

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

SUUFOLK, ss.

David O'Brien,  
*Appellant*

v.

D-04-474

Department of Correction,  
*Respondent*

Appellant's Attorney:

Stephen Pfaff, Esq.  
Merrick, Louison & Costello  
67 Batterymarch Street  
Boston, MA 02110

Respondent's Attorney:

Marcelino LaBella, Esq.  
Department of Correction  
Industries Drive  
P.O. Box 946  
Norfolk, MA 02056

Commissioner:

John J. Guerin, Jr.

**DECISION**

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, David O'Brien (hereinafter referred to as "Appellant"), is appealing the decision of the Respondent, Department of Correction (hereinafter referred to as "Respondent"), suspending him for 5 days from his position as a Correction Officer for violation of General Policy 1, Rule 7C and 12A of the Rules & Regulations Governing all Employees of the Massachusetts Department of Correction. The appeal was timely filed. A hearing was held on March 4, 2006, at the offices of the Civil Service Commission. As no written notice was received

from either party, the hearing was declared private. Two (2) audiotapes were made of the hearing. A Motion to Sequester Witnesses was allowed. Proposed Decisions were submitted by both parties, following the hearing, as directed.

### **FINDINGS OF FACT:**

Based on the exhibits entered into evidence (Joint Exhibits 1-16), the testimony of the Appellant, Director of Security Suzanne Thibault, Captain Jorma Maenpaa, Captain David Duplin and Correction Officer Christopher Markham, I make the following findings of facts:

1. The Appellant is a tenured civil service employee in the position of Correction Officer I. The Appellant has been employed by the Respondent since June 20, 1999. His duty station at all times relevant to this appeal was the Outer Control Room of the Massachusetts Correctional Institute at Framingham (hereinafter referred to as "MCI-Framingham"). (Testimony of Appellant).
2. Respondent's Director of Security Suzanne Thibault is responsible for overall security at MCI-Framingham for 2 years. Thibault testified at the Civil Service Commission that on August 16, 2004, she saw the Appellant sleeping in a reclined position at approximately 5:00 AM during the Appellant's overnight shift in the Outer Control Room. Thibault attempted to wake the Appellant by shouting through a slot, banging on the Outer Control Room windows, and tapping her keys on the window and surrounding metal frame. The Appellant did not respond to Thibault's actions. (Testimony of Suzanne Thibault).

3. Thibault observed the Appellant was “leaning back in this chair with both his eyes closed.” (Exhibit 6).
4. Thibault claims she has no personal issues with the Appellant that would warrant a fabricated story. (Testimony of Suzanne Thibault).
5. The Outer Control room is approximately 40’ X 12’. (Testimony of the Appellant).
6. The Outer Control Room, where the Appellant was suspected of being asleep while on duty, was described as being very dark inside for the lights were dimmed through a practice to conserve energy. (Testimony of Suzanne Thibault and Exhibit 16).
7. Thibault stated the sign in the Outer Control Room indicating there was a “company policy” meant for dimming the lights, applied only to the lights in the bathroom. After inspecting the facility, I find Thibault credible because the sign in the Outer Control Room was placed where a reasonable person would understand it applied only to the bathroom. A Correction Officer’s duty is to secure safety of the facility and dimming the lights in the Outer Control Room would hinder the safety of the facility. (Testimony of Suzanne Thibault and Administrative Notice).
8. Captain Jorma Maenpaa, a captain since 1998, testified he was the Shift Commander at the facility at the time of incident and wrote up an incident report on August 16, 2004. Maenpaa appeared professional and credible when he testified. Maenpaa also states he was alerted by Thibault that a Correction Officer was sleeping in the Outer Control Room. (Testimony of Jorma Maenpaa).

9. Captain David Duplin, an employee of the Respondent's Department of Security since 1987, testified he was assigned by Thibault to conduct a Fact-Finding Hearing and to prepare a report on this matter. Captain Duplin has a professional relationship with the Appellant and based his report on credibility determinations. (Testimony of David Duplin).
10. Christopher Markham, a Correction Officer for 3.5 years, was working with the Appellant at the time of the incident. Markham testified at the Civil Service Commission he never saw Appellant fall asleep on August 16, 2004. Markham was on a bathroom break roughly around the time the incident happened. I find that Markham was not credible because if he was in the Outer Control Room, the Director of Security would have seen him. Also, he is not credible because he would have not gone into the bathroom before processing Thibault into the facility when she requested to enter into the Outer Control Room during the incident. (Testimony of Christopher Markham).
11. On August 26 and 27, 2004, Captain Duplin conducted interviews with the Appellant and Officer Markham. A union representative was present during the fact-finding interviews. Captain Duplin concluded, "David O'Brien fell asleep." I found Captain Duplin's testimony was very professional and credible; Duplin had no animosity towards the Appellant. (Exhibit 5).
12. In his opinion, Captain Duplin felt Christopher Markham's answers were not consistent during his investigation because Markham admitted to being in the bathroom at the time he asserted the Appellant was awake. (Testimony of David Duplin).

13. The Appellant argues Suzanne Thibault would not be able to tell if the Appellant's eyes were opened or closed because he sat 40 feet away from the glass window where she saw the Appellant. Fan noise could have prevented the Appellant from noticing Suzanne Thibault's attempts to gain the Appellant's attention. (Testimony of Appellant and Exhibit 6).
14. The Appellant testified he was not asleep. (Testimony of the Appellant).
15. The Appellant testified the lights were either turned down low or off in the Outer Control Room and the Air Conditioning was inoperable at the time. (Testimony of the Appellant).
16. The lighting in the Outer Control room was lit well enough to allow Thibault to make an identification of an individual in a "slouched" position, but probably could not tell if the Appellant's eyes were shut. However, Thibault's actions of yelling and banging would have alerted and got the attention of the Appellant. The Appellant did not respond, therefore I find the Appellant was asleep. (Testimony of Suzanne Thibault and Administrative Notice).
17. The Appellant testified he was flying to Florida after his overnight shift to visit his grandmother who was a victim of a hurricane. I believe this Appellant could have fallen sleep before he left for Florida. (Testimony of the Appellant).
18. The Respondent claims the Appellant had been found sleeping while on duty in the past. The Respondent also claims the Appellant received verbal counseling from the Director of Security for these prior acts of sleeping on duty. (Testimony of Suzanne Thibault).

19. The Appellant acknowledges the “verbal counseling,” but asserts it occurred after the matter involved here. In Thibault’s testimony, it appeared that she was trying to assert there was a pattern of the Appellant’s sleeping on duty. The Respondent offered no evidence to support Thibault’s testimony that the verbal counseling occurred before the incident. In addition, Thibault stated she had little interaction with the Appellant before the incident. Other than a standard instruction to remain vigilant while manning the Outer Control Room, I find it is unlikely Thibault gave the Appellant verbal counseling before the incident for these reasons. (Testimony of Appellant and Testimony of Suzanne Thibault).
20. On September 8, 2004, the Appellant was charged by written notice with the violation of the Department of Correction’s Rules & Regulations Governing all Employees of the Massachusetts Department of Correction, General Policy 1, Rule 7C and 12A. For this violation he received a five (5) day suspension without pay. (Exhibit 4).
21. Rules & Regulations Governing all Employees of the Massachusetts Department of Correction General Policy 1 indicates, “Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment, full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective Superintendents, or by their authority.” (Exhibit 2).

22. Rules & Regulations Governing all Employees of the Massachusetts Department of Correction, Rule 7C indicates, “Any Department of Correction or institution employee who is found sleeping at his/her post during the course of their official duties, or otherwise flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge.” (Exhibit 2).
23. Rules & Regulations Governing all Employees of the Massachusetts Department of Correction, Rule 12A indicates, “Employees shall exercise constant vigilance and caution in the performance of their duties.” (Exhibit 2).
24. On September 9, 2004, the Appellant appealed his suspension to the Department of Correction. (Exhibit 4).
25. On October 8, 2004, a hearing was held by Respondent in order to consider the Appellant’s appeal of his five-day suspension. The Appellant appeared pro se. On October 13, 2004, Appointing Authority, Commissioner Kathleen M. Dennehy, denied the Appellant’s appeal of his suspension. The Appointing Authority found the Appellant in violation of General Policy 1, 7C, and 12A. (Exhibit 7).
26. On March 17, 2005, following the Full Hearing in this case, this Hearing Officer visited the Department of Correction facility in Framingham and observed the lobby and Outer Control Room where the events in this matter occurred.

## **CONCLUSION:**

The issue in this case is whether the Appointing Authority had just cause to suspend the Appellant for 5 days from his position as a Correction Officer for violation of General Policy 1, Rule 7C and 12A of the Rules & Regulations Governing all Employees of the Massachusetts Department of Correction. The Commission has dealt with several discipline cases involving the Respondent and a sleeping employee. Vincelette v. Department of Correction, D-3991 (1991) and Poirier v. Department of Correction, D-5253, 8 MCSR 189 (1995) deal with suspensions for sleeping, one for thirty days and one for ten days with a demotion, respectively. Dawson v. Department of Correction, D-5878, deals with a Correction Officer's 20-day suspension for sleeping on duty when in close proximity to an inmate's cell.

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). In order to show reasonable justification, the Appointing Authority must demonstrate that "the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be proven by a preponderance of the evidence. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). The Commission does not possess the authority "to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Id.

The Respondent has sustained its burden of proving that there was reasonable justification for the action taken by the Appointing Authority. The testimony given by the Respondent's Director of Security Suzanne Thibault appeared to be generally credible and reliable based on her straight-forward and professional demeanor while testifying. In addition, Thibault's job as Director of Security is to oversee the overall security of the facility. While doing rounds, she found the Appellant asleep and reported it.

Thibault's credibility was confirmed by Captain Duplin who made a decision in a Fact-Finding Hearing report that the Appellant was sleeping. Thibault's credibility was confirmed when this Commissioner inspected the Outer Control Room on October 3, 2004. When this Commissioner experienced a simulation of Thibault's activities of tapping her keys, hitting them on the window, metal frame and metal fixtures, this Commissioner concluded that such actions would have alerted an individual who was awake, alert and on-duty in the Outer Control Room. In addition, the level of lighting would have enabled Thibault to identify a person who was most likely sleeping in the Outer Control Room.

Regardless of lights, fans and/or other conditions in the Outer Control Room that were in the control of the Appellant, the Appellant should have been aware that the Director of Security was at the window and should have noticed any activity in lobby. If he was alert, the Appellant would not have been hindered by the lighting, fans, etc. from being attentive to his surroundings.

In Poirier v. Department of Correction, D-5253, the Commission denied an appeal where a Lieutenant was suspended for 10 days, with no pay, for sleeping on the job. In Poirier, the Commission cared more about the Appellant's level of alertness, rather than

if he was actually asleep, stating, “Whether he was sound asleep, meditating, just relaxing, or resting while listening to a radio show lightly sounding in the background, is not of consequence. He was far from being alert.” Also in Poirier, “It was very significant that the flashlight on his face did not make him open his eyes or respond [while not alert in the police car]; that it took a bang on the window to bring him back to a state of alertness.” In this case, the Appellant was not alert, most likely asleep, and did not even respond to banging on a window like the Lieutenant in Poirier responded.

The Massachusetts Department of Correction’s Department Philosophy and Goals, 103 DOC 100, indicate that the Department of Correction’s Mission is achieved through, “Protecting the public by safely and humanely incarcerating inmates at the appropriate security level consistent with public safety.” [100.02(1)]. This Mission is echoed in the Respondent’s Notice of Discipline to the Appellant which stated:

“Be clearly advised that your position as a Correction Officer requires your full attention to insure that the security of the institution is not jeopardized. It is very important to keep alert and aware of your situation within the bounds of the Rules and Post Orders. They are there for good reason; violating them impairs your effectiveness and affects the security of the facility.” (Exhibit 4).

The Appellant’s duty as a Correction Officer is to ensure security at the Department of Correction. The Department of Correction, which is a para-military organization, must maintain an orderly chain of command to directly secure the facility and secure the public safety. By sleeping on the job, the Appellant put both in jeopardy.

Considering the facts of this matter and the clear and generally credible testimony of Suzanne Thibault, the Commission finds that the Appointing Authority has provided just cause and proven by a preponderance of the evidence that the Appellant was asleep

while on duty at the Department of Correction. Therefore, the appeal on Docket No. D-04-474 is hereby *dismissed*.

Civil Service Commission

---

John J. Guerin, Jr.  
Commissioner

By vote of the Civil Service Commission (Taylor, Guerin and Marquis, Commissioners) [Bowman, Commissioner absent] on October 12, 2006.

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. 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 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:

Marcelino LaBella, Esq.  
Stephen Pfaff, Esq.