COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DENNIS E. HANSBURY,
Appellant

v.

D-05-137

DEPARTMENT OF CORRECTIONS,
Respondent

Attorney for the Appellant:

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Representative of the Respondent:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to provisions of M.G.L.c. 31, §43, the Appellant, Dennis E. Hansbury (hereinafter "the Appellant" or "Hansbury") filed an appeal with the Civil Service Commission (hereinafter "the Commission") on April 13, 2005, claiming that the Department of Correction (hereinafter "DOC" or "Appointing Authority") did not have just cause to suspend the Appellant for five (5)

days for breaking the window of a guard tower with a softball. The Appellant filed a timely appeal at the Commission.

A hearing was held on June 5, 2008 at the Commission. One (1) audiotape was made of the hearing. The hearing was declared private.

FINDINGS OF FACT

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

For the Appointing Authority:

- Sergeant Anthony Ciccone (hereinafter "Ciccone"), Investigator, MCI Concord.
- Sean P. Cremin (hereinafter "Cremin"), Union Steward MCI Concord.

For the Appellant:

- Dennis E. Hansbury

I make the following findings of fact:

1. The Appellant, a Recreation Officer, has been a tenured civil service employee of Department of Corrections (hereinafter "DOC") since November 3, 1991. He is assigned to the Massachusetts Correctional Institution Concord (hereinafter "MCI Concord.") (Testimony of Appellant)
2. The Appellant received a copy of the DOC Rules and Regulations Governing All Employees (hereinafter "Blue Book") on June 29, 1992. (Exhibit 8)

Appellant's Prior Disciplinary Record

3. On February 12, 1992 was terminated for failing to notify DOC officials of his arrest in Maine for DUI. His arrest occurred prior to his DOC employment and the trial took place after. He did inform his DOC supervisor of the pending trial. The termination was rescinded on June 25,1992, by settlement agreement. (Exhibit 10)

4. On October 10, 1998, the Appellant received a formal letter of reprimand for leaving before the end of the shift and failing to punch out. (Exhibit 10)
5. On April 23, 1999, the DOC suspended the Appellant for one (1) day for leaving work a half hour early without permission. (Exhibit 10)
6. The Appellant received a formal letter of reprimand on August 25, 1999 when (unnamed) contraband was found in his personal bag. (Exhibit 10)
7. The DOC terminated the Appellant a second time on November 15, 1999 after he introduced contraband into MCI Concord which had been mailed to his home address by an inmate's family and for failing to report the receipt of said package. He was reinstated after nine (9) months without pay. That nine month suspension was upheld, pursuant to a decision by the Civil Service Commission (D-99-813), dated August 9, 2001. (Exhibit 10)
8. The Appellant received a thirty (30) day suspension on July 13, 2004 for untruthfulness during an investigation. That suspension was appealed to the Commission, Docket No. D-04-369 and is now pending. (Exhibit 10)

October 9, 2004 Incident

9. On October 9, 2004, the Appellant was on his regularly assigned shift in the recreation yard at MCI Concord. (Exhibit 6)
10. Correction Officer Robert Hoey (hereinafter "Hoey") was assigned to duty in Guard Tower 2 at the time of the incident. (Exhibit 6)
11. The prison is surrounded by a fence approximately twenty-five (25) feet high. Outside the fence, there is a concrete wall which is approximately thirty (30) feet high interspersed with forty-five (45) foot high guard towers. The space between the fence and the wall, commonly called "no

man's land," gives the officers access to the towers. (Exhibit 8, Testimony of Ciccone, Testimony of the Appellant)

12. After recreation time was complete, the Appellant went to retrieve the errant softballs from "no man's land. (Exhibit 7, Testimony of Appellant)
13. His normal custom was to throw some of the good balls back over the fence onto the field, dispose of the damaged ones by carrying them out of the yard, and collect the remaining good balls in a bag. On the day of this incident, the Appellant collected approximately 12 softballs and threw 4 back over the fence on to the field. (Testimony of Appellant)
14. While passing Guard Tower 2, the Appellant attempted to throw one ball which was missing its exterior leather cover up to Hoey in the guard tower but missed. (Testimony of Appellant)
15. The Appellant attempted to throw a second ball up to Hoey through the open window of the Guard Tower but missed and hit the window this time, which shattered. The Appellant described and demonstrated how he threw the softball and it appeared to be more of a basketball hook shot than a throw. (Exhibit of 6, Testimony of Appellant)
16. The Appellant testified that he was very surprised that the window broke because he believed that the window was made of plexiglass. (Exhibits 6, 7, Testimony of Appellant)
17. The Appellant immediately reported the incident to Supervisor Kevin Foley. (Exhibits 6 and 7)
18. Sgt. Anthony Ciccone (hereinafter "Ciccone") conducted the Superintendent's investigation of this matter for the DOC, which he completed on November 4, 2004. (Exhibit 6, Testimony of Ciccone)
19. On February 9, 2005, the Appellant received notice of a March 8, 2005 hearing. He was charged with violating Blue Book Rule 7(d) which states "Employees should not read, write, or engage in any distracting amusement or occupation during the work hours except to consult rules or other

materials necessary for proper performance of their duties." He was also charged with violating Rule 15(b) which states "You will be **liable for any willful destruction, loss, waste or damage by you** of state property." (Emphasis added) (Exhibit 4)

20. G.L. c. 266 § 104. Buildings; destruction or injury. §104 is as follows: "Whoever wilfully, intentionally and without right destroys, injures, defaces or mars a dwelling house or other building, whether upon the inside or outside, shall be punished by imprisonment for not more than two months or by a fine of not more than fifty dollars. (administrative notice)
21. Willfull-adj. is used when referring to acts which are intentional, conscious and directed toward achieving a purpose. *See* "The word 'wilfull' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidently or negligently…it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent." Rollin M. Perkins & Ronald n. Boyce, *Criminal Law* 875-76 (3d. ed. 1982) as quoted in Black's Law Dictionary Seventh Edition, West Group St. Paul Minn. 1999, p. 1593. (administrative notice)
22. A hearing was held in the superintendent's office on March 8, 2005. The hearing officer was Labor Relations Advisor Christopher Simonelli (hereinafter "Simonelli"). The Appellant, Chief Union Steward DOC Sgt. Sean Cremin (hereinafter "Cremin") and Appellant's attorney Stephen Pfaff (referred to as "Fafe" in Exhibit 3, hereinafter know as "Pfaff.") were present at this hearing. (Exhibit 3)
23. Sgt. Sean Cremin testified that as the union steward he was at the Appellant's disciplinary hearing. He had a clear memory of the DOC disciplinary hearing; no witnesses were sworn before Simonelli, which hearing took place in Simonelli's office. Simonelli prefaced his remarks

by stating that he had been a recreation officer previously. The evidence was summarized and Simonelli then stated that he had looked over the circumstances and not see any intentional damage. He "did not see anything here to warrant discipline." Simonelli clearly and repeatedly stated that his recommendation was "No discipline." (Testimony of Cremin)

24. The Appellant did serve the DOC hearing officer Simonelli with a subpoena, on June 3, 2008, commanding his presence as a witness at this Commission hearing for June 5, 2008. Simonelli did not appear at the hearing nor did he contact the Appellant's attorney as requested in the subpoena. (Exhibit14)
25. Simonelli's written recommendation is not sent to DOC Commissioner Dennehy directly. It is sent "THRU: Ronald T. Duval, Associate Commissioner, Administration" He found that while the Appellant had not violated Blue Book Rule 7(d) but he had violated Rule 15(b). (Exhibit 3)
26. He recommended a five (5) day suspension and that the Appellant pay $972 in restitution to be paid within 60 days. (Exhibit 3, Exhibit 13)
27. Executive Office of Public Safety Commissioner Katherine Dennehy accepted Simonelli's findings and sent Appellant notice of his five (5) day suspension on March 28, 2008. She ordered that he pay the restitution within 60 days. **"Failure to make restitution will result in your being terminated".** (Exhibit 2)
28. The Appellant paid the $972 in restitution, under the duress that he would be terminated from his employment, if he did pay it. (Exhibits 2 and 13, testimony of Appellant)
29. Sgt. Ciccone, Sgt. Cremin and the Appellant testified that there was no intent on the part of the Appellant to damage the window when he threw the softball. It is found that the Appellant did not willfully damage the window. (Testimony of Ciccone, Cremin and Appellant)

30. The Appellant applied for and received unemployment compensation for his period of his suspension. His claim for unemployment compensation required a hearing due to the DOC claim that he was suspended for violation of established rules and regulations of the employing unit. The hearing was held by the Mass. Department of Workforce Development, Division of Unemployment Assistance. The Division determined that: "…the employer witness failed to substantiate that the claimant violated the rule in question." The Division further concluded that "The claimant did not intentionally break the window. There was no "wilful" damage to state property. While the claimant exercised poor judgment in throwing the softball as he did, the employer failed to establish that the claimant threw the ball intending to break the window." (Exhibit 11, testimony of Appellant)

CONCLUSION

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. Civ. 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 Civ. Serv. v. Municipal Ct. of the City of Boston, 359, Mass. 211, 214 (1971)

The Commission determines if disciplinary actions are justified 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 Appointing Authority has failed to meet its burden. The record does not support preponderance of the evidence that there was just cause to suspend the Appellant for five (5) days.

Appellant is charged with violating Blue Book rule 15(b) which states, in part: "You will be liable for any willful destruction, loss, waste or damage by you of state property." It is necessary to define conduct that is "willful" and also differentiate conduct that is "reckless," in order to determine if the suspension of the Appellant was justified because "indifferent or reckless wrongdoing is not deliberate or intentional wrongdoing." Andover Newton Theological Sch. v. Continental Casualty Co., 409 Mass. 350, 352 (1991)

As a general legal principle, "intentional" is "limited, wherever it is used to the consequences of the act." Restat. 2d of Torts §8A. It is the consequences of an act, not the act itself, which must be intentional.

Conversely, "reckless" refers to intentional conduct where there is a "high degree of likelihood that substantial harm will result to another." Commonwealth v. Cruz, 430 Mass. 182 (Mass. 1999) quoting Commonwealth v. Catalina 407 Mass. 779 (Mass 1990) That is, an actor who is reckless is aware of the highly probable results of his actions, but chooses to disregard the risk and engage in the act regardless of this knowledge.

In this case, willful must be interpreted to mean intentional behavior. Commonwealth v. Luna, 418 Mass. 749, 753 (Mass. 1994) quoting Commonwealth v. Welansky, 316 Mass. 383, 397 (Mass. 1944); Sheehan v. Goriansky, 321 Mass. 200 (Mass. 1947). In Blue Book Rule 15(b) the word "willful" modifies "destruction, loss, waste or damage," meaning that the actual destruction itself must be willful. Interpreting this rule to include all willful conduct which brings about any destruction or damage, whether it is intentional or unintentional, robs the rule of its efficacy. If the intent of the drafters of the Blue Book Rules was to make employees liable for intentional acts which result in unintentional damage, the rule should have been written to reflect reckless behavior as well.

The Appointing Authority has presented no evidence that the Appellant willfully broke the window. On the contrary, all of the credible evidence supports the determination that the damage caused was not intentional or wilfull. The rule clearly states that the destruction or damage must be willful. While the Appellant's behavior may have exhibited poor judgment or negligence, it does not rise to the level of willful. The Appellant only paid the Restitution under the duress of being terminated from his employment, if he did not pay. This Restitution was imposed by the

DOC in disciplinary manner for a rule violation, which rule violation has been determined not to have occurred. Therefore, the Restitution paid by the Appellant shall be returned to him. However, the DOC is not precluded by this decision from seeking payment of restitution, by some other means or theory that the Appellant is liable for the damage.

For all the above reasons, the Appellant's appeal filed under Docket Number D-05-137 is hereby ***allowed***. The Appellant shall be returned to his position, without any loss of pay or other benefits. Additionally, the Appellant shall be repaid the $972 he paid in restitution to the DOC.

Civil Service Commission,

_____
Daniel M. Henderson,
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman-No: Henderson-Yes, Marquis-No, McDowell-Yes and Stein-Yes, Commissioners) on November 18, 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.

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DEPARTMENT OF CORRECTION,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

The instant appeal involves a 5-day suspension imposed on Dennis Hansbury, an employee at the Massachusetts Department of Correction (DOC).

Mr. Hansbury is no stranger to the Civil Service Commission. In 2001, then-Commission Chairman France Lopez penned a decision upholding a 9-month suspension against the Appellant. That misconduct involved an incident in which the Appellant received a package from an inmate's relative and failed to report it. Writing for a unanimous Commission, Lopez stated in part: " …[a] handwriting expert provided clear and convincing testimony that the Appellant was the author of a piece of paper found in [an inmate's] cell which provided the Appellant's wife's name and address. The indicia of the record evidence: the package mailed to his house and the piece of paper found in [the inmate's] cell, implicate the Appellant in an apparent scheme that attempted to subvert the security of the correctional facility."

Prior to that nine-month suspension, the Appellant had received two written warnings and a one-day suspension, including one offense for contraband that was found in his personal bag.

Subsequently, the Appellant received a 30-day suspension in 2004 for being untruthful during an investigation.

Only months later, the Appellant engaged in the misconduct which resulted in the instant five-day suspension. It is undisputed that the Appellant, who was responsible for picking up and retrieving stray softballs hit over a fence by inmates, threw a softball at a security tower occupied by a fellow correction officer, causing the window of the tower to break. For this, he was suspended for five days and ordered to pay restitution for the broken window.

In a report completed on the day of the incident, the Appellant stated in relevant part, " … after retrieving the softballs … [I] threw a softball (with no cover) up to Box 2. The softball broke the window in Tower 2. I honestly thought the glass was plexiglass and there was no intention on my part to break anything." There is no mention in the Appellant's incident report that the correction officer in the Tower (Hoey) had asked the Appellant to throw the ball to him or that Hoey even knew that the Appellant planned to throw it at the tower.

Sergeant Anthony Ciccone subsequently interviewed the Appellant regarding the incident. According to Ciccone's report, the Appellant told him that he " … observed Officer Hoey in the window of tower 2 … the window was open and Officer Hoey was standing in the opening. <u>He (the Appellant) stated that Officer Hoey did not say anything</u>. He claimed that he threw the first softball to Officer Hoey but missed. He stated that he did not see if it went over the wall or not … He stated that when he threw the second softball he accidentally struck the window to the tower."

During his testimony before the Commission, however, the Appellant, for the first time, stated that he was throwing the balls at the tower <u>at the request of Officer Hoey</u>, who had allegedly yelled down to the Appellant and volunteered to dispose of the damaged softballs.

The Appellant's conflicting statements, his alarming disciplinary history and common sense make it painfully clear what happened here. The Appellant engaged in childish misconduct while on duty at a secure correctional facility which resulted in a security tower glass being broken.

The Appellant, in his testimony before the Commission, calls his actions, "the dumbest thing I've ever done." The hearing officer, however, concludes that since there was "no evidence that the Appellant willfully broke the window", the discipline must be overturned. Remarkably, the hearing officer also orders DOC to reimburse the Appellant for the restitution he already paid for the window that he damaged. Not only is this additional order beyond the Commission's jurisdiction, it ignores the common sense warning that parents have instilled in their children for generations, "if you break it, you pay for it."

DOC employees should not be permitted to project hard objects at glass windows of security towers – and the Commission should not overturn DOC's decision to discipline individuals who do so.[1]

For these reasons, I respectfully dissent.

_____

Christopher C. Bowman
Chairman
November 18, 2010

[1] The Appellant testified that he collected unemployment insurance benefits for the 5 days that he was suspended from DOC. Should DOC choose not to appeal this decision, any payments made to the Appellant for this period of time should be reported to the Division of Unemployment Assistance to facilitate his repayment of those unemployment insurance benefits to the governmental UI trust fund.