COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **CIVIL SERVICE COMMISSION**

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

DENNIS E. HANSBURY,
Appellant

v.

D-04-369

DEPARTMENT OF CORRECTIONS,
Respondent

Attorney for the Appellant: Stephen C. Pfaff, Atty.
Merrick, Louison & Costello LLP
67 Batterymarch St.
Boston, MA 02110

Representative of the Respondent: Jeffrey S. Bolger
Department of Corrections
Division of Human Resources
P.O. Box 946
Norfolk, MA 02056

Commissioner: Daniel M. Henderson

DECISION

Pursuant to provisions of M.G.L.c. 31, § 43, the Appellant, Dennis Hansbury (hereinafter "the Appellant" or "Hansbury") appealed the decision of the Massachusetts Department of Correction (hereinafter"DOC"), claiming the DOC lacked just cause to suspended the Appellant for thirty (30) days for being untruthful during a DOC investigation. A timely appeal was filed at the Civil Service Commission, (hereinafter "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

Nine (9) 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.
- Correction Officer Philip A. Larson, (hereinafter "Larson") MCI Concord.

For the Appellant:

- Dennis E. Hansbury

I make the following findings of fact:

1. Dennis E. Hansbury, (hereinafter the "Appellant") a Recreation Officer II, had been a tenured civil service employee of the Department of Correction ("DOC") since November 3, 1991. He was assigned to Massachusetts Correctional Institution Concord ("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 6)

Appellant's Prior Disciplinary Record:

3. On February 12, 1992, the Appellant 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 The termination was rescinded on June 25, 1992, by settlement agreement.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 9)

4. On October 10, 1998, the Appellant received a formal letter of reprimand after he left work before the end of the shift and did not punch out. (Exhibit 9)
5. On April 23, 1999, the DOC suspended the Appellant for one (1) day for leaving work a half hour early without permission. (Exhibit 9)
6. The Appellant received a formal letter of reprimand on August 25, 1999 when (unnamed) contraband was found in his personal bag. (Exhibit 9)
7. The DOC terminated the Appellant a second time on November 15, 1999 after he failed to report that he had received a package from an inmate's family at his home and then introduced contraband into MCI Concord. He was reinstated by the DOC after 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 9)

December 18, 2003 Incident:

8. On December 18, 2003, the Appellant reported to his regularly assigned to the 3-11 pm shift. He worked in the gym in H Building at MCI-Concord. (Exhibits 5 and 8)
9. Correction Officer Phillip Larson (hereinafter "Larson"), Correction Officer Aphouse Silva (hereinafter Silva), Correction Officer Robert Hoey (hereinafter "Hoey") and Correction Officer William Legget (hereinafter "Legget") were also on this shift and assigned to nearby areas. (Exhibit 5)
10. Inmates PC (hereinafter "PC"), DL (hereinafter "DL") and RR (hereinafter "RR") were Inmate –Workers, working in the gym this evening. (Exhibit 5)
11. The gym was exceptionally crowded that night because of an ongoing search or "shake-down" of one of the housing units, so that those inmates sent into the gym during the search.

With 189 inmates present in the gym, it was loud and chaotic (Exhibit 5, Testimony of Larson, Testimony of Appellant)

12. Before using gym equipment, inmates must hand over their ID cards to the recreation officer in charge. The ID's are places on a peg-board by the recreation officer. The recreation officers give the ID cards back when the equipment is returned. (Testimony of Appellant)
13. At the end of recreation time, the inmates were disorderly and the Appellant ordered them to form a single file line, which continued out the door and around the corner. (Exhibit 5)
14. When, several inmates tried to cut the line the Appellant sent them to the back. Many of the inmates were agitated, cursing and yelling (Exhibit 5)
15. At approximately 8:40 pm, inmate CC (hereinafter "CC") approached the Health Services Unit (hereinafter "HSU") and claimed he was punched in the face by a corrections officer. CC then left the HSU and returned to his unit(West Down) (Exhibit 5)
16. After CC left the HSU, inmate GW (hereinafter "GW") approached Captain David Zamaitis (hereinafter "Zamaitis") and stated that the recreation officer had punched CC in the mouth. (Exhibit 5)
17. Zamaitis notified IPS Sergeant Charles Hill (hereinafter "Hill") and CC was ordered to report to the IPS office at 9 pm. Upon arrival at the IPS office, CC was checked for any marks or injuries. (Exhibit 5)
18. Hill and IPS Officer William Farley (hereinafter "Farley") conducted an interview with CC, the evening of the alleged incident at 9:00 pm. (Exhibit 5)
19. Hill and Farley noted a small laceration on inmate CC's inner upper lip. (Exhibit 5)
20. Inmate CC initially denied any issue when he arrived in IPS. (Exhibit 5)

21. CC admitted to IPS's Hill and Farley that he was frustrated and that he called the recreation officer a "piece of shit" when he left the gym. He left the gym and was walking with inmate GW. CC had asked inmate GW to return to the gym with him yet GW stopped but did not return with him. However, he stated that he returned to the gym alone when he was called back. CC claimed that he was punched in the mouth by the Appellant immediately as he walked inside the gym door. (Exhibit 5)
22. Around 9pm, IPS Sgt. Hill and IPS Officer Farley called Sergeant Anthony Ciccone (hereinafter "Ciccone") of the IPS unit at home and informed him of this incident. (Exhibit 5)
23. CC claimed that when he had returned to his unit he spoke with his roommate "JJ" about the incident. He also claimed that he was in the process of calling his grandmother about the incident and handed the telephone to JJ, when he was called to the IPS office that night. **However, Ciccone's finding #19 on page 12 of his report contradicts CC on these claims: JJ denied talking with CC after the incident and also denied placing a call to CC's grandmother that night.** (Exhibit 5)
24. When CC arrived at the IPS office he was read his Miranda Rights and asked to write a handwritten statement but he refused to write a statement about the incident. (Exhibit 5)
25. Around 9:40 pm, CC was underwent a medical check. The nurse on duty noted that there were no medical complaints by CC and no injuries noted by LPN Bonnell. (Exhibit 5)
26. CC was then placed in the "HSU back cell" by the IPS officers. (Exhibit 5)
27. Ciccone launched an investigation into this incident on December 19, 2003. (Exhibit 5)

DOC Investigation:

Interview with Appellant

28. Ciccone interviewed the Appellant on December 19, 2003 at 8 am. (Exhibit 5)

29. The Appellant told Ciccone that CC did not ask him to return his ID card and denied speaking to or seeing CC that night. (Exhibit 5)
30. The Appellant was interviewed by Ciccone on December 19th. He told Ciccone that he was collecting gym equipment and handing back ID's to the inmates at closing time. It was unusually crowded due to the search and the gym stayed open longer. He ordered to form a single line due to the confusion. He made approximately five inmates wait until the end, due to them cutting the line. He had heard many inmates yelling at him that night. The last inmates to leave the gym were the three inmate gym-workers, (DL, PC and RR) and that PC was the last inmate to exit the gym. He said that CO's Legget and Hoey were posted at the gym door then. The Appellant did not recognize a photograph of inmate CC. He did not call CC or any other inmate back to the gym that night. He denied assaulting CC or any other inmate that night. (Exhibit 5)
31. Ciccone examined the Appellant's hands and found only a small abrasion on his index finger, "consistent to a hangnail". No other marks or injuries or swelling was observed on either hand. (Exhibit 5)
32. Ciccone, at approximately 8:30 AM, on December 19th ordered IPS to have a nurse re-examine CC for any marks or injuries. Another nurse, RN Reynolds examined CC, and found CC denying any medical issues. A small laceration was found on CC's inside left upper lip. However, it was determined by RN Reynolds that this laceration was not consistent with being punched in the mouth with a close fist, there was no bruising or swelling observed. (Exhibit 5)

Interview with CC

33. Ciccone interviewed inmate CC on December 19, 2003 at 9:30 am. This was CC's second interview as he was interviewed on December 18th by IPS's Hill and Farley. (Exhibit 5)
34. CC varied his story somewhat from what he had told Hill and Farley the day before. He told Ciccone that he asked the Appellant to return his ID card and the Appellant refused; that the Appellant had ordered him to **wait in the hallway until the end because he had interrupted the Appellant…and that he waited for a little while.** He previously told Hill and Farley that the officer posted outside the gym (Hoey) called him back to the gym for calling the Appellant a "piece of shit", while he was exiting the gym. The Appellant made no mention to Hill and Farley; of being ordered to wait in the hallway by the Appellant. (Exhibit 5)
35. CC admitted that he called the Appellant a "piece of shit" as he exited. CC admitted that he became "frustrated" and "insolent" that evening. (Exhibit 5)
36. CC claimed that Hoey called him back to the gym. (Exhibit 5)
37. CC claimed that he was walking with inmate GW when he was called back to the gym. He asked inmate GW to return to the gym with him, but GW stopped and did not return with him. CC claimed that after he was punched and then left the gym building; he met up with inmate GW at the corner of "thunder alley", showed his lip to GW and told GW what had just happened. CC also stated that he met up with inmate GW in the "Service Yard". CC then went to the medication line, and then returned to his unit. He stated that a short time later he was called to the IPS office.(Exhibit 5)
38. CC claimed that he had a detailed conversation with Hoey in the Service Yard, after he left the HSU and was returning to his unit. (Exhibit 5)

39. CC said that after he was called back to the gym as soon as he took a step inside the gym, the Appellant punched him in the mouth. (Exhibit 5)
40. CC claimed that no other inmates were present during the assault incident. (Exhibit 5)
41. CC was shown fifteen photographs of correction officers to identify the officer who CC claimed was standing behind the Appellant at the time of the assault. He identified three photographs, **CC claiming it was one of these guys**. Only officer Larson of the three was found to have worked that shift, on the day of the incident. (Exhibit 5)

Interview with Larson

42. This incident took place during Larson's first week as a Correction Officer. He was still on probation during this time. (Testimony of Larson)
43. Ciccone interview Larson on December 19th around 12 pm, prior to Larson writing his written report. Larson told Ciccone that there was "a lot of confusion" as the Appellant was collecting the equipment. (Exhibit 5)
44. Ciccone reported that Larson heard CC, whom he identified by a photograph, call the Appellant a "piece of shit" as he exited. (Exhibit 5)
45. Larson told Ciccone that the officer standing by the door, (Hoey) told the Appellant what CC had said. (Exhibit 5)
46. According to Larson, the Appellant then called CC back into the gym. (Exhibit 5)
47. Larson did not see Hansbury hit CC and he did not see any altercations that night. Larson told Ciccone that he was standing outside the gym, on the walkway with officer Silva at that time (Exhibit 5)
48. Larson however was called as a witness by the DOC and has no present memory of the alleged incident or his interview by Ciccone. He was new on the job then and did not know

anyone on the staff who he worked with except Silva whom he had been in the DOC academy with. He remembers that it was hectic at the time with the gym closing and the large number of inmates there. He was shown documents including photographs to attempt to refresh his memory. However, he could not identify CC. He could not remember statements claimed to have been attributed to the Appellant or Hoey. He could not identify who called CC back to the gym. His best memory is that it was "someone" He did not know the Appellant then. He did not see any assault. (Testimony of Larson)

Interview with Silva

49. Ciccone interviewed Silva at 12:30 pm on December 19, 2003. (Exhibit 5)
50. Silva informed him that there was a lot of confusion during the collection of gym equipment. He said that numerous inmates were cursing and agitated while exiting the gym. (Exhibit 5)
51. Silva saw a black inmate who was extremely upset and swearing while exiting the gym. He was shown a photo of CC but did not recognize him and did not see CC at all, (who is white). (Exhibit 5)
52. Silva denied seeing anyone call back any inmate back into the gym. (Exhibit 5)
53. Silva did not observe any altercation during the shift. (Exhibit 5)
54. Silva denied seeing the Appellant punch CC. (Exhibit 5)
55. Silva said he was standing outside the gym on the walkway with Officer Larson. (Exhibit 5)

Interview with Officer Robert Ranier (hereinafter "Ranier")

56. Ciccone interviewed Ranier on December 19, 2003 around 3 pm. (Exhibit 5)
57. Ranier was standing outside of HSU with Lieutenant Katherine Golden (hereinafter "Golden") at the time of the incident. (Exhibit 5)

58. Ranier observed CC standing in the HSU medication line talking to some inmates. (Exhibit 5)
59. Ranier saw CC looking agitated when he entered HSU around 8:30 pm on December 18, 2003. (Exhibit 5)
60. Ranier observed IPS officers enter the HSU, strip search CC and place him in the HSU cell. Ranier said that CC never mentioned that he was assaulted during the strip search. (Exhibit 5)

Interview with Hoey

61. Ciccone interviewed Hoey at 3 pm on December 19, 2003. (Exhibit 5)
62. Hoey said that the gym closed later than normal due to the shake-down and the large number of inmates in the gym. Most of the inmates were rushing to get out of the gym and it was louder than normal. There were two new officers downstairs and he made extra rounds downstairs due to it. (Exhibit 5)
63. Hoey denied hearing CC make a comment to Hansbury and did not recognize CC after being shown a photograph (Exhibit 5)
64. Hoey never saw CC come back and he did not call CC back to the gym. However, he stated that two black inmates returned to obtain their ID cards. (Exhibit 5)
65. Hoey said that in the course of the night he confiscated approximately six (6) inmates' ID cards, because they did not have a board pass to enter the gym. He initially sent these inmates back to the unit but was advised that the West Side unit was being searched and to let the inmates enter the gym. He stated that he collected the ID's of all inmates that did not have their movement pass. (Exhibit 5)
66. Hoey said there was a medication call while inmates were exiting the gym and numerous inmates were heading to J-building for medication call. (Exhibit 5)

67. Hoey said that he handed back four of the six ID cards while the gym was clearing out. (Exhibit 5)

68. Hoey said that inmate gym-worker PC was the last inmate to leave the gym. (Exhibit 5)

69. Hoey did not see CC come back to the gym. (Exhibit 5)

70. Hoey denied speaking with CC in the Service Yard, as CC was returning to his unit from the HSU. (Exhibit 5)

71. Hoey did not see the Appellant punch CC. (Exhibit 5)

Interview with Inmate JJ (hereinafter "JJ")

72. Lieutenant Brian Collins (hereinafter "Collins") and Hill conducted an interview with JJ, CC's roommate, on December 19, 2003. (Exhibit 5)

73. JJ denied speaking to CC after he returned from the gym. (Exhibit 5)

74. JJ denied placing a phone call to CC's grandmother for him. (Exhibit 5)

Interview with GW

75. Collins and Hill interviewed inmate GW on December 19th. (Exhibit 5)

76. GW said that CC yelled that the Appellant was a "piece of shit" as they exited the gym. (Exhibit 5)

77. GW said he saw the Appellant call CC back to the gym. (Exhibit 5)

78. GW claimed that he saw the Appellant punch CC in the mouth. He claimed to have observed this through the recreation office window. However, the investigators found that it would have been impossible for GW to witness this from his vantage point. Therefore GW's statement was not found to be credible (Exhibits 3 and 5)

Interview with Officer Keith Abare (hereinafter "Abare")

79. Ciccone conducted an interview with Abare on December 22, 2003. (Exhibit 5)

80. Abare was assigned to HSU at the time of the incident. (Exhibit 5)

81. Abare told Ciccone that CC entered HSU around 8:30 pm and told him “I want to talk to IPS. I was just hit in the mouth.” (Exhibit 5)

Interview with Golden

82. On December 22, 2003, Ciccone interviewed Golden, who posted near HSU at the time of the incident. (Exhibit 5)

83. Golden observed CC talking in the medication line to another inmate, JR (hereinafter “JR.”) (Exhibit 5)

84. Golden told Ciccone that she asked JR why CC was upset. (Exhibit 5)

85. JR replied, “He just told me he got wacked in the gym.” (Exhibit 5)

86. Golden told Ciccone that she ordered CC to HSU, but he refused to discuss it and told her everything was all right and left the building. (Exhibit 5)

87. Abare approached Golden shortly after that and told her that CC was involved in an incident that night. (Exhibit 5)

88. Golden then contacted Lt. DeCourcy and advised him that she was looking for CC and that he may be upset. (Exhibit 5)

Interview with Legget

89. Ciccone interviewed Legget on December 22, 2003. (Exhibit 5)

90. Legget witnessed Hoey call over two black inmates to return their cards. (Exhibit 5)

91. Legget did not see Hansbury punch CC. (Exhibit 5)

Interview with JR

92. Collins and Officer Rose Boucher (hereinafter “Boucher”) interviewed inmate JR on December 22, 2003. (Exhibit 5)

93. JR saw CC the night of the incident near HSU. (Exhibit 5)

94. JR told Collins and Boucher that CC had said that "the Recreation officer had just punched him in the mouth" and then showed JR his lip. (Exhibit 5)

Interview with RR

95. RR was interviewed by Boucher and Collins on December 22, 2003. (Exhibit 5)

96. RR saw CC ask the Appellant for his ID card back and the Appellant told CC he had to wait. (Exhibit 5)

97. RR denied seeing the Appellant or any officer punch CC or any other inmate. (Exhibit 5)

Interview with PC

98. Collins and Boucher interviewed inmate PC on December 22, 2003. (Exhibit 5)

99. PC said he did not see CC during the night of the incident. (Exhibit 5)

100. PC did see Officers Silva and Larson in the area when he left the gym. (Exhibit 5)

101. PC did not see any staff member assault an inmate while he exited the gym. (Exhibit 5)

102. PC has never had any issues with the Appellant. (Exhibit 5)

Interview with Inmate DL (hereinafter "DL")

103. Collins and Boucher interviewed DL on December 22, 2003.

104. DL said he did not observe CC at the gym on the night of the incident.

105. DL did not see any staff member assault any inmate, while he was exiting the gym. (Exhibit 5)

106. Peter St. Amand, acting superintendent notified the Appellant on December 19, 2003 that he was detached, without pay, while this investigation was pending. (Exhibit 5)

107. On April 6, 2004, DOC Commissioner Katherine Dennehy (hereinafter Dennehy) sent to the Appellant that a hearing would be held April 21, 2004. The Appellant was charged with violating Blue Book Rule 8, Rule 10 and Rule 19 (C). (Exhibit 4)

108. Labor relations Advisor Dennis Cullen conducted a hearing on April 21, 200. He found that while there was insufficient evidence to prove that Appellant punched the inmate, there was enough evidence that the Appellant had lied to investigators, and recommended a thirty 30 day suspension. (Exhibit 3)

109. Dennehy adopted Cullen's recommendation and notified the Appellant of his thirty (30) day suspension on July 13, 2004. (Exhibit 2)

110. The Appellant testified that he did not punch CC. He did not call CC back to the gym. He did not direct anyone to and did not hear anyone call CC back to the gym. He did not hear anyone call him a "piece of shit" that night. Being called names by the inmates is common if not a daily occurrence. He did not confiscate any inmates' ID or pass that night. His routine is to take inmates ID's when equipment is taken out, put the ID on the peg-board and return it to the inmate when the equipment is returned. He may have held on to 3-4 ID's that night on the peg-board waiting for equipment to be returned. There was a "bull rush" of inmates at the end of gym that night; they were all in a rush to get out of the gym and the gym was overcrowded due to the "shake-down". The inmates were angry at the delay. He had to get them organized and line up single file. He told 3-4 of them to go to the end of the line for cutting the line. It was hectic and many of them were yelling out or name calling, all kinds of things. If someone called him a "piece of shit" he couldn't identify the inmate. He testified that Ciccone did not ask him if he knew CC called him a "piece of shit". The five assigned inmate gym-workers were the last inmates to leave the gym that night. He did not lie to

Ciccone in his interview. He answered every question truthfully, to the best of his memory. (Testimony of Appellant)

CONCLUSION

LEGAL STANDARDS

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission has the duty to determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31, §43. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102, (1983).

An action is "justified" if "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." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). 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." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations,

favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The Appointing Authority's burden of proof 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the hearing officer's purview to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'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.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant's perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

> "It is well to remember that the *power to modify is at its core the authority to* review and, when appropriate, *to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control' . . and 'the removal of those who have proved to be incompetent or unworthy to continue in the public service*'."

Id., 39 Mass.App.Ct. at 600. (emphasis added). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission's task "is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. [Citation] Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether if "the circumstances found by

the commission" vary from those upon which the appointing authority relied, there is still reasonable justification for the penalty selected by the appointing authority. "The 'power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority." Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

CONCLUSION OF THE MINORITY (COMMISSIONERS HENDERSON & MCDOWELL)

The DOC has not fulfilled its evidentiary burden. During the DOC investigation, through interviews with eight officers and seven inmates, about eight different versions of the events of December 18, 2003 emerged. Not one single fact surrounding this incident is reported consistently by all eight witnesses who were in the immediate area at the time. "When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof." Commonwealth v. O'Brien, 305 Mass. 393 (1940)

The Investigator concluded that there was insufficient evidence that the Appellant had assaulted CC because every witness but CC and GW had denied seeing the incident. It was not possible for GW to witness this assault from his vantage point. Furthermore, though there was a minor laceration on CC's inner upper lip, Reynolds reported that there was no bruising or swelling of CC's mouth, which would have been consistent with an injury resulting from being punched in the mouth.

However, it is not clear that the Appellant lied to investigators. Due to the loudness and chaos of attempting to move 189 prisoners out of the gym, it is possible that witnesses may have misheard CC or confused him with another inmate. The Appellant testified that many of the inmates were yelling comments due to the frustration of the delay. It is not unusual in the Appellant's experience for inmates to call him names; he doesn't pay much attention to it.

There is evidence on the record which suggests that CC yelled his comment, contrary evidence that CC made the comment under his breath, and further evidence that didn't make it at all. If CC did make a comment to the Appellant, it is entirely possible that the Appellant never heard it at all among the noise. Larson, Silvia, Hoey and the Appellant all testified that the gym are was noisy and confusing that night.

The evidence in this case supports not just two contradictory propositions but three, which are: 1) CC made the comment and the Appellant never heard it or found out about it. 2) CC made the comment and the Appellant was either informed of it or heard it or 3) CC never made the comment. Since the record tends to equally support multiple propositions, the evidence given cannot be said to be proof of any version of the facts.

CC was the reporter of these allegations and the scenario of events. However his version was found to be inconsistent if not contradictory. His version was not corroborated by any of the numerous inmates interviewed in this DOC investigation. Nearly all of the inmates in a position to see or hear any altercation denied that any altercation occurred. The inmates interviewed, who said anything happened, received their information orally from CC. Even CC's roommate Inmate JJ clearly contradicted CC regarding any conversation and a telephone call taking place when CC returned from the HSU medication line. The only inmate, who claimed to have observed the assault, Inmate GW, was found by the DOC to be lying as he could not have observed any thing from his position. CC even contradicts GW's version stating that GW was not near the gym when the incident occurred and that he informed GW of the allegations only when he met GW later on. CC repeatedly spoke or acted in an inconsistent or contradictory manner, from the beginning. First alleging then denying the assault and then reversing himself.

CO Larson was the only DOC staff person claimed by the DOC to have verified some of the preliminary events leading up to the alleged assault; which might be some factual evidence of those preliminary events and therefore, possibly of the Appellant's lying about them. However, CO Larson testified here and showed no present memory of any of the events that night or even his interview with Investigator Ciccone. CO Larson was a new employee then and only knew CO Silva, someone he attended the DOC academy with. He could not remember CC or any of the

other staff on that shift, including the Appellant. He could only remember that he was standing outside the gym door with Silva when the alleged assault took place. Silva confirmed that he was standing with Larson at that time. Silva stated that it was confusing at that time and many of the inmates were upset and swearing when exiting the gym. Silva stated that he did not see CC that night and did not see or hear any altercation or "unusual incidents" that night.

The Appellant testified convincingly and credibly in denial of all of the material allegations made by Inmate CC against him. He also testified convincingly and credibly that he answered all of the questions asked of him by the DOC investigators to the best of his ability and memory.

Multiple people interviewed regarding this situation may have lied, lacked a memory of or made a mistake about the sequence of events that took place on December 18, 2003. The great bulk of the witnesses interviewed claimed that no such incident or certainly not CC's scenario of events did occur. Due to this circumstance and the inconsistency or wide disparity in some of the accounts of the events, there is insufficient reliable or credible evidence in the record to find that the Appellant lied to the DOC investigators about those alleged events. The Department has failed to establish by a preponderance of the evidence there was just cause for the discipline it imposed on the Appellant.

For all the above reasons, the Appellant's appeal filed under Docket Number D-04-369 should be allowed and the Appellant should be returned to his position without any loss of pay or other benefits.

Civil Service Commission,

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Daniel M. Henderson,
Commissioner

CONCLUSION OF THE MAJORITY (CHAIRMAN BOWMAN, COMMISSIONERS MARQUIS & STEIN)

The Majority of the Commission concludes that the DOC had met its burden of proof to establish just cause for discipline of the Appellant by the preponderance of the evidence. The majority agrees (as DOC Commissioner Dennehy found) that the evidence did not establish that the Appellant committed the serious offense of verbally or physically mistreating an inmate during an alleged altercation on December 18, 2003, but this was not the basis for the discipline imposed on the Appellant in this circumstance. Rather, he was suspended for his untruthfulness in the course of the investigation of the incident.

As to the charge of untruthfulness, the DOC presented credible evidence, through the detailed investigatory report of Sgt. Ciccone which reported the substance of his interviews with CO Larson and the Appellant. According to Sgt. Ciccone's report, he interviewed the Appellant on December 19, 2003 (one day after the alleged incident), with a union representative present, and reported the following:

> ". . . .Sgt. Ciccone asked Officer Hansbury if any inmates remained in the gym after everyone had exited. Officer Hansbury stated that the inmate gym workers were the last inmates to exit the gym. . . . and no other inmates were present after that. Officer Hansbury stated that after he was done collecting equipment that he went to Gym Down and conducted an inventory of equipment. *He stated that Correction Officer Bob Hoey was posted up at the door* . . .
>
> "*Sgt. Ciccone showed Officer Hansbury a photograph of inmate [CC] and asked him if he had any problems with this inmate during the collection of equipment. Officer Hansbury stated that he did not recognize inmate [CC] and did not have any issues with him. Sgt. Ciccone asked officer Hansbury if he called inmate [CC] or any other inmate back to the gym while the inmates were exiting or after the gym had been closed. Officer Hansbury replied that he did not call anyone back to the gym once they exited*. . . ." (Exh.5) (*emphasis added*)

Sgt. Ciccone also interviewed CO Hoey on December 19, 2003, with a union representative present, and reported as follows:

> "*Officer Hoey stated that he was posted up outside the gym by the entrance doo*r . . . .

"*Sgt. Ciccone showed Officer Hoey a photograph of inmate [CC]. Officer Hoey stated tha he did not recognize inmate [CC].* . . ..

"O*fficer Hoey stated that inmate [PC] was the last inmate to exit the gym*. Officer Hoey stated that two black inmates did come back to the door afterwards to retrieve their ID cards. *Officer Hoey also stated that he did not observe inmate [CC] come back to the gym. Officer Hoey stated that he did not hear inmate [CC] call Officer Hansbury a 'piece of shit.'* Officer Hoey denied calling inmate [CC] back to the gym." (Exh. 5)(*emphasis added*)

On December 19, 2008, Sgt. Ciconne also interviewed CO Larson, one of the two new Correctional Officers who had worked at the gym that day, also with a union representative present. The report of the interview with CO Larson states:

". . . . Officer Larson stated that he was posted up in Gym Down. He stated that when the gym closed he assisted in a security check of all equipment. He stated that he was with another new officer, identified as Correction Officer Aphouse Silva. *Officer Larson was shown a photograph of Recreation Officer Hansbury. Officer Larson stated that Officer Hansbury was also in the lobby with a few other officers* (names unknown)."

"*Officer Larson stated that there was a lot of confusion as Officer Hansbury was collecting equipment from the gym. He stated that one inmate was upset and called Officer Hansbury a 'piece of shit' while exiting the gym. Stg. Ciccone showed Officer Larson a photograph of inmate [C} and asked him if that was the inmate that made the statement. Officer Larson identified inmate [CC]'s photograph as the inmate that made the statement. Officer Larson stated that the officer posted by the door (name unknown) advised Officer Hansbury what inmate [CC] had said."*

"*Officer Larson stated that Officer Hansbury then called inmate [CC] back to the gym. Officer Larson stated that Officer Silva and him were outside the gym on the walkway when inmate [CC] entered the gym.* . . ." (Exh. 5) (*emphasis added*)

These three interview statements are clearly inconsistent. The Appellant denied any unusual contact with inmate CC. CO Hoey did not testify at the Civil Service Commission hearing. CO Larson testified but stated he had no recollection of the events, which is hardly surprising because, by the time of the hearing, the incident in question had occurred more than four years earlier.

The Hearing Commissioner was apparently unimpressed with the live testimony of the investigating officer, Sgt. Ciccone. Even when giving due deference to the credibility

determinations of the Hearing Commissioner, however, the Commission Majority finds that the specific and irreconcilably inconsistent statements from CO Larson and the Appellant in Sgt. Ciccone's report are sufficient proof in this case that the Appellant had not been truthful when he was interviewed one day after the incident. The Commission majority finds it incredible that the Appellant would not even recognize inmate CC, must less deny have specific interaction with him that CO Larson clearly described in his contemporaneous statements to Sgt. Ciccone. These statements are not impeached by CO Larson's subsequent lack of recollection, as the passage of time between the initial interview and the Commission hearing provide very plausible reason why CO Larson would have been candid with Sgt. Ciccone but would not be prepared to testify under oath to something that was, then, only a vague recollection.

This is not an appeal in which the claim of untruthfulness hinges on the testimony of a DOC inmate or the nature of the Appellant's actual mistreatment of an inmate.[1] The close Commission vote in this appeal bears notice, however, as it reflects the difficulty of proof of a claim of untruthfulness, even when based on testimony of other DOC officers, when those witnesses testify with less than clear and persuasive recollection of the events, and the Appellant presents credibly on his own behalf. This difficulty could be avoided if the DOC would take care to make a contemporaneous record of the statements that are ultimately used to prove a case of untruthfulness – i.e., tape recorded interviews and requiring that the investigator procure from all witnesses, especially the employee who is being subject to possible discipline –a signed written

[1] The DOC Commissioner determined that the Appellant's alleged mistreatment of inmate [CC] had not been proved, and the discipline imposed on him was for his untruthfulness only. Moreover, unlike the related appeal by this Appellant decided by the Commission today (**CSC No. D-05-137**), involving the Appellant's alleged misconduct (which the Hearing Commissioner found to be mere negligence that involved no inmate interaction in tossing a ball into a guard tower that accidentally broke a window), this appeal involved misconduct of a willful nature concerning the Appellant's core responsibility for care and custody of inmates. This distinction, at least for the author of the decision for the majority in this appeal, is a significant one, as the untruthfulness in the present case, even in the absence of proof of mistreatment, clearly involves "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

statement containing the statements. By following such a procedure, the DOC would ensure that incriminating statements were accurately documented and could be persuasively proved at any future hearing, no matter how much delay were involved and without regard to the particular investigator's personal testimonial skills. This record demonstrates that DOC internal affairs investigations are quite time consuming and extensive, and following such procedures would not seem particularly burdensome. The DOC is encouraged to consider taking such steps in future investigations

The majority of the Commission also takes note that proof of the Appellant's untruthfulness through the statements of CO Larson to Sgt. Ciccone also would tend to implicate CO Hoey in untruthfulness as well, since CO Hoey denied hearing inmate [CC]'s derogatory remark and denied passing it along to the Appellant, as CO Larson's statement claimed. It is somewhat troubling that, apparently, CO Hoey also may have been guilty of untruthfulness of his own, and the evidence leaves it uncertain whether CO Hoey was disciplined at all for this untruthfulness of his own. This evidence might, in different circumstances, suggest that the Appellant was subjected to disparate treatment and/or overly severe discipline. Given the Appellant's two prior cases of discipline for deceitful behavior, however, which Commissioner Dennehy specifically took into account in deciding to impose a 30-day suspension, the majority of the Commission finds no reason to modify the penalty imposed by the DOC Commissioner in this case.

Accordingly, for the reasons stated above, the appeal of the Appellant, Dennis Hansbury, in CSC Case No. D-04-369, shall be, and is hereby ***dismissed.***

For the majority

Paul M. Stein, Commissioner

For all of the reasons cited in the conclusion of the majority, the Appellant's appeal under Docket No. D-04-369 is dismissed.

By vote of the Commission (Bowman, Chairman-Yes; Henderson- No, Marquis-Yes, Stein- Yes and McDowell-No, 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.

Notice:
Stephen C. Pfaff
Merrick, Louison & Costello, LLP
67 Batterymarch St.
Boston, MA 02110

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