COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

JOEL WEINREBE,
Appellant

v.

D1-06-347

DEPARTMENT OF CORRECTION,
Respondent

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Joel Weinrebe (hereafter "Weinrebe" or "Appellant"), is appealing the decision of the Department of Correction (hereafter "DOC" or "Appointing Authority") on December 7, 2006 to terminate him from his position as a Correction Officer I. The appeal was timely filed. Hearings were held on March 13, 2007, June 11, 2007, and July 2, 2007 at the offices of the Civil Service Commission. Per the Appellant's request, the hearing was public. However, all

witnesses, with the exception of the Appellant, were sequestered. Eight (8) tapes were made of the proceedings as well as three (3) volumes of transcripts, which are deemed the official record of the proceedings. Both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Sixty-two (62) Exhibits were entered into evidence at the hearing (Appointing Authority Exhibits 1-23 and 25-48; Appellant Exhibits 49-63). Based on the documents submitted, a stipulation of facts, and the testimony of the following witnesses:

Called by the Appointing Authority:

- Parole Officer Nelson Bauman; Parole Board;
- Captain Scott Brown; Department of Correction;
- Sergeant Donald Mills; Brockton Police Department;
- Officer Stanley David, Brockton Police Department;
- Detective Timothy Stanton, Brockton Police Department;
- Lieutenant Al Saucier, Department of Correction;
- Sergeant Richard Costello, Department of Correction;
- Captain Edward McGonagle, Department of Correction;
- Personnel Officer Adrienne Level, Department of Correction;
- Steven Ayala, Director of the Special Operations Division, Department of Correction;
- Correction Officer Paul Dougherty, Department of Correction

Called By the Appellant:

- Steven Kenneway, President of the Massachusetts Correction Officers Federated Union ("MCOFU")
- Appellant's girlfriend ("girlfriend") (name withheld due to allegations of domestic violence and testimony regarding confidential medical information);
- Joel Weinrebe; Appellant

I make the following findings of fact:

1. The Appellant, Joel Weinrebe, was a tenured civil service employee of the Massachusetts Department of Correction serving in the position of Correction Officer I. He had been employed by the DOC for approximately 10 years prior to being terminated via letter dated December 7, 2006. (Testimony of Appellant; Exhibit 4; Stipulation of Fact)
2. Prior to his termination, the Appellant had received four (4) letters of reprimand. (Exhibit 43)
3. Via a letter dated May 27, 2005, the Appellant was charged with violating Rules 8(a), 8(b), and 8(c) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. (Stipulation of Facts)
4. Via a letter dated August 10, 2005, the charges articulated against Weinrebe in the May 27, 2005 charge letter were reissued. In addition, Weinrebe was charged with violating Rules 1 and 18(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, as well as the Department's Policy for the Prohibition of Domestic Violence, 103 DOC 238. (Stipulation of Facts)
5. Via letter dated August 31, 2006, the Appellant was charged with violating the General Policy I, Rule 1, and Rule 2(b) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. (Stipulation of Facts)

Charges that Appellant Intervened on Behalf of An Inmate at A Parole Hearing:

6. Parole Officer C (also known as an Institutional Parole Officer) Nelson Bauman testified that in January 2004, the Appellant arrived, unsolicited, at his office and said that he would like to speak on behalf of an inmate at a preliminary parole hearing (in which four disciplinary reports would be reviewed, including one report that the Appellant had written regarding the inmate). (Testimony of Bauman, V.1, p. 18) The testimony of Bauman was consistent with his incident report, which stated, "On January 8, 2004, [inmate A][1] had a preliminary Revocation hearing on C47772. Officer Weinrebe appeared unsolicited and unannounced at the Parole Office at [Old Colony Correctional Center] on January 8, 2004 to make comments regarding [inmate A]. (Exhibit 5) Mr. Bauman then asked then Appellant to speak to the hearing officer regarding the matter. (Testimony of Bauman, V.1, p. 21)
7. Mr. Bauman testified that the normal practice regarding officers attending preliminary parole hearings as follows: If the inmate had wanted witnesses, he would make the request either to [Bauman] or to the hearing examiner, and then [Bauman] would try to respond appropriately to it. Sometimes an inmate would request a correction officer to appear at the hearing, and what [Bauman] would normally do then [was] to talk to the deputy superintendent of the facility to request their permission for the officer to attend. (Testimony of Bauman, V.1, p. 21)

[1] There are two (2) inmates relevant to this case. In order to protect the identity of these inmates and comply with CORI regulations, these inmates will referred to as "inmate A" and "inmate B."

8. With respect to inmate A's preliminary parole hearing, Mr. Bauman testified that he did not ask permission from the deputy superintendent for Appellant to attend the hearing because "the inmate had made no such request to [him], and as far as [he knew], the inmate had made not such request to the hearing examiner." (Testimony of Bauman, V.1, p. 21)
9. During his testimony before the Commission, the Appellant offered vague, contradictory and implausible testimony regarding the circumstances surrounding his visit to the parole office on January 8, 2004. During cross-examination, the Appellant initially testified that "I didn't know it was the day of the [inmate's] hearing. I just went down there in passing, going to chow to get something for lunch. I said [to Bauman], 'Do you want to speak to me about the [inmate's] disciplinary report?' Because the inmate had been harassing me for five or six days to speak to these people about why I wrote a ticket." (Testimony of Appellant, V. 3, pp. 151-152)
10. Under cross-examination, the Appellant stated, "It was solicited by the inmate who kept bothering me, so I wanted to find out why they wanted to speak to me about a disciplinary report that was pretty simple and straightforward…The inmate kept telling me that they wanted to speak to me down there or to – that's what he kept telling me. [Inmate A] kept telling me, 'you need to go down there, they want to speak to you about my disciplinary report'." (Testimony of Appellant, V. 3, ,pp. 151-152)
11. Asked by this Commissioner if he had spoken with the inmate on the day of the parole hearing, the Appellant was at first non-responsive, stating, "he'd [Inmate A] been harassing me for about a week to go down there to speak to them about this

ticket." After further questioning by this Commissioner, the Appellant finally acknowledged that he spoke to the inmate "four or five" times on the morning of the parole hearing prior to the Appellant approaching parole officer Bauman. (Testimony of Appellant, V3, p. 152)

12. Despite acknowledging that he spoke to the inmate four or five times on the morning of the parole hearing in question, the Appellant continued to insist during his testimony before the Commission that his conversation with parole officer Bauman was simply a chance encounter, stating, "He [Bauman] was coming out of his office…we were going up the ramp to go to get lunch…where the staff dining hall was. I says, 'why is [Inmate A] asking me to come and speak to you about the disciplinary report that I wrote on him? That's when he brang (sic) me into the offices through three other doors into a closed room with that other gentleman." (Testimony of Appellant, V. 3, p. 157)
13. The Appellant's evolving testimony before the Commission regarding this matter was in stark contrast to an incident report he signed on February 26, 2004, only weeks after the incident in question in which he wrote, "on or about 11:30 A.M., Jan. 8, 2004, I C.O. Weinrebe was called to the Parole Office by Nelson Bauman, who introduced me to Joseph Rull (hearing examiner)." (Exhibit 12)
14. Captain Brown, a DOC investigator, testified that he interviewed the parole hearing officer regarding this matter and Mr. Rull said that "he didn't know who had requested [Appellant], that he had just shown up." (Testimony of Brown, V.1, p. 45)
15. After the preliminary hearing, inmate A was found not guilty of the Rule 1C violation. He was found not guilty because: "Subject claimed that he did not hear the

loudspeaker which ordered him to report to another area, and he did not purposefully violate the institutional rule. Note: Corrections Officer Joel Weinrebe did appear at the hearing and did admit that there was a miscommunication, but, that he had to write up a disciplinary report per another superior officer, which he did not want to do as it was not warranted. He also stated that he has known subject for eight years and had many positive things to say on subject's behalf." (emphasis added) (Exhibit 6; Exhibit 11)

16. The Appellant's testimony regarding his visit to the parole office on the day in question was not credible. His answers were evasive, implausible and not supported by the documentary evidence in this case. (Testimony, demeanor of Appellant)
17. I find that the Appellant, without any authorization from his superiors, and absent any prior request from the parole office, inserted himself into an inmate's parole hearing with the intent of assisting that inmate.
18. DOC Rule 8(a) states, "[Y]our attitude toward inmates should be friendly not familiar." (Exhibit 4)
19. DOC Rule 8(b) states, "Department of Correction and/or institution employees must not personally intercede for an inmate regarding release…, nor endorse a petition for granting parole, pardon, commutation…without the permission of the Commissioner or his designee." (Exhibit 4)

Charges that Appellant Intervened on Behalf of An Inmate Regarding a Disciplinary Matter and discussed the affairs of an inmate with an outside civilian known to be a member of the Outlaws motorcycle gang:

20. Officer Paul Dougherty testified that in January 2004, he was the disciplinary hearing officer at Old Colony Correctional Center ("OCC"). (Testimony of Dougherty V.3, p. 113)

21. Officer Dougherty testified that in January 2004, while he was walking down a corridor in OCCC, Appellant stopped him and "asked [Dougherty] to do [Appellant] a favor regarding the inmate, that [inmate B] got a ticket and (the Appellant) wanted (Dougherty) to do a favor for him in giving him a lesser sanction." Officer Dougherty indicated that the Appellant said that he wanted Officer Dougherty to lessen inmate B's disciplinary sanction because inmate B was a "good guy." Officer Dougherty explained that sometimes officers who wrote disciplinary reports would approach him regarding these reports to explain them in more detail. (Testimony of Dougherty V.3, pp. 113-114). The Appellant, however, was not the author of the disciplinary report that he approached Officer Dougherty about. (Exhibit 9; Testimony of Appellant, V.3 p. 64)

22. On January 28, 2004, Officer Dougherty submitted an incident report stating: "On January 28, 2004 at approximately 9:00 a.m. officer Joel Weinrebe spoke to me regarding an inmate in the federal unit in hopes that I would look out for inmate [B] during his upcoming d-board. Officer Weinrebe asked it be considered a personal favor to him because the inmate was a good guy". (Exhibit 8)

23. The Appellant testified before the Commission that he was informed by a *food runner* that inmate B's wife was dying of terminal cancer and that inmate B had received a ticket or disciplinary report and he was on awaiting action status. Appellant admitted

that he asked Officer Dougherty to postpone inmate B's sanctions. (Testimony of Appellant, V.3, p. 64)

24. Officer Dougherty testified that the Appellant never told him that inmate B's wife was dying of cancer, nor did he ask Officer Dougherty to delay the punishment so that inmate B would not be restricted from using the telephone. Officer Dougherty explained that the Appellant would not have said that because the inmate's sanction did not restrict him from using the phone. (Testimony of Dougherty, V. 1, p. 119 and Exhibit 9)

25. Asked by this Commissioner if he told Officer Dougherty the reason for approaching him about inmate B was related to the inmate's wife having cancer, the Appellant stated, "No, sir, I never addressed that. I said that in my statement previous, sir, that I never told Officer Dougherty that because I considered him to be a sadistic officer and that he would utilize that to torment and harass the individual even further than they already head been." (Testimony of Appellant, V.3, p.161)

26. On February 26, 2004, the Appellant submitted a disciplinary report that was inconsistent with his testimony before the Commission. (Exhibit 19). Specifically, the incident report stated: "Sometime in the month of January 2004, [inmate B] informed me [he] had received a d-report for being out of place. [Inmate B] asked if there was anything I could do to get the d-report taken care of? I asked 'like what?" Inmate B asked me to put a word in with the D-officer for him, not to hit him with heavy sanctions. Later that day, I saw D-officer Dougherty coming from his office. I asked him as he approached what [inmate B's] d-report was for. Dougherty told me it was for being out of place. I asked what the sanctions were for that. He stated seven days

ISO. I asked is there any chance that it could be suspended. He stated no. I said ok, and that was the end of the conversation about [inmate B]." (emphasis added) (Exhibit 19)

27. On February 26, 2004, in addition to interviewing the Appellant regarding intervening at a parole hearing regarding inmate A, Captain Brown also interviewed the Appellant regarding approaching Officer Dougherty regarding inmate B's disciplinary report. (Exhibit 14) Specifically, Captain Brown asked the Appellant "if he had approached the D-officer and asked the D-officer to be lenient on an inmate by the name of [inmate B]." (Testimony of Brown, V.1, p. 47) The Appellant responded, "that he had, and when [Captain Brown] asked him why, he said that inmate B was a biker." (Testimony of Brown, V.1 p. 47) Further, the Appellant stated to Captain Brown:

    [Inmate B] had told him that he was a member of the Outlaws, actually the president of the Outlaws, that [Appellant] did not believe [inmate B]. He thought he was not telling the truth, so that Officer Weinrebe then stated to [Captain Brown] that he had taken it upon himself to call an individual by the name of Rusty Deutsch, who was affiliated with a member of the Outlaws, and he stated that this person named Rusty Deutsch had had a positive influence on Officer Weinrebe's life, and that's why he trusted what this person named Deutsch was going to tell him about [inmate B], and that Rusty Deusch had confirmed that [inmate B] was president of the Outlaws." (Testimony of Brown, V. 1, p.48; see also p. 51) Captain Brown's testimony regarding his interview with Appellant is consistent with the memorandum he drafted documenting the interview on February 26, 2004. (Exhibit 14)

28. Captain Brown testified before the Commission that that the Outlaws motorcycle group is considered a "Security Threat Group" by the DOC. A security threat group is a group or gang of individuals that is known to be involved an illicit or illegal activity. (Testimony of Brown, V. 1, p. 50-51)

29. As referenced above, the Appellant testified before the Commission that he received the information about inmate B's sick wife from a *food runner*. In his incident report, he wrote that he received that information *directly from inmate B*. Asked to explain this inconsistency, the Appellant stated, "we'll pull all my educational grades. I've never got better than a C in English. I'm not -- I don't know all 90,000 words in the dictionary. I'm not a literary major, I make lots of grammatical mistakes. You can check all my D-reports and incident reports; I've made thousands of errors writing…I have some disabilities." The Appellant went on to state that when he was writing the incident report that he was "under duress." (Testimony of Appellant, V.III, p.166)

30. I find that the Appellant's testimony regarding his involvement with inmate B's disciplinary report is not credible. Specifically, his explanation for the inconsistent statement in his incident report as compared to his live testimony before the Commission rings hollow. His contradictory incident report can not be chalked up to poor writing skills. Even leaving room for this shortcoming, the Appellant's written incident report is unequivocal, stating that he (the Appellant) spoke directly to inmate B. In his testimony before the Commission, he stated that he never spoke to inmate B, but, rather, spoke to a *food runner* regarding inmate B's disciplinary report. I find that the Appellant deliberately misspoke in his testimony before the Commission and was not truthful about his interaction with inmate B.

31. I find that the Appellant inappropriately inserted himself into inmate B's disciplinary matter after being directly solicited for assistance by inmate B, a violation of DOC Rules 8(a) and 8(b) (referenced above).

32. After a careful review of all the testimony and documentary evidence, I make no finding regarding whether or not the Appellant was ever a member of the motorcycle group named "The Outlaws" and/or whether or not he associated with, or was ever a member of, this group. The testimony and documentary evidence was not sufficient to make such a finding.

Charges that Appellant Provided Pizza to Inmates

33. Captain Brown testified that he was monitoring video surveillance regarding another activity when he observed the Appellant:

"walk by the control room of the unit with a pizza box in his hand. [Appellant] had walked in front of the control room and then to the left of the control room, and then I observed…him come back without the pizza box, and in the area where he had walked, there was an ironing board, I know, because I know the housing unit….Moments later while reviewing the same tape, I had observed several inmates walk over to the area where Officer Weinrebe had just been and then walk away from the area with what appeared to be pizza in their hands, and then I had to conduct an interview with Officer Weinrebe concerning this." (Testimony of Brown, V.1, p. 56)

34. Captain Brown testified that he recalled "specifically" what the Appellant stated when he was asked about this incident. Captain Brown testified that Appellant stated that he was wondering how long it would take Captain Brown to ask him about the pizza. Captain Brown stated that Appellant told him that he left the remainder

(approximately 6 to 8 pieces) of a pizza he had purchased from outside the institution for the inmates because they had done a great job preparing for an audit and Appellant did not have anything else to give them. (Testimony of Brown, V. 1, p.57; see also Exhibits 15 and 19 regarding Brown's March 25, 2004 interview with Appellant)

35. In the Appellant's incident report, dated March 29, 2004, he admitted that on February 21, 2004, he left pizza for inmates on the ironing board. (Exhibit 23)

36. On cross-examination, however, the Appellant completely changed his story, stating: No, I did not allow [the inmates] to have anything. I left [the pizza] near the trash barrel and they took it. I didn't hand it to them, I didn't leave it for them. I left it on the ironing board next to the trash because it wouldn't fit in the box. When they came out to do their job, they ate it. Simple enough. They pick the trash, every day they pick the trash." (Testimony of Appellant, V.3, p. 180) When compared against the other charges against the Appellant, this incident is relatively minor. Even regarding this minor incident, however, the Appellant offered contradictory answers, further undermining his credibility. (Testimony, demeanor of Appellant)

Charges that Appellant 1) engaged in conduct unbecoming an officer as a result of his December 2004 arrest for Assault and Battery with a Dangerous Weapon, Domestic Violence, and Threats to Murder; and 2) was unfit for duty because he was held without bail at the Plymouth County House of Correction from approximately May 4, 2005 through August 23, 2005

37. Sgt. Donald Mills testified before the Commission that in December 2004, he was in the police station when a woman (Appellant's girlfriend) came in and stated that she was "pushed and shoved and dragged down a set of stairs, that her head hit each stair as it fell down." (Testimony of [the girlfriend], V. 1, pp. 98-99).

38. Likewise, the girlfriend and a female witness reported the following to Brockton Police Officer Kevin Jones:

"[the girlfriend] stated that Weinrebe had pushed and grabbed her and then dragged her down the stairs. She called [the witness] at 7:45 a.m. to pick her up. [The witness] stated when she went to pick up [the girlfriend], that she observed Weinrebe pushing and grabbing [the girlfriend]". (Exhibit 32)

39. On December 10, 2004, the Appellant was arrested and arraigned in criminal court on the following charges: 1)A& B with a Dangerous Weapon (stairs) and; 2) threatening to murder. (Exhibit 42, 32, and 53)

40. On December 10, 2004, [the girlfriend] took out a restraining order against the Appellant. In her application for a restraining order, [the girlfriend] submitted an affidavit stating the following:

> Joel Weinrebe assaulted me and held me prisoner of his home from 2 AM to 8 AM on December 10th 2004. He was arrested and charged with assault. Pictures of all bodily harm done to me were taken at Brockton Police Station. He is a C.O. in Bridgewater Correction, but is currently on suspension. The abuse consisted of: He dragged me from upstairs bedroom by my head and hair down stairs through the kitchen and outside where he then banged my head into cement. He then dragged me back in by my hair again where he continued to do bodily harm. He then held me prisoner by taking my cell phone, keys and clothes. Exhibit 33.

41. When testifying about the arrival of local police and his subsequent arrest on December 10, 2004, the Appellant testified before the Commission that as he (the Appellant) was standing out on the sidewalk near his house while he was off-duty, "…[the police officer] asked me who I was. I told him my name, and he told me that I may need to stand by because I may be…arrested for assault and battery. At that time, I informed him that I was a member of the Department of Correction. I had my

badge around my neck, I had a firearm and a knife on at that time, and I surrendered to the officer." (Testimony of Appellant, V.3, p.26)

42. On December 12, 2004, the Appellant was charged with violating the restraining order that [the girlfriend] had against him. (Exhibit 34)

43. On January 31, 2005, the December 10, 2004 restraining order was vacated at [the girlfriend's] request. (Exhibit 33)

44. In May 2005, the Brockton Police reported that "[the girlfriend] stated [that Appellant was] acting crazy and loosing his temper. She said he was just yelling at her and then he pulled her by the hair and threw her to the ground." The police also reported that [the girlfriend] was "crying during the entire interview telling [the officer] that [Appellant] is crazy and she is extremely fearful of him." (Exhibit 36b)

45. The Appellant was subsequently arrested and charged with Domestic Assault and Battery, resisting arrest, possession of a class D controlled substance, and carrying a dangerous weapon (a spring-loaded knife). (Exhibits 42 and 36a & b)

46. DOC Sergeant Richard Costello testified that [the girlfriend] contacted the Department and notified it that the Appellant had assaulted her. Sgt. Costello stated that he spoke with [the girlfriend] once over the phone and another time they met for approximately 45 minutes at a Burger King in Bridgewater. Further, Sgt. Costello indicated that [the girlfriend] gave the DOC photos and answered a series of questions. (Testimony of Costello, V.2, pp. 29-30).

47. The Department Policy of the Prohibition on Domestic violence, 103 DOC 516, states that the Commonwealth of Massachusetts has a "zero-tolerance policy for domestic violence occurring within or outside the workplace." Exhibit 1. Further, the policy

notes that Executive Order 398 establishes a zero tolerance policy for domestic violence and applies to all individuals employed by the Office of the Governor or any state agency under the Executive Department. Exhibit 1. Moreover, the commission of domestic violence is a blatant violation of the General Policy of the Blue Book, and is conduct unbecoming a correction officer.

48. [The girlfriend], who is now engaged to the Appellant, testified before the Commission and sought to recant most of the statements she made to local police and DOC in 2004 and 2005 regarding the Appellant and the incidents which occurred in 2004 and 2005. (Testimony of [the girlfriend])

49. In regard to the 2004 incident, [the girlfriend] testified before the Commission that she "wasn't in the right state of mind" when she went to the Brockton Police Department on December 10, 2004. (Testimony of [the girlfriend]; V.3, p.14)

50. Asked why she kept going to police and making allegations after 2004 if she wasn't afraid of the Appellant, [the girlfriend], whose testimony took place before the Commission with the Appellant in the room, testified that "I was probably more afraid of myself and what was happening in my mind, I guess." (Testimony of [the girlfriend], Volume 3, p.15)

51. In regard to her prior statements to DOC, [the girlfriend] stated that she was interviewed by Costello in the spring of 2005 on two occasions. She testified that Costello was trying to convince her that her life was in danger and that Weinrebe was a violent person and that she should be afraid of him. (Testimony of [the girlfriend]; Volume 3, p. 15)

52. Unfortunately, I do not find [the girlfriend's] allegation against Sergeant Costello, to

be credible. I find that [the girlfriend] did tell Sergeant Costello that she was afraid of the Appellant. Further, I find that [the girlfriend's] testimony before the Commission was geared toward portraying the Appellant, with whom she is now engaged and who was now observing her testimony, in the most favorable light possible. Further, [the girlfriend] filed her complaint against the Appellant with the Brockton Police Department *before* speaking to Sergeant Costello. It defies common sense for [the girlfriend] to testify that somehow Costello convinced her that the Appellant was a danger to her, as opposed to reaching that conclusion on her own and, on at least three occasions, notifying local law enforcement authorities about her fear of the Appellant. (Testimony, demeanor of [the girlfriend])

53. As a result of the Appellant's May 2005 arrest, he was held without bail in the Plymouth County House of Correction for more than 4 months. (Testimony of Appellant, V. 3, p.184, and Exhibit 26, p 11)
54. The cases were tried before a jury, and after hearing testimony from [the girlfriend} and others, the Appellant was found not guilty. After the not guilty findings, the Appellant was then released from custody. (Exhibits 53c and 53j)
55. Lt. Kenneway testified on behalf of the Appellant that domestic violence is becoming more prevalent among DOC personnel and that DOC requested a meeting to discuss this problem. Kenneway further testified that a Captain who shot his wife and spent six months in jail is still a Captain after the case against him was dropped. He also testified that there is a current case pending regarding a Captain who pistol whipped his wife, and is still a Captain. (Testimony of Kenneway)
56. Kenneway testified that he has seen Correctional Officers reinstated after being

incarcerated, if they are exonerated of the charges. (Testimony of Kenneway)

Charges that Appellant: 1) unlawfully possessed a weapon; 2) failed to promptly submit a written report notifying his Superintendent or designee that he was indicted for this unlawful weapons possession; and 3) falsely reported to the Brockton Police that he was authorized to have this banned weapon because of his position with the Department's Tactical Unit

57. In December 2004, the Brockton Police Department, as referenced above, responded to the Appellant's home at 45 Taylor Avenue in Brockton after [the girlfriend] reported that Appellant had assaulted her.

58. Sgt. Mills of the Brockton Police Department testified that he arrived at the Appellant's home moments after Officer Stanley David. Sgt. Mills stated that after the Appellant was arrested and seated in the back seat of Officer David's cruiser, he had a conversation with the Appellant. During this conversation, Sgt. Mills explained to Appellant that Ms. Field had made a complaint and that she was taking out a restraining order, and therefore, the police had to take the Appellant's firearms and his license to carry. (Testimony of Mills, V. 1, pp. 100-102)

59. Sgt. Mills testified that he and Officer William Schlieman went into the Appellant's home, collected the Appellant's firearms, brought them back to the station, and logged them in for safekeeping. (Testimony of Mills, V. 1, pp. 103, 105)

60. Sgt. Mills testified that the items listed on page 3 of the Brockton Police Arrest Report, dated December 10, 2004, which is Exhibit 32, are the items removed from Appellant's home and placed in safekeeping. (Testimony of Mills, V. 1, p. 105 and Exhibit 32)

61. The Appellant holds a Class "A" License to Carry a Large Capacity firearm. [Ex. 37a and 49].

62. One of the items removed from Appellant's home was a "Colt AR 15A3 .223 CAL serial #LBD001907 labeled "Restricted Military/Government Law Enforcement/Export Use only." (Exhibit 32; see also Testimony of Stanton, V. 2, p. 180)
63. Both parties offered witnesses and documentary evidence regarding whether or not the Appellant was authorized to carry the firearm in question.
64. The Appellant indicated to the Brockton Police that he was authorized to possess this firearm because of his position on the Department's Tactical Response Team ("TRT"). (Exhibit 260
65. Detective Stanton testified that Detective Donahue asked him to check the AR15A3 taken from Appellant's home to make sure there was no ammunition inside the weapon. (Testimony of Stanton, V. 2, pp.135-136)
66. Detective Stanton testified that when clearing the gun, he noticed that it was labeled for military or law enforcement use only. This label was stamped into the well where the detached feeding device affixes to the weapon. (Testimony of Stanton, V. 2, p.138)
67. Detective Stanton testified that after making these observations on the AR15, he made phone calls and inquires to Colt Manufacturing Co., to the DOC, and subsequently forwarded a criminal complaint regarding the weapon to the district attorney's office. (Testimony of Stanton, V. 2, pp. 140-141)
68. Detective Stanton testified that Colt Manufacturing Co. informed him that the AR15 that was confiscated from Appellant's home left the factory in 1996. (Testimony of

Stanton, V. 2, p. 141) The Appellant also testified that the gun was manufactured in 1996. (Testimony of Appellant, V. 3, p. 47).

69. Detective Stanton testified that he was informed by DOC that the AR 15 was not the property of DOC. (Testimony of Stanton, V. 2, p. 142)

70. The Appellant does not dispute that the AR 15 taken from his home was his gun. (Testimony of Appellant; V. 3, p.150)

71. On his Class A license, the Appellant listed his "occupation" as "Special State Police Officer." (Exhibit 37b)

72. DOC's Director of Special Operations explained that a Special State Police Commission is really a *certification* rather than a job title. (Testimony of Ayala, V. 2 p. 119)

73. When the Appellant registered the weapon, he listed its model as an "AR15." (Exhibit 58)

74. The Appellant's DOC issued weapons license states that Appellant is "hereby authorized to carry firearms and such other weapons as are necessary in the performance of [his] duties…" (Exhibit 49)

75. Director of Operations Steven Ayala testified that the Appellant's DOC issued firearms permit (Exhibit 49) did not authorize him to have non-DOC issued firearms at home. Further, he stated the DOC issued firearms permit is a limited permit for DOC business only. (Testimony of Ayala, V. 2, p. 120)

76. Director Ayala testified that the Appellant's DOC issued firearm permit would not authorize Appellant to privately possess the AR 15 at issue in this case. (Testimony of Ayala, V. 2, p. 121)

77. On September 27, 2005, at a DOC disciplinary hearing regarding the charges against the Appellant, the Appellant testified that the he was authorized to possess the AR 15 through "the licensing authority from the Chief of Police, and also from the Department of Corrections." He further stated, "my firearms permit for the Department of Corrections allows me to carry those things." (Exhibit 46, p. 45)
78. The Preliminary Large Capacity Weapon Roster [Ex. 60], effective February 15, 2002, lists the Colt AR15-A2, AR15-A2-HBAR and AR15. The roster states "Weapons not listed on this roster may also be large capacity weapons if they are semiautomatic and are capable of accepting or readily modifiable to accept a large capacity feeding device." " Unless otherwise exempted by section 121, the term "large capacity weapon" shall apply to all semiautomatic weapons equipped with a large capacity feeding device, including any such weapons not listed on the roster." Exhibit 61a states that "if the gun was made between 1994 and 2004, then it is not an "assault weapon." (Exhibit 61b)
79. The Appellant testified that the weapon does not have a flash suppressor, bayonet lug, or folding or collapsible stock. (Exhibit 48)
80. On cross-examination when asked if his class A license permitted him to possess guns that were banned and marked for military/government use only, the Appellant first responded, "I don't know of any." Then when asked when his AR 15 was stamped for law enforcement/military/government use only, the Appellant stated: "Because a federal law that was probably passed in1994 and when I went to buy magazines for my guns that were high capacity magazines, they were all stamped the

same thing and I had to show my driver's license, my handgun license, my work I.D., and my badge to be able to buy those things." (Testimony of Appellant, V. 3, p. 142)

81. When this Commissioner asked Appellant, "why did you purchase a gun that said that it was only for government use?", the Appellant responded, "I knew the ban was coming off. It was only for 10 years. The federal government made that law for ten years. I know that the law was going to expire. To tell you the truth, sir, the AR 15 is an inferior firearm." (Testimony of Appellant, V. 3, pp.146-147)
82. Appellant testified that he purchased the gun in March 2004 and his understanding was that the assault weapons ban was going to sunset in September 2004.
83. Appellant did not notify DOC that he had purchased the AR 15. (Testimony of Appellant, V. 3, pp. 147 & 149)
84. When Appellant was asked why he believed the AR 15 was marked for government use only, Appellant stated, "They do that to lots of devices that were high capacity, magazines or other firearms, and some rifles were labeled that. That's why I bought that gun as a collectible item, sir." (Testimony of Appellant, V. 3, p. 147)
85. On cross-examination, Appellant initially indicated that he was authorized to purchase the AR 15 in question because of his position with the DOC. But then when asked if this was because the gun was marked for law enforcement/government use only, he provided the following non-responsive answer: "No, because it was a collectible firearm worth a lot of money. I paid a thousand dollars for it the day I bought it; it was worth $2,500." (Testimony of Appellant, V. 3, pp.195 & 196)
86. The Department's Director of Special Operations testified that members of the Special Response Team ("SRT") are issued 24 hour handguns. However, assault

weapons are kept at the armory, and could only be taken home with special permission in the event that the team needed to be somewhere late at night or early in the morning. Director Ayala noted that this is the exception, not the rule. Director Ayala testified that Appellant was one of the *logistica*l people for the Tactical Response Team. Director Ayala testified that Appellant would not have been issued an assault weapon to take home. (Testimony of Ayala, V. 2, 80, 92 & 94)

87. Director Ayala testified that Appellant was not authorized to have the AR 15 that is the subject of this case because of his duties with SRT or TRT. (Testimony of Ayala, V. 2, p. 110; see also Exhibit 26, p. 7)
88. The Appellant was indicted for unlawfully possessing the AR 15 and failed to notify the DOC of this fact in writing. (Testimony of Appellant)
89. According to the post-hearing brief submitted by the Appellant, the Plymouth Superior Court case was dismissed after a Motion to Supress. The Appellant's post-hearing brief stated, "That Motion was based on an illegal search. The Court, in *dicta*, wrote that Weinrebe did not have a permit. This was an error in the Court's decision, and the fact was that Weinrebe did have a Class A LTC." (Appellant's post-hearing brief)
90. In regard to the above-referenced dismissal, which occurred after the hearings before the Commission, DOC states in its post-hearing brief, "the case was dismissed after the Court ordered that Appellant's motion to suppress the assault weapon discovery in his home be allowed on the grounds that it was discovered pursuant to a warrantless search. The fact that the criminal case was dismissed on a technicality has no bearing on the case before the Commission. The issue before the Commission regarding the

assault weapon is whether or not the Department was able to demonstrate by a preponderance of the evidence that Appellant was in possession of a banned assault weapon." (Appointing Authority's post-hearing brief)

91. Based on the conflicting testimony of non-expert witnesses as well as the conflicting documentary evidence and the purported confusion regarding the Plymouth Superior Court order regarding this matter, I am unable to make a finding regarding whether or not the firearm in question, was, as alleged by the Appointing Authority, unlawful for the Appellant to carry.
92. Based on the Appellant's own testimony, however, I do find that the Appellant failed to promptly notify the Superintendent or his designee at the Department of Correction regarding his criminal indictment in Plymouth Superior Court pertaining to this matter. According to the Appellant's post-hearing brief, the Appellant only "called the Union and informed them" about the indictment. (Post-hearing brief of Appellant)
93. DOC Rule 2(b) provides in part that DOC employees must "report promptly in writing to your Superintendent, DOC Department Head, or their designee…any involvement with law enforcement officials pertaining to any investigation, arrest or court appearance." (Exhibit 2)
94. Further, I find that the Appellant lied to Brockton police officers when he told them that he was authorized to possess the firearm in question because of his position on the Department's Tactical Response Team. (Exhibit 26)
95. The Department's policy regarding Special State Police Commissions, 103 DOC 516, provides that officers who are appointed Special State Police Officers may:

"…serve warrants issued by the governor, commissioner, or the parole board and orders of removal or transfer of prisoners issued by the commissioner, and warrants issued by any court or trial justice in the commonwealth for the arrest of a person charged with the crime of escape or attempted escape from a penal institution or from the custody of an officer while being conveyed to or from such an institution, and may perform police duties about the premises of penal institutions". (Exhibit 41; 103 DOC 516.01)

96. The Department's Special State Police Commission policy, 103 DOC 516, also states, "Any other use not detailed by statute shall be grounds for disciplinary actions, up to and including termination. Misrepresentation of powers either deliberate or unintentional may be grounds for disciplinary actions, up to and including termination." (Exhibit 41)

CONCLUSION

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). *See* Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist.

Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission concludes that that Appellant inappropriately intervened on behalf of two different inmates regarding their pending disciplinary matters. This conduct is a clear violation of DOC rules and reflects the Appellant's inability to treat inmates impartially.

The Commission concludes that the Appellant's repeated arrests on domestic violence and other charges, which ultimately lead to him being incarcerated in the Plymouth County House of Correction for over four (4) months, reflects badly on the Department and demonstrates that the Appellant lacks the good judgment demanded of Correction Officers. Further, the Commission concludes that the Appellant failed to promptly notify DOC of the above-referenced arrest, in violation of DOC Rules.

The Commission, although making no finding regarding whether the Appellant was unlawfully in possession of a firearm, concludes that the Appellant lied to Brockton Police when he told them he was authorized to carry the firearm in question because of his employment with the Department of Correction.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness' testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v, Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

On every substantive issue involved in this disciplinary hearing, the Appellant's testimony was evasive, contradictory and, at times, deliberately misleading. To accept his version of events, from the smallest episode involving providing pizza to inmates to

the more substantive issue of intervening on behalf of an inmate at a parole hearing, would defy common sense and contradict the credible testimony of other witnesses and the documentary evidence that is part of the record in this case.

Having concluded that the Appellant engaged in much of the conduct that led to his termination, the question before the Commission is whether the Department had reasonable justification to terminate the Appellant in this case. If the Commission decides to modify a penalty, it must provide explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep**.** 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission**.** 39 Mass. App. Ct. 594, 602 (1996)**.** When the Commission modifies an action taken by the Appointing Authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from inappropriate actions such as partisan political control. Id. at 600. Town of Falmouth v. Civil Service Commission**,** 61 Mass. App. Ct. 796, 801 (2000).

The Appellant failed to present any evidence of disparate treatment as a defense and did not present examples of officers who engaged in conduct comparable to the Appellant's who was not terminated. Specifically, the Appellant failed to show that the other employees referenced by Mr. Kenneway were charged with the same litany of offenses for which the Appellant was charged with in the instant appeal.

DOC has proven, by a preponderance of the evidence, that it had just cause for terminating Joel Weinrebe from his position as a correction officer and there is no

evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him. The Appellant's appeal under Docket No. D1-06-347 is hereby ***dismissed***.

_____
Christopher C. Bowman, Chairman

By a 4 -1 vote of the Commission (Bowman, Chairman - YES; Guerin, Commissioner – YES; Henderson, Commissioner- NO; Marquis, Commissioner – YES; Taylor, Commissioner - YES) on November 29, 2007.

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:
Melvin Norris, Esq. (for Appellant)
Amy Hughes, Esq. (for Appointing Authority)