

COMMONWEALTH OF MASSACHUSETTS

Civil Service Commission

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

JOHN HENNESSEY,
Appellant

v.

D-04-489

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, John Hennessey (hereinafter "Appellant"), is appealing the decision of the Appointing Authority, Department of Correction (hereinafter "Respondent"), in suspending him without pay from the Department of Correction for a period of ten (10) days for violating Rule 19(c) of the Rules and Regulations of the Massachusetts Department of Correction regarding internal investigations. The appeal was timely filed. A full hearing was held at the offices of the Civil Service Commission on May 17, 2005. One tape was made of the hearing. Appellant submitted a post-hearing brief. As no notice was received from either party, the hearing was declared private. Two exhibits were entered into the record by the Respondent. The first exhibit, which consisted of twenty-seven (27) separate documents

comprising the Respondent's complete record of investigation of the underlying incident and personnel file, was stipulated to by the Appellant. The second exhibit, which consisted of three (3) decisions of the Civil Service Commission in unrelated cases, was objected to by the Appellant. The Appellant submitted one exhibit (handwritten notes of Correction Officer David Barbato), which was stipulated to by the Respondent.

FINDINGS OF FACT

Based upon the documents entered into evidence (Exhibits 1-3), and the testimony of the Appellant; Harold Wilkes – Sergeant Internal Affairs, Dept. of Correction; Robert W. Benedict, Jr. – Sergeant, Dept. of Correction; Tiffany J. Davis – Correction Officer I, Dept. of Correction; and David Barbato - Correction Officer I, Dept. of Correction, I make the following findings of fact:

1. The Department of Correction is the employer and appointing authority. (Testimony, Exhibit 1)
2. At all relevant times, the Appellant was a permanent, tenured employee (Correction Officer II) of the Department of Correction. (Testimony, Exhibit 1)
3. The Rules and Procedures of the Department of Correction set forth rules of conduct for employees of the Department of Correction, including but not limited to Rule 19(c), which states in pertinent part:

19. ADMINISTRATIVE PROCEDURES

(c) Since the sphere of activity within an institution of the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. Pending investigation into the circumstances and your possible involvement therein, you may be detached from active duty

forthwith, however, without prejudice and without loss of pay.
(Exhibit 1)

4. On September 25, 2003, Correction Officer Tiffany Davis was assigned to MCI-Framingham, Brewster II Unit, when she overheard heated argument coming from Room 9. Officer Davis directed the inmates to cease and desist, and separated the inmates. (Testimony, Exhibit 1)
5. The inmate making the allegations (“Inmate A”) asserted that a second inmate (“Inmate H”) had claimed that approximately one week earlier, she been directed by Officer Tiffany Davis to see Appellant in the stairwell of Brewster II unit, and that once there, “Inmate H” had performed oral sex on Appellant.¹ (Testimony, Exhibit 1)
6. On September 25, 2003, Officer Tiffany Williams filed an Incident Report with respect to the foregoing. (Testimony, Exhibit 1).
7. On September 25, 2003, Appellant, upon being notified by telephone of the allegations against him, notified Sgt. Benedict and the Shift Commander of the allegations, and filed an Incident Report. (Testimony, Exhibit 1)
8. Thereafter, on September 25, 2003, Sergeant Benedict conducted a preliminary inquiry into the inmate allegations. As part of his inquiry, Sgt. Benedict conducted separate interviews with Inmate “A”, Inmate “H” and their roommates. At the conclusion of his inquiry, Sgt. Benedict determined that there was insufficient evidence to support the allegation of staff sexual misconduct against Appellant, and reported his preliminary findings to Superintendent Lynn Bissonnette by letter dated October 1, 2003 by report dated. (Testimony, Exhibit 1).

¹ Additional allegations were made with respect to other correction officers; however, these allegations are unrelated to the issue at bar.

9. Thereafter, on October 13, 2003, Superintendent Bissonnette reported to Mark Reilly, Chief of Investigative Services, that Framingham Sgt. Patricia Walsh submitted a report which contained additional information regarding the investigation. Thereafter, the matter was referred to Sergeant Harold K. Wilkes of the Internal Affairs Unit – Investigation Services. (Testimony, Exhibit 1).
10. Sgt. Wilkes thereafter conducted a thorough investigation, which included multiple interviews with Officer Davis, the inmates in question, and Appellant. (Testimony, Exhibit 1).
11. On October 20, 2003, Officer Davis advised Sgt. Wilkes that a couple of months previously, while working at the Brewster II housing unit, she received a telephone call from Appellant requesting to see Inmate “H” outside the unit. (Testimony, Exhibit 1)
12. On October 20, 2003, Sgt. Wilkes interviewed Inmate H who similarly testified that Officer Davis had advised her that Appellant had requested to see her outside the unit.
13. On October 20, 2003, Sgt. Wilkes interviewed Appellant at M.C.I. –Framingham. (Testimony, Exhibit 1).
14. In the course of the October 20, 2003 interview, Appellant denied that he ever called the Brewster II unit to request that Inmate H be sent out of the unit to see him. Appellant also denied having any involvement whatsoever with Inmate H. (Testimony, Exhibit 1)
15. Thereafter, on February 12, 2004, Sgt. Wilkes re-interviewed Appellant at M.C.I.-Framingham. Also present during this interview was Union Representative Patrick Doherty. (Testimony, Exhibit 1)

16. In the course of the February 12, 2004 interview, Sgt. Wilkes questioned Appellant regarding his prior statement in which he denied that he had ever called the Brewster II housing unit requesting that Inmate H be sent out of the unit to meet with him. Additionally, Sgt. Wilkes advised Appellant of the contradictory testimony of Officer Davis and Inmate H. (Testimony, Exhibit 1)
17. In response, Appellant recanted his prior statement, and stated that when he was previously questioned by Sgt. Wilkes on October 20, 2003, he understood the question to be “whether he physically went to the Brewster II unit and asked to see Inmate H.” (Testimony, Exhibit 1)
18. Appellant’s interpretation of the question was supported by the written notes of MCOFU Union Steward David Barbato, who attended the October 20, 2003 meeting. (Testimony, Appellant’s Exhibit 1)
19. Appellant next stated that while he did not *physically* go to the Brewster II unit, he did recall *telephoning* the Brewster II unit (from *another* location) to ask that Officer Davis send Inmate H to the foyer to meet with him, but could not recall why he wanted to see Inmate H or what was discussed. (Testimony, Exhibit 1)
20. Thereafter, Sgt. Wilkes filed his investigation report, in which he concluded that while there was no evidence to support the allegation of “Staff Sexual Conduct”, Appellant did lie about his actions. (Testimony, Exhibit 1)
21. Thereafter, on September 16, 2004, a disciplinary hearing in the matter was held.
22. Thereafter, by letter of Commissioner Kathleen M. Dennehy dated October 25, 2004, Appellant was suspended without pay for ten (10) days for violation of Rule 19(c).
23. This appeal ensued.

24. The Commission assigns little credibility to the testimony of Appellant. Appellant seeks to rely on an overly technical, semantic distinction as the basis for this appeal, to wit: whether Appellant was asked during the first interview by Sgt. Wilkes on October 20, 2003 whether or not he “physically went over to the unit” and called out the inmate”, rather than whether he “called (via telephone) to the unit” in order to summon the inmate.
25. The Commission finds the handwritten notes of Officer Barbato credible with respect to which version of the question was posed by Sgt. Wilkes during the October 20, 2003 interview.
26. However, the testimonial and documentary evidence established that, at all times, including the October 20, 2003 interview with Sgt. Wilkes, Appellant was fully aware of why he was being interviewed and what the underlying issue was: whether, and if so, how, he had been involved with Inmate “H” which would have led to the sexual misconduct accusations. Indeed, Appellant testified (and the incident report he himself filed on September 23, 2003 established) that at all times he was cognizant of the underlying issue.
27. Further in assigning credibility to Officer Barbato’s notes, the Commission accepts the entirety of Officer Barbato’s notes as credible; not merely that small portion relied upon by Appellant. To that end, it is noted that Officer Barbato’s notes confirm a critical piece of Sgt. Wilkes’ testimony: that on October 20, 2003, Sgt. Wilkes asked Appellant if he had “*any involvement*” regarding the alleged incident, and did he “*remember anything*”. To each of these critical questions, Officer Barbato’s notes indicate that Appellant answered, unequivocally, “No”.
28. However, when subsequently questioned on February 12, 2004 by Sgt. Wilkes, and after having been presented with the conflicting testimony of both Officer Davis and Inmate “H”, Appellant, for the first time, recalled that he had in fact “telephoned the Brewster II unit and requested that Inmate “H” meet with him”.

29. Appellant failed to offer any credible explanation as to why he was unable to recall his involvement and actions when interviewed in October 2003. Nor did Appellant offer any credible explanation as to why he failed to contact Sgt. Wilkes to clarify his involvement with Inmate “H” in the four (4) month period between October 20, 2003 and February 12, 2004. Further, Appellant’s testimony was notably silent as to why his memory of the incident and his involvement in same, was better on February 12, 2004 than on October 20, 2003 (a date nearly four (4) months’ closer in time to the date of the incident).
30. Additionally, both Appellant and Officer Barbato testified that during the October 20, 2003 interview, they attempted, on several occasions, to clarify to Sgt. Wilkes that the name of the unit was “Brewster” and not “Bristol” (as Sgt. Wilkes incorrectly referred to it). Yet, neither Appellant nor Officer Barbato *ever* attempted to clarify their perceived distinction between the questions of whether or not he [Appellant] “physically went over to the unit” and called out Inmate “H”, rather than whether Appellant “called (via telephone) to the unit” in order to summon the inmate.

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). 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.” City of Cambridge 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 proper inquiry for determining if an action was justified is, “whether the employee has been guilty of substantial

misconduct which adversely affects the public interest by impairing the efficiency of the 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). This burden must be met by a preponderance of the evidence. M.G.L. c. 31, §43.

It is the conclusion of this Commission that the Respondent has satisfied its burden of proving reasonable justification for suspending the Appellant for ten (10) days without benefits. Specifically, the evidence proffered by the Department is sufficiently reliable to warrant a reasonable mind to find that the Appellant committed the acts for which he was penalized.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness’ testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

Here, the Commission assigns little credibility to the testimony of Appellant. Appellant and his counsel seek to rely on an overly technical, semantic distinction as the basis for this appeal, to wit: whether Appellant was asked during the first interview by Sgt. Wilkes on October 20, 2003 whether or not he “physically went over to the unit” and called out the inmate”, rather than whether he “called (via telephone) to the unit” in order to summon the inmate. While this Commission finds the handwritten notes of Officer Barbato credible with respect to which version of the question was posed by Sgt. Wilkes during the October 20, 2003 interview², several factors mitigate against a determination in favor of Appellant.

² Sgt. Wilkes testified that he asked whether Appellant “called over to the Brewster II unit” because that was the language used to transmit the underlying allegation to him, and he thus would not have had reason to ask whether Appellant physically went over to the subject housing unit. However, Officer Wilkes was unable to substantiate his claim with documentary evidence as he failed to retain his original notes from the October 20, 2003 interview. (Testimony)

First, to accept Appellant's interpretation would invalidate the public policy underlying Rule 19(c). In his post-hearing brief, Appellant and his counsel maintain that "for the Dept. of Correction to insinuate that the word "fully" in Rule 19(c) automatically requires an officer to answer questions not asked of him - when that officer is potentially facing criminal charges- is beyond absurd."³ However, it is Appellant's position that lacks merit.

The purpose of Rule 19(c) is to foster honesty and full disclosure among its employees, in order to ensure that internal investigations uncover the truth underlying incidents which occur within the various arms of the Department of Corrections. Taken to its (il)logical conclusion, Appellant's highly restrictive interpretation of Rule 19(c) would allow this very purpose to be circumvented. For example, had Appellant been accused of beating an inmate, Appellant's position would sanction him to answer "No" to the question: "Did you beat the inmate with a blackjack?" (provided he had, in fact, beaten the inmate with a lead pipe instead). The absurdity of this position is evident.

Second, the testimonial and documentary evidence established that, at all times, including the October 20, 2003 interview with Sgt. Wilkes, Appellant was fully aware of why he was being interviewed and what the underlying issue was: whether, and if so, how, he had been involved with Inmate "H" which would have led to the sexual misconduct accusations. Indeed, Appellant testified (and the incident report he himself filed on September 23, 2003 established) that at all times he was cognizant of the underlying issue.

Third, in assigning credibility to Officer Barbato's notes, the Commission accepts the entirety of Officer Barbato's notes as credible; not merely that small portion relied upon by Appellant. To that end, it is noted that Officer Barbato's notes confirm a critical piece of Sgt. Wilkes' testimony: that on October 20, 2003, Sgt. Wilkes asked Appellant if he had "*any involvement*" regarding the alleged incident, and did he "*remember anything*".

³ Appellant's Post-Hearing Brief at p. 3

To each of these critical questions, Officer Barbato's notes indicate that Appellant answered, unequivocally, "No".

However, when subsequently questioned on February 12, 2004 by Sgt. Wilkes, and after having been presented with the conflicting testimony of both Officer Davis and Inmate "H", Appellant, for the first time, recalled that he had in fact "telephoned the Brewster II unit and requested that Inmate "H" meet with him". Appellant failed to offer any credible explanation as to why he was unable to recall his involvement and actions when interviewed in October 2003. Nor did Appellant offer any credible explanation as to why he failed to contact Sgt. Wilkes to clarify his involvement with Inmate "H" in the four (4) month period between October 20, 2003 and February 12, 2004. Further, Appellant's testimony was notably silent as to why his memory of the incident and his involvement in same, was better on February 12, 2004 than on October 20, 2003 (a date nearly four (4) months' closer in time to the date of the incident).

Additionally, both Appellant and Officer Barbato testified that during the October 20, 2003 interview, they attempted, on several occasions, to clarify to Sgt. Wilkes that the name of the unit was "Brewster" and not "Bristol" (as Sgt. Wilkes incorrectly referred to it). Yet, neither Appellant nor Officer Barbato *ever* attempted to clarify their perceived distinction between the questions of whether or not he [Appellant] "physically went over to the unit" and called out Inmate "H", rather than whether Appellant "called (via telephone) to the unit" in order to summon the inmate. Knowing that he was facing serious allegations, it is simply unbelievable that Appellant would engage in a Herculean effort to correct a misstatement as to the name of the unit, but would make no effort whatsoever to clarify his involvement in the crux of the underlying matter.

For all of the above stated reasons, it is found that the Department of Correction has conclusively established by a preponderance of the reliable and credible evidence in the record that it had just cause to discipline the Appellant for the misconduct. Therefore, this appeal (Docket No. D-04-489) is *dismissed*.

Civil Service Commission

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Taylor, Guerin and Marquis, Commissioners) on January 25, 2007.

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 MGL ch. 30A sec. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL ch. 31 sec. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under MGL ch. 30A sec. 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 To:

Marcino La Bella, Esq.
Stephen C. Pfaff, Esq.