

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

One Ashburton Place-Room 503
Boston, Ma 02108

Jeffrey Tosca
Appellant

v.

D-06-337

Department of Correction,
Respondent

Appellant's Attorney:

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

Respondent's Attorney:

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

Commissioner:

John Taylor

DECISION

Pursuant to the provisions of G.L c. 31, s. 43, the Appellant filed his appeal claiming that just cause for the Appointing Authority's action did not exist. The Appellant, Correction Officer Jeffrey Tosca, is appealing the decision of the Appointing Authority, the Massachusetts Department of Correction, to suspend him for three (3) working days without pay from his employment, as a Correction Officer. Specifically, via a letter dated November 8, 2008, Officer Tosca was suspended for violating the General Policy and Rule 1 of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction ("Blue Book") on May 30, 2006 as a result of his off duty incident which resulted in his being arrested and charged by

the Marion, MA. police with resisting arrest.

The Appellant filed a timely appeal. A hearing was held on May 1, 2008 at 10:30 a.m. One tape was made of the hearing. As no notice was received from either party, the hearing was declared private. The witnesses were sequestered. Proposed decisions were to be filed by June 2, 2008.

FINDINGS OF FACT:

Based on the documents entered into evidence, (Joint Exhibits # 1 through # 7) and the testimony of Sgt. Harold Wilkes, Police Officer Larry Savery, Police Officer Scott Smith and the Appellant Jeffrey Tosca, I find the following:

- 1.) On May 30, 2006, Appellant was a tenured civil service employee in the position of Correction Officer I. The Appellant has been employed by the Appointing Authority since July 16, 1995 (Testimony of Appellant).
- 2.) The Appellant was never arrested prior to the May 30, 2006 incident and in thirteen years with the Department of Correction has only been suspended once which was overturned by the Civil Service Commission. (Testimony of Appellant)
- 3.) On November 8, 2006, after a hearing pursuant to M.G.L. c. 31 § 41, the Appointing Authority notified the Appellant that he was suspended for three (3) days for the following conduct which was in violation of General Policy 1 and Rule 1 of the Blue Book. (Exhibit # 1)
- 4.) Employees of the Department of Correction are subject to a set of Rules and Regulations (Exhibit # 4 and Testimony of Wilkes).

- 5.) The Rules and Regulations read as follows:
General Policy 1, states in part, “Improper conduct affecting or reflecting upon any correctional institution or the Department of Correction in any way will not be exculpated whether or not it is specifically mentioned and described in these rules and regulations.”

Rule 1, states in part, “You must remember that you are employed in a disciplined service which requires an oath of office. Employees should give dignity to their position...” (Exhibit # 5)
- 5.) The Appellant received and signed for a copy of the Rules and Regulations on July 11, 1995. (Exhibit # 4)
- 6.) On May 30, 2006, Officer Larry Savery of the Marion Police Department was informed that Jeffrey Tosca, Jr. had been at Brockton Hospital earlier in the day for mental issues. The hospital staff felt that he was a threat to himself and issued a Section 12 order to hold him for evaluation. (Savery testimony)
- 7.) Officer Savery and Marion Police Officer Scott Smith along with the assistance of two officers from the Wareham Police Department proceeded to the Tosca residence at 167 Cross Neck Road in Marion. (Smith testimony)
- 8.) Officer Savery advised Jeffrey Tosca Sr. that they had a Section 12 order for his son and that his son was considered suicidal by Brockton Hospital.

(Savery testimony)

- 9.) Tosca was upset and attempted to prevent the police officers from affecting the arrest. When ordered to quiet down, he failed to do so and refused to comply with police orders, as a result he was arrested for resisting arrest.
- 10.) Police Officers Smith and Savery were credible witnesses.
- 11.) The charges against the appellant, for resisting arrest, were dismissed with payment of Court costs.

CONCLUSION

On May 30, 2006, the Appellant refused to follow several lawful orders given by the police in order to place his son Tosca, Jr. under protective arrest. Even though the incident was tumultuous with loud voices from both parties, the Appellant's actions were inappropriate. As such, his conduct constituted conduct unbecoming a Correction Officer and was in violation of the DOC's Rules and Regulations.

The Respondent did show by a preponderance of the evidence that it did have just cause to suspend the Appellant from employment for a period of three days without pay.

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)

For all of the above stated, findings of fact and conclusion, the Commission determines that by a preponderance of evidence there is just cause for the three day suspension of the Appellant from employment without pay by the Respondent.

The Appellant's appeal on Docket No. D-06-337 is hereby *dismissed*.

Civil Service Commission

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor) on February 26, 2009.

A true record. 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 M.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 die 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:
Stephen Pfaff, Esq.
Jeffrey Bolger

