

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

FREDDY GONZALEZ,
Appellant

v.

D-04-224

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Representative:

Henry Harris
Executive Secretary
MCOFU
159 South Main Street
Milford, MA 01757

Respondent's Representative:

Jeffrey Bolger
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Freddy Gonzalez (hereafter "Gonzalez" or "Appellant"), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Commission regarding a three-day suspension, claiming that the Department of Correction (hereafter "DOC" or "Appointing Authority") did not have just cause to discipline him.

A full hearing was conducted on January 9, 2008 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private.

Two (2) tapes were made of the hearing and both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Twenty-three (23) exhibits were entered into evidence. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Captain James Brannan, Department of Correction;

For the Appellant:

- Appellant Freddy Gonzalez;

I make the following findings of fact:

1. The Appellant, Freddy Gonzalez, is a tenured civil service employee of the Department of Correction. He had been employed by the Department of Correction for approximately fourteen (14) years at the time of the suspension which is the subject of this appeal. (Testimony of Appellant)
2. Prior to his suspension in this matter, he had no prior disciplinary record. (Testimony of Appellant)

3. On September 5, 2003, the Appellant was assigned to the 3:00 – 11:00 P.M. shift in charge of the Health Services Unit at the Souza Baranowski Correctional Center (SBCC). (Testimony of Appellant)
4. Also on September 5, 2003, Sergeant Charles Latulippe was serving as an “Acting Lieutenant” at SBCC and was the Appellant’s immediate supervisor. (Testimony of Appellant)
5. On September 5, 2003 at approximately 4:30 P.M., an inmate (hereafter “the inmate”) was transferred from the Special Management Unit (SMU) to the Health Services Unit and placed on a mental health watch in an at-risk cell by several correction officers who escorted him in. (Testimony of Brannan)
6. The SBCC search procedures state in relevant part, “HSU – Officers are required to perform pat searches on all inmates entering and exiting the HSU. Upon an inmate’s admission to the infirmary, the inmate will be strip-searched.” (Exhibit 10)
7. The SBCC Security Watch Procedure states in relevant part, “The inmate shall be strip searched prior to the application of restraints...The inmate shall retain only a security Johnny, shower tongs and one (1) pair of underwear. All other personal property shall be secured by the Officer in charge...Immediately bring to the attention of the supervisor all pertinent information, behavioral issues of the inmate, complaints, etc. and, log the time and supervisor to whom you reported this information.” (Exhibit 11)
8. The Mental Health Watch Post Order states in relevant part, “Strip searches should be done upon entering or leaving the cell, unless the inmate has been under constant

security observation. If there is any question, a search should be done, e.g., returning from shower.” (Exhibit 13)

9. There is no dispute that Acting Lieutenant Latulippe, who was the Appellant’s supervisor, began to oversee the strip search of the inmate. (Testimony of Brannan and Appellant)
10. There is also no dispute that when the strip search first commenced, the Appellant was sitting at the HSU control station. (Testimony of Brannan and Appellant)
11. At some point while the strip search was being overseen by Acting Lieutenant Latulippe, the Appellant walked over in front of the cell where the strip search was being conducted and took over the responsibility for overseeing the strip search. (Testimony of Appellant)
12. Captain Brannan, a witness called by the Appointing Authority, testified that “whoever begins a strip search should finish it”. (Testimony of Brannan)
13. Based on the testimony of Captain Brannan, I find that Acting Lieutenant Latulippe, who initiated the strip search, erred when he turned over responsibility for the strip search to the Appellant.
14. Prior to the Appellant assuming responsibility for the strip search in question, Captain Brannan, based on a review of a videotape played at the Commission, testified that the inmate was acting suspiciously by laying on the floor and putting his arm under the bed in the cell. (Testimony of Brannan)
15. After the Appellant assumed responsibility for the strip search in question, Captain

Brannan, based on a review of a videotape played at the Commission, testified that the inmate again acted suspiciously by putting his arm under the mattress. (Testimony of Brannan)

16. The Appellant instructed the inmate to hand him what the inmate had placed under the mattress. In response, the inmate handed the Appellant a pair of boxers.

(Testimony of Appellant)

17. Captain Brannan testified that based on the inmate's suspicious behavior, he should have been removed from the cell and the cell should have been searched before the inmate was placed back into the cell. (Testimony of Brannan) It is undisputed that the inmate was not removed from the cell and the cell was not searched after the inmate's suspicious behavior.

18. Approximately five hours after the strip search in question, the inmate, while on security watch, produced two pencils which he proceeded to swallow. (Testimony of Brannan)

19. As a result of the inmate swallowing two pencils, Captain Brannan was directed to conduct an investigation regarding whether or not proper strip search procedures were followed in regard to the inmate. (Testimony of Captain Brannan)

20. Captain Brannan testified before the Commission that he was only instructed by DOC to investigate the Appellant and was never told by DOC to investigate Acting Lieutenant Latulippe, the supervisor who initiated the strip search. (Testimony of Brannan)

21. As a result of his investigation, Captain Brannan concluded that the Appellant “should have questioned the unusual and suspicious behavior that [the inmate] was displaying. Sergeant Gonzalez should have notified his area supervisor and the Captain about these unusual and suspicious behaviors. I find that Sergeant Gonzalez failed to sign his post orders for the Health Services Sergeant on September 5, 2003.” (Exhibit 6)
22. Captain Brannan testified before the Commission that he was unaware that Acting Lieutenant Latulippe, the Appellant’s supervisor, was standing next to the Appellant from the time the Appellant took over the strip search until the strip search was over. (Testimony of Captain Brannan)
23. Asked by this Commissioner how he could not have been aware that Latulippe was standing next to the Appellant given the videotape evidence played at the Commission, Captain Brannan testified that he had never seen the “outside view” videotape just played at the Commission. Rather, Captain Brannan based his conclusions on a review of a separate “inside view” videotape that was also played at the Commission. (Testimony of Captain Brannan)
24. Captain Brannan never interviewed Acting Lieutenant Latulippe as part of his investigation. (Testimony of Brannan)
25. There is no evidence that Acting Lieutenant Latulippe was ever investigated and/or disciplined for the incident in question.

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 established "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).

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 partisan political control. *Id.* at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

The Commission concludes that the penalty imposed against the Appellant should be modified for the following reasons. Based on the testimony of the Appointing

Authority's own witness, an inmate was observed acting suspiciously during a strip search on two separate occasions. On the first occasion, when the inmate reached his arm under the bed, the strip search was being overseen by Acting Lieutenant Latulippe, the Appellant's supervisor on the day in question. On the second occasion, when the inmate reached his arm under the mattress, the strip search was now being overseen by the Appellant, while Acting Lieutenant Latulippe was standing right next to the Appellant. Several hours after the strip search, the inmate produced and swallowed two pencils.

It is unknown whether the inmate concealed the two pencils when he reached under the bed (done while Latulippe was overseeing the strip search) or when the inmate reached under the mattress (done while the Appellant was overseeing the strip search). Yet, DOC investigated and disciplined only the Appellant. Further, it is clear that the investigating officer, Captain Brannan, was handicapped in his investigation by not having the opportunity to view the "outside view" videotape which was played at the Commission. This "outside view" videotape provides a better view of the role played by Acting Lieutenant Latulippe on the day in question.

The failure to investigate and/or discipline Latulippe for violating the same rules as the Appellant, shows, in the starkest terms, that the Department of Correction failed to treat these two employees in a uniform and equitable manner.

For all of the above reasons, the Appellant's appeal is *allowed*. The three-day suspension is rescinded and the Appellant should be restored to his position for these three days without any loss of pay or benefits.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on February 14, 2008.

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:
Henry Harris (for Appellant)
Jeffrey Bolger (for Appointing Authority)