed the document into evidence as Exhibit 18 "for what it may be worth", noting its late

submission. Upon further review of the document, it provides no comprehensive disciplinary history regarding the employee for each entry of No Call/No Show, and I have no way of determining if the discipline of that particular employee was actually disparate treatment, especially given the limited opportunity for scrutiny of the data by DOC. I have given no weight to this document as evidence of disparate treatment.

The Appellant's contention of disparate treatment, is also not persuasive in view of Mr. Sylvester's long disciplinary history with eleven (11) entries on it, ten (10) of which are related to attendance issues for which he had recently been disciplined with a three (3) day suspension. He previously also received two (2) day suspensions, a five (5) day suspension, and six (6) Letters of Reprimand.

Finally, the facts on which the DOC relied to impose a five (5) day suspension do not differ significantly from those I found on de novo review. As such, I find no basis on which the Commission would be warranted to modify the five (5) day suspension imposed in this case.

For these reasons, the appeal of the Appellant, Brian Sylvester, in Case No. D-19-210 is hereby

DENIED.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office

of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Brian Sylvester (Appellant)

Joseph S. Santoro, Esq. (for Respondent)