

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

AARON ZACHARY,
Appellant

v.

D-07-52

DEPARTMENT OF CORRECTIONS,
Respondent

Appellant's Attorney:

James W. Simpson, Jr., Esq.
Merrick, Louison & Costello, LLP
67 Batterymarch Street
Boston, MA 02110

Respondent's Attorney:

Kerry A. Rice
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Department of Correction
P.O. Box 946

Commissioner:

Donald R. Marquis

**DECISION ON RESPONDENT'S MOTION FOR SUMMARY
DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Aaron Zachary (hereafter "Zachary" or "Appellant") appealed the decision of the Respondent, the Department of Correction (hereafter "Respondent" or "the Department"), suspending him for five days from his employment as a Correction Officer. The appeal was timely filed. A pre-hearing conference was conducted at the offices of the Civil Services Commission on April 5, 2007. On April 18, 2007, the Department submitted a Motion for Summary

Decision. On April 24, 2007, the Appellant submitted an Opposition to the Motion for Summary Decision and requested that the Commission schedule a full hearing on the appeal.

Factual Background

The Appellant was hired by the Respondent in 1991 and worked as a Correction Officer at MCI-Concord until his termination in October 2002. He was reinstated by decision of the Civil Service Commission in February 2006. On July 12, 2006, the Appellant received a five day suspension for failure to properly conduct a stand up inmate count for Post #J-5 at MCI-Concord, which allegedly violated Rules 6, 7 and 12. The Department specifically contended that the Appellant conducted an inmate count in which a substantial number of inmates did not stand in plain view because he failed to require them to do so. A Department hearing was held on December 13, 2006 subsequent to which the Department sustained the charges and suspended the Appellant for five working days. The Appellant's prior disciplinary record includes over eleven (11) suspensions.

Respondent's Grounds for Dismissal

The Respondent moves for summary decision for lack of a genuine issue of fact as there is no dispute that the incident occurred. Massachusetts Department of Correction Policy 103 DOC 513.01, Inmate Accountability, provides, "The 7:00 AM, 11:00 AM, 4:30 PM and 9:30 PM counts shall be considered stand-up counts, thus all inmates shall stand in their assigned rooms in plain view of the counting official. The only exceptions to this rule shall be in level 1-3 facilities for inmates who had worked an overnight shift.

All such exceptions shall be authorized by the shift commander.” The Appellant does not dispute the facts as stated regarding what occurred but argues that it was an established practice at MCI-Concord to have inmates on the top bunks sit up, rather than jump down to the floor, for counts and thus his performing the count on the day in question was not a violation of the Department’s Rules and Regulations and just cause did not exist to discipline him for the charged infraction. The Respondent counters that the Appellant argues ignorance of his post orders, which he signed an acknowledgement of receiving on May 15, 2006, and that his contention that the Department had altered the policy since his October 2002 termination and February 2006 reinstatement is false. The Respondent’s arguments are persuasive. The record shows that the Appellant signed an acknowledgement sheet for Post # J-5 on May 15, 2006 indicating that he had “reviewed the entire post order for the above named post on the date(s) indicated.” The post required in part that the 7:15 am count shall be a “major stand up count.” Further, the Appellant submitted no evidence to substantiate his contention that the Department altered the policy for conducting an inmate count between October 2002 and February 2006.

For all of the above reasons, the Respondent’s Motion for Summary Decision is allowed and the appeal under Docket D-02-852 is hereby *dismissed*.

Civil Service Commission

Donald R. Marquis
Commissioner

By vote of the Civil Service Commission (Taylor Guerin, Marquis and Bowman, Commissioners) on June 14, 2007.

A true copy. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. 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.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

James W. Simpson, Jr. Esq.
Kerry A. Rice