Decision mailed: 8/13/10
Civil Service Commission CS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

SHELLEY WILLIAMS,
Appellant

v.

D-08-36

DEPARTMENT OF CORRECTION,
Respondent

Attorney for the Appellant: Shelley Williams, *Pro se*

Representative of the Respondent: Jeffrey S. Bolger
Department of Correction
Division of Human Resources
P.O. Box 946
Norfolk, MA 02056

Commissioner: Daniel M. Henderson[1]

DECISION

Pursuant to M.G.L.c. 31, s.43, the Appellant, Lieutenant Shelley Williams (hereinafter "Appellant" or "Williams") filed an appeal with the Civil Service Commission (hereinafter "Commission") on February 12, 2008 claiming that the Department of Correction (hereinafter "DOC" or "Appointing Authority"), did not have

[1] The Commission acknowledges the assistance of Legal Intern Kristin Billera in preparation of this Decision.

just cause to suspend her for one (1) day for making an inappropriate comment to fellow Corrections Officer Crystal Bowersox (hereinafter "Bowersox.").

Williams filed a timely appeal with the Civil Service Commission. A hearing was held on September 23, 2008 at the offices of the Commission. Two (2) audiotapes were made of the hearing and are retained by the Commission. The hearing was declared private. The Appellant and the Appointing Authority each submitted proposed decisions.

FINDINGS OF FACT

Fourteen (14) exhibits were entered into evidence. Based on these exhibits and the testimony of :

For the Appointing Authority:

- Corrections Officer Audrey Bowersox
- Directory of Security William Devine (hereinafter "DOS Devine")
- Correction Program Officer Christine Dodd (hereinafter "CPO Dodd")

For the Appellant:

- Appellant, Shelley Williams, Lieutenant, MCI Concord

I make the following findings of fact:

1. The Appellant, Shelley Williams, a tenured civil service employee, has been an employee of the DOC since March 23, 1986. (Exhibit 1, Testimony of Williams)
2. She is assigned to Massachusetts Correctional Institution Concord (hereinafter "MCI Concord").
3. Williams has no disciplinary history. (Exhibit 5, Testimony of Appellant)
4. On August 28, 2005 the Appellant reported for her scheduled 3-11 pm shift at MCI Concord, the J-7 gate. (Exhibit 5)

5. At the time of the incident on August 28, 2005, the Appellant had been working as a Corrections Officer III, (Lt.) and for the DOC for 19 years. (Testimony of Appellant)
6. Audrey Bowersox is also a Corrections Officer at MCI Concord who had been employed by DOC for a year.
7. The Appellant was Bowersox's supervisor at the time. She and Bowersox had a cordial working relationship. They were also friendly outside of work, and Williams gave Bowersox career advice during several off-duty telephone conversations. (Testimony of Bowersox, Testimony of Appellant).
8. Captain Martin Doto (hereinafter "Doto"), Bowersox, Correction Officer James Dapkas (hereinafter "Dapkas"), Corrections Officer Babbitt (hereinafter "Babbit") and Correction Officer George Cassidy (hereinafter "Cassidy") were also assigned to the 3-11 pm shift at MCI Concord . (Exhibit 5)
9. During the inmates' mealtime, Doto stopped Bowersox and they spoke for approximately twenty minutes. (Exhibit 5, Testimony of Bowersox, Testimony of Appellant)
10. When Bowersox returned to the group comprised of Williams, Babbitt, Dapkas and Cassidy, someone made a comment to the effect of "What are you trying to do, Audrey? Flip the captain?" The group laughed. (Exhibit 5, Testimony of Bowersox, Testimony of Dodd, Testimony of Appellant)
11. Appellant then jokingly responded, "That wouldn't work. Marty's [Doto] already a lesbian." (Exhibit 5, Testimony of Bowersox, Testimony of Appellant)

12. Appellant testified that she made the off hand comment in a joking manner. She did not intend the comment to be hurtful, harassing or offensive, but rather saw joking with Bowersox as a means of including her as part of the group. (Testimony of Appellant)

13. The Appellant said that she felt that she was on friendly terms with Bowersox. She tried to help her in any way she could. She had discussed the personal issues of Bowersox'sexual preference and life style choices with Bowersox numerous times prior to this incident. (Testimony of Appellant)

14. Bowersox testified that although she had between 5-10 private telephone conversations with the Appellant prior to this incident, she denied that she had divulged her own sexual preference or life style choice to the Appellant. (Testimony of Bowersox)

15. After the group dispersed, the Appellant spoke to Doto who was still completing his rounds. Appellant informed him of the conversation she had just had with the others and Doto laughed. According to an incident report written during the investigation, Doto was aware that Williams was only joking about the incident. (Exhibit 5, Testimony of Appellant)

16. Shortly thereafter, at some time before 8 pm, Bowersox contacted Union Steward Phillip Matthews (hereinafter "Matthews") and Chief Union Steward Sean Cremin (hereinafter "Cremin") and discussed this incident with them. (Testimony of Bowersox)

17. The Appellant later called Bowersox around 8 pm that day to confirm that the jokes hadn't upset her. Bowersox admitted that she had been embarrassed. (Exhibit 5, Testimony of Bowersox, Testimony of Appellant).

18. Bowersox admitted that she had always gotten along with the Appellant. The Appellant had trained her and given her advice. She had also sought advice from the Appellant. She had never received any mistreatment or any repercussions, directly or indirectly from the Appellant, at any time in the past or due to this incident. (Testimony of Bowersox)

19. Bowersox testified that she had told the union stewards that she wanted to handle this incident "in house" and "off the record." She expressed no desire to see the Appellant disciplined, never wrote a confidential report and said she preferred speaking to Williams about the incident informally. (Exhibit 5, Testimony of Bowersox, Testimony of Devine, Testimony of Dodd)

20. Bowersox testified that she suffered no discrimination or harassment resulting from this incident. She suffered "absolutely no repercussions at the work place" (Testimony of Bowersox)

21. On September 11, 2006 Cremin arranged a meeting with Director of Security William Devine (hereinafter "Devine") about this incident. Both Cremin and Matthews accompanied Bowersox to this meeting. (Exhibit 5, Testimony of Bowersox, Testimony of Devine)

22. Matthews and Cremin, requested that the meeting be held off the record as Bowersox had requested. However, Devine stated that he could not promise that. (Testimony of Bowersox, Testimony of Devine)

23. Bowersox told Devine during the meeting, of another incident when the Appellant informed her that some other correction officers called Bowersox "Officer Sourbox." However, the Appellant had said that she used her discretion as a supervisor to handle this incident informally and verbally addressed and corrected this behavior with those officers. Bowersox said that she never heard anyone call her that name. (Exhibit 5, Testimony of Appellant).

24. Devine said he could not allow Bowersox to handle this incident off the record. He testified he believed it was his duty to report the incident and to keep a record of the meeting. (Testimony of Devine.)

25. On September 12, 2006, the case was then referred for further investigation to Correction Program Officer Christine Dodd (hereinafter "Dodd"), of the Office of Investigative Services. (Exhibit 5)

26. Dodd concluded that "Bowersox's interpretation of the comments made to her does not constitute sexual harassment or hostile work environment per 103 DOC 239." However, she concluded that the Appellant may have been in violation of Rule 6(b) of the Blue Book which states: "Do not foster discontent...be particularly discreet in your interest of the personal matter of any coworker." (Exhibit 5)

27. Dodd completed her report on June 12, 2007. She then sent a copy to the Executive Office of Public Safety and Security (hereinafter "EOPS"). The report was forwarded to Deputy Chief of Internal Affairs Paul Oxford (hereinafter "Oxford") on June 15, 2007, Chief John McLaughlin (hereinafter "McLaughlin")

of the Office of Investigative Services on June 19, 2007 and Alex Fox (hereinafter "Fox"), the Director of Affirmative Action for the DO on July 23, 2007.

28. Oxford, McLaughlin and Fox signed off on this report prior to its receipt by Timothy Hall (hereinafter "Hall"), Acting Deputy Director of the EOPS on August 9, 2007. (Exhibit 5)

29. Hall overruled Dodd's conclusion and found that Appellant had indeed facilitated a hostile work environment, which is a violation of 103 DOC 239, in addition to a violation of Blue Book Rule 6(b). (Exhibit 5)

30. On October 2, 2007, the DOC sent the Appellant notice of an October 11, 2007 hearing on this incident. The notice stated that she had allegedly violated rules 103 DOC 239 and Blue Book Rule 6(b). (Exhibit 4)

31. Labor Relations Advisor John T. Farley (hereinafter "Farley") conducted the hearing. (Exhibit 3)

32. The Appellant was represented by Attorney Chester V. Shea III and the DOC was represented by Director of Security Jorma Maenpaa. Dodd testified on behalf of the DOC. (Exhibit 3)

33. Williams received notice on January 30, 2008 from the Executive Office of Public Safety that she would be suspended for one (1) day. Farley had concluded that her actions created a hostile work environment in violation of 103 DOC 239 and Rule 6(b). (Exhibit 2)

34. The Appellant is straight forward and sincere in her responses. She is consistent in her answers and exhibited a good memory. Her answers in language, tone and delivery rang true. She is sincere and appeared honestly hurt that anyone could

misconstrue her words or actions in this incident as intended to cause any harm or hostility or discomfort. She had nothing but a friendly attitude toward Bowersox. She seems to have taken on a mentoring or protective role regarding Bowersox prior to this incident; which makes this allegation even more hurtful to her. I find her to be a very credible and reliable witness. (Exhibits and testimony, Testimony and demeanor of Appellant)

35. Audrey Bowersox appeared to be a reluctant witness. She was vague at times and evasive at other times. She exhibited a poor memory. She qualified many of her answers with "I believe" or "I think"; even answers to simple factual or identifying questions. She did not like being in an accusatory role versus the Appellant. However, she did try to play the victim role generally without getting any particular co-worker into trouble. She appeared to be especially sensitive or prickly about this subject matter of the joke. She is a private person, to the point of not wanting to admit even a fact that may be apparent to many others. She did not want any formal discipline to evolve from her initial contact with her union steward regarding this incident; but, it did evolve anyway, eventually from the DOC bureaucracy. Any embarrassment that she felt from this incident was subjectively determined, not objectively reasonable under the circumstances and unintentional on the part of the Appellant. Her emotional sensitivity affected her reliability as a witness. I do not find her to be a reliable witness. (Exhibits and testimony, Testimony and demeanor of Bowersox)

CONCLUSION OF THE MAJORITY (Bowman, Marquis and McDowell)

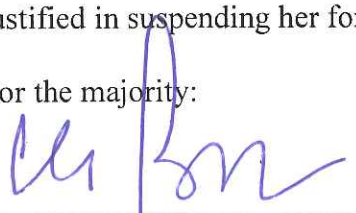
The majority of Commissioners respectfully disagree with Commissioners Henderson and Stein regarding their conclusion, noted below as the conclusion of the minority.

The instant appeal involves the suspension of a lieutenant for making inappropriate comments to a subordinate correction officer. While working her post on August 28, 2006, a DOC correction officer was speaking to a DOC Captain for approximately 20-30 minutes. According to the correction officer, the Appellant, in the presence of three correction officers, approached her after the conversation ended and said, "what are you trying to do? Turn the Captain into a Lesbian?" The Appellant testified that she did not make that comment. According to the Appellant, she only *responded* to this comment made by a male correction officer she could not identify by saying, "that wouldn't help or do anything because he already is a lesbian".

Regardless of whose testimony is deemed credible, the Appellant's comments were inappropriate, especially when made by a superior officer toward a subordinate in front of her co-workers.

DOC has a right to expect all employees, particularly their superior officers, to behave in an exemplary manner. Here, the Appellant fell far short of that standard and DOC was justified in suspending her for one (1) day.

For the majority:



Christopher C. Bowman
Chairman

CONCLUSION OF THE MINORITY (Henderson, Stein):

The responsibility of the Commission is to determine, by a preponderance of the evidence, that disciplinary action taken by the Appointing Authority was reasonably justified at the time when the decision was made. Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997); see also Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct 726, 728 (2003).

An action is considered justified when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and correct rules of law." Id. at 304, quoting Selectman of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civil Serv. v. Municipal Ct. of the City of Boston, 359, Mass. 211, 214 (1971)

The Commission determines justification for disciplinary actions by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public's interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civil Serv. Comm'n 486, 488 (1986).

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. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The Appealing Authority failed to meet its burden. The DOC failed to produce sufficient and sound credible evidence in the record to meet its burden of persuasion and proof. The record does not support a finding by a preponderance of the evidence that the Appointing Authority had just cause to suspend the Appellant for one day.

The Appellant, was charged with violating 103 DOC 239, Prevention and Elimination of Discrimination and Retaliation in the Workplace. Harassment, as defined by 103 DOC 239.03, must either amount to quid quo pro sexual harassment or hostile work environment. The Respondent has alleged that the Appellant created a hostile work environment through her comments. This policy defines a hostile work environment as:

> "A person's deliberate and repeated conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance by creating and intimidating, hostile, humiliating or offensive work environment based on an employee's membership in a protected class." (Exhibit 6)

Additionally, the appendix of 103 DOC 239 states: "[Sexual harassment] refers to the deliberate or repeated behavior consisting of verbal comments, gestures or physical contact of a sexual nature that is not welcome, that is personally offensive, that lowers morale and that, therefore, interferes with work productivity." (Exhibit 6) In order for behavior to be construed as sexual harassment under 203 DOC 239, the behavior in question must be deliberate and repeated.

The Commission has previously examined the context of a comment in order to determine if the allegedly harassing remark fulfilled the element of being "deliberate." In Kennefick v. Boston Police Dep't, the Appellant made an offhand comment to a colleague who was playing cards with other employees: "Watch out. If you lose, you have to take your shirt off and they are both cheaters." Kennefick v. Boston Police Dep't, 9 MCSR 41, 44 (1996). However, the Commission found that the context of this comment made it clear that the comment was not intended to offend or harass because it was a passing comment, delivered in a joking manner, with no further comments. Id. "...[The Appellant's] words, from an objective basis, viewing the context in which they were made, do not show substantial evidence of an act of harassment or discrimination, the basis for discipline." Id. The Appellant's suspension was reversed.

Similarly, the evidence in this case supports a finding that the comments made by the Appellant were not intended to offend, harass or intimidate Bowersox. The remark was made in an off-hand manner, as a response to the unusual amount of time Doto and Bowersox had spent together. The other officers who were present laughed, which supports a reasonable inference that they understood that it was a joke. Bowersox never claimed that she felt offended, only embarrassed. Up until this point, Williams and Bowersox had always had a cordial working relationship, which may speak to Williams' state of mind at the time of the comment. (Exhibit 5, Testimony of Bowersox, Testimony of Williams.)

Even when taken out of context, the comments, on their face, do not appear to be demeaning, harassing or even directly targeting Bowersox. The comments, instead, playfully single out Captain Doto for the unusual amount of time he spent with

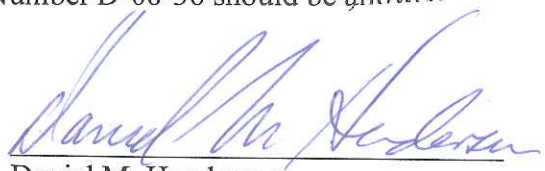
Bowersox. Doto corroborates this in a September 13, 2006 incident report when he says that Williams teased him about the time he spent talking to Bowersox "in a joking manner." (Exhibit 5). A person should not be punished for making a joke even if the joke is lame.

203 DOC 239 also states that a hostile work environment will be found when the harassing conduct is "deliberate and repeated." After this isolated incident, no other employee, including the Appellant, made any further harassing or derogatory reference to Bowersox's sexual orientation. Therefore, no "repeated" harassing or intimidating behavior concerning Bowersox's sexual orientation took place. (Testimony of Bowersox)

Hall, upon reviewing Dodd's report, and without interviewing any involved parties, claimed that the comment did create a hostile work environment as defined by 103 DOC 239.03 because Bowersox felt embarrassed by the comment. (Exhibt 5)

This reasoning, however, ignores the "deliberate and repeated" element in the definition of "hostile work environment." A decision founded on an analysis which blatantly neglects to take into account an element of DOC's own definition of hostile work environment can in no way be "... guided by common sense and correct rules of law." Id. at 304, quoting Selectman of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Furthermore, the Appealing Authority did not show by a preponderance of the evidence that the actions of the Appellant could be equat0ed with "substantial misconduct." A single, isolated comment which had a negligible impact on Bowersox's day to day employment could hardly be considered substantial misconduct worth of a suspension. The Commission credits the Appellant's testimony that she did not deliberately intend to offend Bowersox .

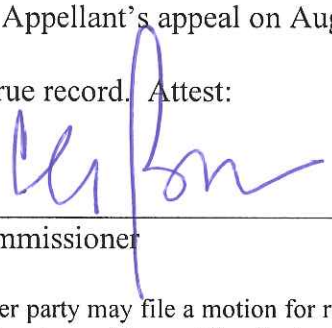
For all the above reasons, I believe the Appellant's appeal filed under Docket Number D-08-36 should be allowed



Daniel M. Henderson,

For all the reasons stated in the conclusion of the majority, the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – No; and McDowell, Commissioner -Yes) voted to dismiss the Appellant's appeal on August 12, 2010.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
Shelly Williams, Appellant

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