

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, SS.

**CIVIL SERVICE COMMISSION**

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

ROBIN L. DAWSON, as Administratrix  
Of the Estate of JAMES DAWSON,  
Appellant

v.

D-99-441

DEPARTMENT OF CORRECTION,  
Respondent

Appearance for Appellant:

Kirsten Z. Young, Esq.  
Michael J. Rossi, Esq.  
CONN KAVANAUGH  
ROSENTHAL PEISCH & FORD  
Ten Post Office Square  
Boston, MA 02109

Appearance for Respondent:

Andrew S. McAleer, Esq.  
Department of Correction  
P.O. Box 946  
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

**DECISION**

On October 6, 1999, James Dawson (Mr. Dawson) filed an appeal with the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 43, to challenge the decision of the Department of Correction (DOC) to demote and reassign him. A full evidentiary hearing was commenced on April 9, 2001 by former Civil Service Commissioner Lee Johnson. Two witnesses testified on behalf of DOC but the hearing

was not completed. On December 26, 2001, prior to the resumption of the hearing, Mr. Dawson died in a motor vehicle accident.

Thereafter, Robin Dawson, as Administratrix of Mr. Dawson's estate, moved to substitute the estate as a party. In or about November 2002, DOC and Mr. Dawson's estate reached a settlement and agreed to a voluntary dismissal of this appeal. On September 2, 2003, the estate of Mr. Dawson (Appellant or Ms. Dawson) moved to vacate the dismissal, with DOC's assent, because the State Retirement Board declined to accept the terms to which the parties had agreed. On September 9, 2003, the Commission received a motion by DOC to "reconsider" previous rulings regarding Ms. Dawson's request for Order of Substitution. On September 16, 2003, the Commission received a Motion to Strike DOC's Motion for Reconsideration from counsel for Ms. Dawson along with a Motion for Hearing. None of the current Civil Service Commissioners were members of the Commission at the time these motions were filed in September 2003. A review of Commission records indicates that, upon the case being dismissed in 2002, the case was listed as "closed" on the Commission's case tracking system. Sometime thereafter, the entire case file was archived. The Commission has no record of receiving any further correspondence or requests for a status update on this matter from either party until 2011, eight (8) years after counsel for Ms. Dawson filed a motion to vacate the dismissal. In 2011, counsel for Ms. Dawson contacted the Commission seeking a status update regarding the motions filed eight (8) years earlier. Upon receiving this request, I had the case file retrieved from archives and further proceedings commenced.

In 2012, the Commission denied the motion to vacate the dismissal. This decision was reversed by order of the Superior Court (Lauriat, J) on May 14, 2014, and this case was remanded to the Commission for further proceedings.

A hearing was conducted on August 4, 2014, which was deemed to be a continuation of the hearing that was commenced on April 9, 2001. Per the Commission's procedural order, the transcript of the April 9, 2001 hearing, without objection from either party, was entered into evidence. The transcript includes the testimony of two witnesses called by DOC: a Nurse at DOC and Duane MacEachern. The hearing on August 4, 2014 was digitally recorded and both parties were provided with a CD of the proceedings. Counsel for Ms. Dawson had a written transcript of the proceedings prepared which is now part of the record. Both parties submitted post-hearing briefs in the form of proposed decisions.

**FINDINGS OF FACT:**

Nineteen (19) exhibits<sup>1</sup> and three (3) chinks were entered into evidence. Based on the documents submitted and the testimony of the following witnesses:

*Called by DOC:*

- Duane MacEachern, Director of Security, Southeastern Correction Center;
- "Nurse<sup>2</sup>", Nurse assigned to Southeastern Correction Center;
- Alfred R. Saucier, Director of Security, MCI-Cedar Junction;

*Called by Ms. Dawson:*

- Kenneth A. Mello, DOC Correction Officer;
- Scott A. Creamer, DOC Lieutenant (Correction Officer I at time of incident)

---

<sup>1</sup> Attorney Zwick, counsel for Ms. Dawson, took custody of ten (10) photographs marked as joint exhibits at the conclusion of the first day of hearing in 2001. According to Attorney Zwick, those photographs were inadvertently destroyed and are no longer available.

I make the following findings of fact.

1. Mr. Dawson was hired by DOC on July 27, 1986 as a Correction Officer I.  
(Stipulated Fact)
2. Mr. Dawson was promoted to Sergeant on June 16, 1992. (Stipulated Fact)
3. At all times relevant to this appeal, Mr. Dawson was assigned to the Addiction Center at Southeastern Correctional Center in Bridgewater, Massachusetts. (Appointing Authority [“AA”] Ex. 5)
4. On June 17, 1999, Correction Officer Scott Creamer was assigned to the “eyeball watch” of three civil commitments during the 3:00 p.m. to 11:00 p.m. shift at Southeastern Correctional Center. (Testimony of Mr. Creamer)
5. At that time, the three civil commitments Mr. Creamer was assigned to watch were confined in the observation cell of D-Ward at the facility. (Testimony of Mr. Creamer; Chalk C)
6. All of the civil commitments in the observation cell were on a finger-food only diet; they were not allowed to use utensils so as to prevent harm to themselves and others. (Testimony of Mr. Creamer; Chalk C)
7. The observation cell was separated from the main ward by a wall with a plexiglass window and a locked door with an open grill. (Testimony of Mr. Creamer; Chalk C)
8. A nurses’ station was adjacent to the observation cell, and was also separated from the observation cell by a wall with a plexiglass window. (Testimony of Mr. Creamer and Nurse; Chalk C)

---

<sup>2</sup> The name of the nurse who testified before the Commission several years ago is not relevant and she is referred to throughout this decision as “The Nurse”.

9. Just after 3:00 p.m. on June 17, 1999, one of the civil commitments in the observation cell, hereinafter referred to as Commitment A<sup>3</sup>, asked to move back to his original bunk in the main ward. Mr. Creamer denied Commitment A's request and told him that he needed to stay in the observation cell. (Testimony of Mr. Creamer)
10. After being told that he needed to remain in the observation area, Commitment A, with a blanket wrapped around him, walked down toward the toilet in the observation area. Commitment A then walked back to the grated-door where Mr. Creamer was reviewing paperwork and again asked to be released from the observation area. As Mr. Creamer began telling Commitment A that he needed to remain in the observation area, Commitment A doused him with liquid from a pink drinking pitcher that was in the observation area. The liquid ended up on Mr. Creamer's face, mouth and other parts of his body. (Testimony of Mr. Creamer)
11. Upon being doused with the liquid, Mr. Creamer, seeking out assistance from the Officer in Charge, Mr. James Dawson, yelled out the name "Jimmy". Mr. Dawson was in the Officers' Station at the time. (Testimony of Mr. Creamer and Chalk C)
12. Mr. Creamer then saw Correction Officer Rebecca Sylvester walk out of the Officers' Station and look in his (Creamer's) direction. He heard Officer Sylvester say, "Dawson, you need to come here." (Testimony of Mr. Creamer)
13. Mr. Dawson walked out of the Officers' Station, began walking in Mr. Creamer's direction, said, "OH" and called for assistance from a Lieutenant whose last name is Taylor. (Testimony of Mr. Creamer)

---

<sup>3</sup> The Commission refers to the civil commitment by a randomly assigned letter, rather than by name, to protect any patient privacy interest of the individual involved.

14. Shortly thereafter, the following individuals were standing next to the grated door:  
Mr. Creamer, Mr. Dawson, Ms. Sylvester and fellow Correction Officer Kenneth Mello, who was assigned to a nearby location and had come to assist. (Testimony of Mr. Creamer and Chalk C)
15. At this point, Commitment A was still in the observation area and had returned to his bed, which was next to an observation window from the adjacent Nurses' Station. Commitment A was lying face up with his head near the wall. (Testimony of Mr. Creamer)
16. Mr. Creamer, Mr. Dawson, Ms. Sylvester and Mr. Mello opened the grated-door and entered the observation area. Mr. Dawson ordered Commitment A to "cuff up", an order that requires a Commitment to roll over and be placed in restraints. At this time, Ms. Sylvester was placing towels on the wet floor; Mr. Dawson was standing near Commitment A's head on one side of the bed; Mr. Creamer was standing near Commitment A's head on the other side of the bed; and Mr. Mello was standing at the foot of the bed. (Testimony of Mr. Creamer and Chalk C)
17. Commitment A refused to roll over and be restrained and tried to punch Mr. Dawson. Mr. Dawson pulled Commitment A forward and grabbed one of his arms; Mr. Creamer grabbed his other arm; and Mr. Mello grabbed Commitment A's feet. Both Mr. Creamer and Mr. Dawson then placed handcuffs on Commitment A's hands. (Testimony of Mr. Creamer)
18. At some point while Commitment A was being restrained, Mr. Creamer heard a knock on the observation window between the observation area and the Nurses' Station. (Testimony of Mr. Creamer)

19. Commitment A was then “sat up” and taken out of the bed. At this point, a correction officer with the last name “Slaiding” had arrived. Correction Officer Slaiding escorted Commitment A out of the observation area. (Testimony of Mr. Creamer)
20. At no point from the time the four (4) DOC employees entered the observation area until Commitment A was escorted out was Mr. Dawson alone with Commitment A. During this period of time, Mr. Creamer never saw Mr. Dawson strike Commitment A. (Testimony of Mr. Creamer)
21. Mr. Creamer proceeded to clean up pieces of the pitcher that had shattered on the floor and then continued to observe the two civil commitments that remained in the observation area. (Testimony of Mr. Creamer)
22. William Taylor was the Lieutenant on duty that day. According to his incident report, he “spoke to Sgt. Dawson and asked him if any force was used, which he [Mr. Dawson] replied no.” (AA Exhibit 5)
23. The Nurse (Nurse) who was working in the adjacent Nurses’ Station subsequently penned an “Incident Report”, writing: “On 6/17/99 @ 1520, I observed a c/o strike a patient with his open hand on both sides of his face. This patient was laying on the bed with his hands cuffed behind his back.” (AA Exhibit 5)
24. On June 18, 1999, Lt. Alfred Saucier was ordered by a DOC Superintendent to investigate whether Commitment A “might have been slapped by a staff member at the conclusion of the Use of Force and subsequent to the application of handcuffs.” (Testimony of Mr. Saucier and AA Exhibit 5)

25. On June 21, 1999, the Nurse who completed the Incident Report that triggered the investigation was interviewed. Mr. Saucier's summary of that interview wrote in relevant part:

“At some point she observed Correction Officers hand cuffing [Commitment A]. She specifically recalled that two of the officers brought him forward on the bed While another officer placed the handcuffs on him.

As conveyed by [the Nurse], an officer she described as being ‘good size’ with his hair tied back with a rubber band struck [Commitment A] with an opened right hand after he had the handcuffs applied. She claimed that the officer was the only officer in the area and was standing at the foot of the bed before striking [Commitment A] while [Commitment A] was lying on his back. [The Nurse] recalled knocking on the window when she observed this. The officer turned and looked at her while shrugging his shoulders.” (AA Exhibit 5)

26. On July 19, 1999, another interview of the Nurse was conducted. In his summary of that interview, Mr. Saucier wrote in relevant part:

“[The Nurse] affirmed that she was not witness to the assault of C.O. Scott Creamer by [Commitment A]. When asked if she observed the Use of Force upon [Commitment A], she answered in the affirmative. She claimed that after the officers had [Commitment A] hand cuffed he was lying on his back. [The Nurse] recalled observing only the ‘big’ Officer with long hair and a pony tail in the cell with [Commitment A] after he was restrained. That is when she observed the Officer slap him on both sides of his face. It is also the time that she banged on the window in an effort to inform him that she was displeased with the officers actions.

[The Nurse] concluded by stating that only a few minutes after she observed [Commitment A] get slapped did other officers enter the cell and remove [Commitment A] from the observation cell.” (AA Exhibit 5)

27. Mr. Creamer was interviewed on June 18, 1999. During that interview, Mr. Creamer stated that he never saw anyone slap [Commitment A] in the face as part of the incident on June 17<sup>th</sup>. (AA Exhibit 5)

28. Mr. Mello was interviewed on July 1, 1999. During that interview, Mr. Mello stated that he never saw anyone slap [Commitment A] in the face. (AA Exhibit 5)

29. Ms. Sylvester was interviewed on June 17, 1999. During that interview, Ms.

Sylvester stated that she was retrieving towels at the time [Commitment A] was being restrained. (AA Exhibit 5)

30. A second nurse [Nurse 2] was interviewed on June 18, 1999 who had been working in the Nurses' Station on June 17<sup>th</sup>. In Mr. Saucier's summary of that interview he wrote in relevant part:

“[Nurse 2] continued her medical supply count when [the Nurse] stated, ‘what’s going on in there?’, referring to the observation cell. She [Nurse 2] recalled observing through the window, Sgt. James Dawson, C.O. Creamer and C.O. Kenneth Mello attempting to get handcuffs on the wrists of [Commitment A]. According to [Nurse 2], it appeared that [Commitment A] was struggling with the staff. Once one wrist was cuffed her attention was directed to her job of counting the medical supplies.

As conveyed by [Nurse 2], at one point [the Nurse] ‘jumped’ from her chair and yelled to the officer, ‘Don’t be ruff (sic). What’s going on? Where are they taking him?’ As the officers were walking [Commitment A] out of the cell [the Nurse] opened the Nurses’ office door.” (AA Exhibit 5)

31. [Commitment A] was interviewed on June 17, 1999. According to Mr. Saucier’s report, [Commitment A] stated that the officers (plural) punched him in the face, but could not recall whether he was hit with an open or closed hand. (AA Exhibit 5)

32. Another Civil commitment [Commitment B] was interviewed on June 18, 1999 who was also in the observation cell at the time. According to Mr. Saucier’s report, [Commitment B] stated that, after restraining [Commitment A], “the officers started beating him up. The Sergeant was slapping him in the face and the officer with the glasses (Mello) was whacking him too. The nurse knocked on the window and said ‘no’ so the guy with the glasses was watching and when the nurse turned around they started hitting him for a long time.” (AA Exhibit 5)

33. A third Civil commitment [Commitment C] was interviewed on July 13, 1999 who was also in the observation cell at the time. According to Mr. Saucier's report, [Commitment C] stated that he observed a "'big Correction Officer with long hair and a pony tail' strike [Commitment A] several times in the face after the handcuffs had been applied." (AA Exhibit 5)

34. Another Nurse [Examining Nurse] who evaluated [Commitment A] at approximately 3:30 P.M. was also interviewed. According to Lt. Saucier's report:

"When initially seen she recalled that he had a contusion on the left side of his forehead along with red marks around his clavicle area. Additionally he had redness and swelling on his right wrist. [Examining Nurse] conveyed that the only medical complaint that [Commitment A] had was the fact that his right wrist hurt. Also evident was redness on his back along with lacerations and scrapes specifically on his lower back."

Lt. Saucier's summary also states in relevant part:

"[Examining Nurse] claimed that [the Nurse] had informed her that she had seen an officer slap [Commitment A] across the face. [The Nurse] advised her to assess his head area for any injuries specific to this act. When asked [Examining Nurse] could not say with any certainty that any injury was caused by an officer striking him in the face." (AA Exhibit 5)

35. Mr. Dawson was interviewed on June 21, 1999. According to Lt. Saucier's report of that interview, Mr. Dawson stated that:

"When [he] arrived at the scene, he entered the observation cell and ordered [Commitment A] to turn over in order that hand cuffs could be applied [Commitment A] refused and therefore a decision was made to force him over on his stomach. Sgt. Dawson claimed that [Commitment A] threw a 'half ass' punch at him and then 'brief struggle' was initiated. [Commitment A] was 'folded up' on the bed being held in that position by two staff members. (AA Exhibit 5)

36. As part of that same interview, Mr. Dawson stated that he "absolutely" and "positively" "did not slap [Commitment A] in the face. (AA Exhibit 5)

37. Mr. Saucier was unable to corroborate the Nurse's assertion that Mr. Dawson was left alone with Commitment A in the observation cell at any time. (Testimony of Mr. Saucier)
38. Mr. Saucier did, however, find the Nurse credible in regard to whether she saw Mr. Dawson strike [Commitment A], and ultimately concluded that Mr. Dawson did strike Commitment A in the face after he was restrained in handcuffs. (Testimony of Mr. Saucier and AA Exhibit 5)
39. Excessive Force under 103 CMR 505.06 is defined as "force which exceeds reasonable force which was reasonable at the time its use began but was used beyond the need for its application." (AA Exhibit 4)
40. Excessive force is prohibited under 103 CMR 505.008 Prohibitions on the Use of Force. Section (1) An employee shall not use or permit the use of excessive force. Section (2) An employee shall not use or permit the use of force as punishment or discipline. (AA Exhibit 4)
41. Mr. Saucier also concluded that Mr. Dawson failed to report to Lt. Taylor that *any* "use of force" was used on Commitment A. (AA Exhibit 5)
42. DOC's definition of use of force is "the use of physical power, the use of a weapon, a chemical agent or instrument of restraint to compel, restrain, or otherwise subdue a person." (AA Exhibit 4)
43. 103 CMR 505.13 (1) states in relevant part:
- "After an employee uses force, the Superintendent, or his designee, or the Special Unit Director, or his designee, shall be notified immediately. In addition, the employee as soon as possible, and in no event later than his tour of duty, unless otherwise authorized by the Superintendent or Special Unit Director, shall submit a written report to the Superintendent, or the Special Unit Director." (AA Exhibit 4)

44. A correction officer is not required to complete a Use of Force packet in cases of routine uses of restraint. (Testimony of Mr. MacEachern)
45. On September 8, 1999, DOC demoted Mr. Dawson from Sergeant to Officer and transferred him to another facility. (AA Ex. 1)
46. The September 8, 1999 disciplinary letter to Mr. Dawson stated in relevant part:

“It is alleged that you used excessive force, you did not follow proper procedures regarding the Use of Force, you were untruthful, and you exhibited poor judgment. Specifically, it is alleged that you slapped the inmate in the face after restraints had been applied, you did not wait for the Lieutenant to arrive before attempting to restrain the inmate, you told the Lieutenant that no force was used, and you allowed the officer that was assaulted to participate in the restraining.

You alleged actions are in violation of the Rules and Regulations, specifically, Rules 10A, 19C and the Use of Force Policy (103 CMR 505 Use of Force).

After reviewing the hearing officer’s report and the investigative report, I find that you do not deny that you did not wait for the Lieutenant to arrive before attempting to restrain the inmate, you did tell the Lieutenant that no force was used, and you did allow the officer that was assaulted to participate in the restraining. These are all violations. Your only denial came in response to the charge that you slapped the inmate after restraints had been applied. However, a credible witness with no apparent reason to lie, observed you in the slapping incident.”

Therefore, I find that you did violate the Rules and Regulations and the Use of Force Policy as cited. This is unacceptable conduct for a supervising officer.

I am therefore demoting you to the position of correction officer effective immediately and I am reassigning you to Old Colony Correction Center.”  
(AA Exhibit 1)

### *Legal Standard*

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct

on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); 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 Appointing Authority's burden of proof by a preponderance of the evidence 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).

### *Procedural Issues*

Procedurally, this is likely the most peculiar appeal in the Commission's history. In 1999, James Dawson filed an appeal with the Commission, contesting DOC's decision to demote him from sergeant to correction officer. The appeal was assigned to former Civil Service Commissioner Lee Johnson, who conducted the first day of hearing in April 2001. Shortly thereafter, Commissioner Johnson was appointed as a District Court judge

requiring a reassignment of the case and a delay in scheduling the second day of hearing. On December 26, 2001, prior to the resumption of the hearing, Mr. Dawson was in a fatal motor vehicle accident. Counsel for Mr. Dawson then filed a motion to substitute Robin Dawson, as Administratrix of Mr. Dawson's estate, as the Appellant.

In November 2002, the parties reached a settlement agreement and the appeal was dismissed. That settlement agreement, however, was contingent upon the State Retirement Board agreeing to provisions which would increase the spousal survivor benefit to Ms. Dawson. (Today, the Commission, to avoid the type of circumstances that occurred here, does not accept "conditional" withdrawals and/or requests for dismissal.) Not surprisingly, the State Retirement Board effectively rejected the terms of the parties' settlement agreement.

In September 2003, counsel for Ms. Dawson, based on the action of the State Retirement Board, then sought to vacate the Commission's dismissal. DOC did not oppose vacating the dismissal, but did oppose substituting Ms. Dawson as the Appellant in this matter. While none of the current Commissioners were members of the Commission at the time, it appears that these motions, along with entire case file, were archived and no action was taken by the Commission at that time. For reasons unknown to the current Commission, counsel for Ms. Dawson then waited eight (8) years to inquire about the status of this appeal. In the interim, exhibits (photographs) that were given to counsel for Ms. Dawson at the conclusion of the first day of hearing were inadvertently destroyed.<sup>4</sup>

---

<sup>4</sup> According to the transcript of the April 2001 hearing, then-Commissioner Johnson stated the following at the conclusion of that hearing: "We're back on the record. We're dealing with the motion by the Appellant for ordering and allowing photographs of scene to be obtained. Because the photographs have already been developed and they're used as exhibits, these photographs will be in the custody of Attorney

In 2011, upon receiving the first request for a status update since 2003 from counsel for Ms. Dawson, I learned that the Commission's case file had been archived several years earlier and no action had been taken by former Commissioners regarding the request to vacate the 2001 dismissal. The file was retrieved from archives and a status conference was held. In 2012, the Commission denied the request to vacate the dismissal. That decision was overturned by the Superior Court in 2014 resulting in a resumption of the full evidentiary hearing that began thirteen (13) years earlier. Prior to the resumption of the hearing, I ruled on a series of motions filed by the parties, including allowing Ms. Dawson to be substituted as the Appellant; and denying a motion by DOC to dismiss the appeal based on laches. The parties agreed to submit the transcript from the first day of hearing into the record, which included the testimony of the nurse who was a percipient witness to the alleged underlying incident in 1999. In August 2014, the second and final day of hearing was concluded and, with the exception of the submission of post-hearing briefs, the record was closed. The proposed decisions were subsequently submitted on September 12, 2014.

### *Analysis*

DOC demoted Mr. Dawson for three (3) reasons:

1. Using excessive force by slapping a Civil commitment in the face after he was in restraints.
2. Exhibiting poor judgment by allowing the correction officer who was assaulted by the Civil commitment to assist in restraining the Civil commitment.
3. Being untruthful by telling a superior officer that no force occurred.

---

Zwicker, with the understanding, and it is the order of this Commission, that no one else will have custody of these photographs, be it a partner or the secretary. Those photographs are to be within your own office,

This case rests largely on the credibility of percipient witnesses, three (3) of whom testified before the Commission: the nurse who allegedly saw Mr. Dawson strike the Civil commitment in the face while in restraints; and Correction Officers Mello and Creamer, who assisted Mr. Dawson in restraining the Civil commitment.

As referenced in the procedural history above, my review of the nurse's testimony was limited to the transcript of her 2001 testimony which was included as part of the record without objection from either party. In addition, I heard live testimony, in 2014, from Officers Mello and Creamer, who were percipient witnesses to the 1999 incident. I also reviewed the entire investigative report of Mr. Saucier, which included reports or summaries of conversations of other percipient witnesses, including Correction Officer Sylvester, two other Civil commitments and another nurse who was working that day.

In regard to the most relevant issues related to this appeal, I did not credit most portions of Mr. Mello's live testimony for the following reasons. First, despite the fact that the incident in question occurred fifteen (15) years ago, Mr. Mello insisted he had a vivid recollection of various details of what occurred during a few-minute span in 2009. This is unlikely and, given the sparse, one-paragraph incident report he completed at the time, it is also unlikely, notwithstanding his testimony to the contrary, that his memory was refreshed from the reading of that report. Second, Mr. Mello, as part of his testimony before the Commission, at times expanded his testimony to include parts of the incident he did not observe, including the Civil commitment throwing liquid at Mr. Creamer. Third, key parts of his testimony were contrary to the credible testimony of Mr. Creamer, including, but not limited to, where the three correction officers were positioned in relation to the Civil commitment's bed and the window between the

---

and the only one who has access to them will be Attorney ... Kirsten Zwicker."

observation cell and the Nurses' office. Fourth, and more generally, Mr. Mello appeared to be too prepared (if not rehearsed) for the questions posed to him.

Mr. Creamer is the other percipient witness who offered live testimony at the August 2014 hearing before me. Given the decade and a half that has transpired since the incident in question occurred, Mr. Creamer, like Mr. Mello, faced a high hurdle to convince me that he could recall what occurred in 1999. Further, although I did not allow DOC to introduce them as exhibits, the Commission is aware of Mr. Creamer's prior disciplinary history at DOC, including a matter that resulted in an unsuccessful appeal to the Commission.

Even against this backdrop, I found Mr. Creamer's testimony to be plausible -- and highly credible. He has reason to remember the 1999 incident because he was doused with a liquid that he first thought might be urine. Further, his testimony did not appear geared toward assisting either side in this matter, often offering testimony that could be viewed as consistent with either parties' divergent version of what occurred. Finally, he limited his testimony only to what he remembered and what he observed. For all of these reasons, and, more generally, because his testimony simply rang true to me, I credited his testimony which ultimately formed the basis of a significant portion of my findings above.

That leaves the testimony of the other percipient witness who testified before former Commissioner Johnson in 2001 -- the nurse whose observations triggered the investigation into this matter. I thoroughly reviewed the written transcript of her 2001 testimony, both before and after the August 2014 hearing. According to the nurse's testimony, she saw the following events:

- Mr. Dawson and other correction officers entered the observation cell.
- Mr. Dawson and other officers restrained the Civil commitment by placing handcuffs on him and laying him, face-up, on the first bed next to the observatory window.
- All of the officers, with the exception of Mr. Dawson, left the observation cell.
- At this point, while no other correction officers and no other civil commitments were present in the observation cell, Mr. Dawson, twice slapped the Civil commitment, who was in handcuffs, in the face with an open palm.
- The other officers then came back into the observation cell and the Civil commitment was escorted out of the observation cell.

Even DOC's lead investigator acknowledges that no other individual, including the Civil commitment who was allegedly slapped, the other Civil commitments who were in the observation cell at the time; as well as the other correction officers, was able to corroborate critical portions of the Nurse's testimony.

None of the other witnesses interviewed by DOC officials (either by Mr. Saucier or one of his employees) stated that Mr. Dawson and the Civil commitment were alone in the observation cell at any time. In fact, *all* of the other witnesses made statements to the contrary, stating that at least two (2) other correction officers were present. Similarly, the two other Civil commitments provided statements that they (the other Civil commitments) were actually in the observation cell at the time and even provided their account of what they observed. During her testimony, the Nurse insisted that no other correction officers and no other Civil commitments were present when the alleged incident (slapping) occurred.

This discrepancy is significant as it relates directly to whether the Civil commitment was restrained when force was used *or* whether the force (if any) observed occurred while Mr. Dawson, and the other correction officers, were seeking to apply the restraints.

As referenced above, the Nurse testified that after the restraints were applied and after the other correction officers left the room and while no other Civil commitments were in the observation cell, Mr. Dawson then slapped the Civil commitment with an open palm – twice. For the reasons stated above, this chain of events is not probable. Thus, I do not credit the testimony of the Nurse in this regard but, rather, credit the credible testimony of Mr. Creamer that he (Mr. Creamer) was present in the observation cell at all times and that he never witnessed Mr. Dawson slap the Civil commitment.

In reaching this conclusion, I did consider DOC's argument that it would be an error to rely on certain defects in the Nurse's testimony as the cross examination of the Nurse relied in part on the photographs that were inadvertently destroyed. Even if those pictures (which were taken after the fact) were available, they would not be determinative of whether individuals other than Mr. Dawson and the Civil commitment were in the room. The Nurse insists they were alone; every other witnesses stated or testified that they were not.

In regard to the second charge, DOC did not point to any rule or regulation that prevented Mr. Dawson from allowing Mr. Creamer to enter the observation cell and help restrain the Civil commitment or that they should have waited for a lieutenant to arrive before entering the observation cell. Similarly, DOC did not show, by a preponderance of the evidence, that the decision to enter the observation cell prior to the arrival of a Lieutenant was as an error in judgment. It is noteworthy that DOC did not even reference this charge as part of the proposed conclusion in their post-hearing brief submitted to the Commission.

Finally, Sgt. Dawson was disciplined because he allegedly “misinformed” Lt. Taylor regarding force used during the restraint of Commitment A. Specifically, DOC claims that Sgt. Dawson reported to Lt. Taylor that “no force was used.” Without the benefit of Lt. Taylor’s testimony, the context of his report that Mr. Dawson had stated that no force had been used is unclear. Further, Director MacEachern also testified that there is no bright line test to determine when a Use of Force packet must be completed, and that this determination relies to some extent on the personal judgment of the individuals involved. To the extent the DOC disciplined Sgt. Dawson for failing to complete the proper paperwork, this charge also fails. It was not until Lt. Taylor had the opportunity to speak with his supervisors and all of the officers involved that a collective decision was made to complete a Use of Force packet in this case. To the extent the DOC alleges that Mr. Dawson misinformed Lt. Taylor about an *excessive* use of force, DOC has failed to establish that any excessive force was used in the first place. Mr. Dawson cannot be disciplined for denying an offense that the DOC has failed to prove.

*Conclusion*

For the above reasons, the appeal under Docket No. D-99-441 is hereby ***allowed***. DOC shall provide Ms. Dawson, as Administratrix of the estate of James Dawson, with any compensation or other rights, other than reinstatement, that Mr. Dawson would have received had he not been demoted for the period September 8, 1999 until his death on December 26, 2001.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein [McDowell – Absent]) on October 30, 2014.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Kirsten Z. Young, Esq. (for Appellant)

Michael J. Rossi, Esq. (for Appellant)

Andrew McAleer, Esq. (for Respondent)