

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

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

NATHAN ORCUTT,
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

D1-10-73

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Nathan Orcutt, (hereinafter "Orcutt" or "Appellant") appealed to the Civil Service Commission (hereinafter "Commission"), from a decision of the Respondent, the Department of Correction (hereinafter "DOC"), as Appointing Authority to terminate him from his position as a Correction Officer I, Head Cook. The Appellant filed a timely appeal. A pre-hearing conference was conducted on June 1, 2010 and a full hearing was held at the offices of the Commission on January 13, 2011. The hearing was declared private. Sixteen (16) exhibits were entered into the record. The hearing was digitally recorded. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT

Based on the documents submitted and the testimony of:

For the Appointing Authority:

- William Devine, Director of Security, Department of Correction;

For the Appellant:

- Nathan Orcutt, Appellant;
- Dana Orcutt, wife of Appellant;

I make the following findings of facts:

1. The Appellant is a twenty-six (26) year old male who lives in Gardner, Massachusetts. He has a bachelors degree in criminal justice from Fitchburg State College. He has been married to his wife Dana for three (3) years. They have a young child. (Testimony of Appellant)
2. The Appellant was employed as a Correction Officer I at DOC from September 9, 2007 until he was terminated on March 29, 2010. (Stipulated Facts)
3. The Appellant began his employment at DOC at Old Colony Correctional Center (Old Colony) as a Correction Officer / Cook and then transferred to the Massachusetts Correctional Institute-Concord (MCI Concord) in July 2008. (Testimony of Appellant)
4. At MCI Concord, the Appellant served in the position of Correction Officer I, Head Cook. When he was first transferred to MCI Concord, he worked the 11:00 A.M. to 7:00 P.M. shift. (Testimony of Appellant)
5. The Appellant testified that he believed that there was resistance and animosity toward him at MCI Concord because his Head Cook position allowed him greater shift bidding and request for time off privileges than those individuals with more seniority than him. Further, according to the Appellant, his Head Cook position meant that he could not be pulled out of

the kitchen to work other areas of the facility, as other employees in the kitchen were often called upon to do. (Testimony of Appellant)

6. The Appellant testified that during his employment at MCI Concord, he bragged to co-workers about his ability to pick better shifts and days off and the fact that he wasn't pulled out of the kitchen as they were. (Testimony of Appellant)
7. According to the Appellant, his bragging resulted in threats and harassment from his co-workers. (Testimony of Appellant)
8. The Appellant testified that he received harassing phone calls at home, that the tires of his car were slashed while in a DOC parking lot and that he was told by co-workers that he was "on his own" if a riot ever broke out at MCI Concord. (Testimony of Appellant)
9. The Appellant testified that he never reported these incidents to DOC because he believed it would only make matters worse. (Testimony of Appellant)
10. The Appellant testified that sometime prior to May 25, 2009, while he was working the 11:00 A.M. to 7:00 P.M. shift, he discovered a batch of rotten hamburger in the refrigerator which he believed was caused by negligence of employees working the 5:00 A.M. to 1:00 P.M. shift. According to the Appellant, instead of inquiring with employees from the earlier shift, he reported the matter directly to a DOC Captain. (Testimony of Appellant)
11. Sometime after this "hamburger incident", the Appellant's request to transfer to the 5:00 A.M. to 1:00 P.M. shift was approved by DOC. (Testimony of Appellant)
12. On May 25, 2009, the Appellant penned a letter addressed to employees on the 5:00 A.M. to 1:00 P.M. shift and posted it on the employee bulletin board. The letter, in its entirety, states:

Let me start out by apologizing for any actions, or comments I made that may have offended you in any way. I'm young and obviously haven't grasped the magnitude of the situation we face here in the

Kitchen. I have all the respect in the world for those of you that have done your time, running blocks, etc. Time in is a huge factor in this camp, and I have very little in. Understand that any comments that I have made in the past was never intended to insult, down play, or rub in your face the fact that my job gets certain perks that yours doesn't. Like I have already said I am young and I like to joke, but joking from a person in my position can be taken as an insult or cockiness, and I am sorry for doing so.

I would also like to take the time to try and mend some old wounds. The hamburger situation was a huge mistake on my part. I should have found Brian and realized he was here before I made the decision to get rid of those burgers. In my defense, I did tell Marly, and the burgers were rotten. I had to get that fridge working. After I told Captain Kortez, Captain Edwards handcuffed me, demanding all the paperwork and a report to be written. (NOTE: despite rumor there was NO confidential report written.) I'm not trying to make you guys look bad to get this kitchen to close. I could care less if this kitchen closes or not because I'm here regardless. Again I am sorry for this to have ever happened, I should have reported the fridge's being down, and fixed the meal without a report.

As you are all aware, I have decided to go 5X1. This letter is to try and put water under the bridge, so the atmosphere in the kitchen can remain relatively normal. I understand that me being there may cause people with a lot more time than me to possibly be pulled. This situation is very sensitive, but please understand I'm not doing it on purpose to get at you guys, I'm doing it for my family. I never see my son and this is the only way (sic) I can be there for him. I have no problem getting pulled to cover chow when needed. That is a great idea and I welcome it.

In conclusion this to me is the easiest and best way to let all of you know I'm sorry for everything leading up to this. I am going to respect the situation and keep my two cents to myself whether or not I think its funny. And I will do my job as a CO/Headcook to the best of my ability. I hope this letter answer (sic) any questions you may have and if not, I am willing to talk about anything else that I may have done that upset you.

Sincerely,

Nathan Orcutt

(Exhibit 11)

13. On May 28, 2009, DOC initiated an investigation at the request of Acting Chief of Investigative Services Paul Oxford. The investigation was initiated after MCI Concord Superintendent Peter Pope reported that the Appellant had written the above-referenced letter. (Exhibit 15)
14. Lt. Mark McCaw of DOC's Internal Affairs Unit conducted an investigation and completed a report that was submitted to Oxford on July 22, 2009. (Exhibit 15)
15. McCaw interviewed all member of the 5:00 A.M. to 1:00 P.M. kitchen shift, including the Appellant, as well as Deputy Superintendent Lois Russo and Captain Michael Edwards. (Exhibit 15)

16. During his interview, the Appellant told McCaw that everything was fine on the 5:00 A.M. to 1:00 P.M. shift and that the letter was an “overreaction” on his part. (Exhibit 15)
17. McCaw concluded that there was insufficient evidence to show that the Appellant or any other member of the kitchen staff was being harassed or that there was a hostile work environment. (Exhibit 15)
18. The Appellant testified before the Commission that he didn’t tell McCaw the truth about the harassment he was facing from his co-workers on the 5:00 A.M. to 1:00 P.M. shift because it would have made matters worse and he just wanted the whole matter to go away. (Testimony of Appellant)
19. The Appellant was absent from work on October 26, 2009. (Testimony of Appellant)
20. The Appellant subsequently submitted an “Illness Certification Form” to DOC regarding the October 26th absence. The form states in bold print: “TO BE COMPLETED BY MEDICAL PROVIDER”. (Exhibit 16)
21. Next to the heading “Medical Provider”, the Appellant hand-wrote “St. Vincent Medical Group.” (Exhibit 16)
22. Next to the heading “Licensed Profession”, the Appellant circled “licensed physician”. (Exhibit 16)
23. Next to the pre-printed words: “He / she was incapacitated by personal illness or injury due to”, the Appellant hand-wrote the word “confidential”. (Exhibit 16)
24. On top of the signature line which states “Signature of Medical Provider”, the Appellant acknowledges that he signed the document with a fictitious, illegible name. (Exhibit 16)
25. The Appellant was absent again on November 3, 2009. (Testimony of Appellant)

26. The Appellant again filled out and submitted an “illness certification form” with the same information, with different dates and again signed the document with a fictitious, illegible name where there is supposed to be a signature of a “medical provider”. (Exhibit 16 and Testimony of Appellant)
27. DOC Director of Security William Devine testified before the Commission that he reviewed the notes and found them suspect because the signature looked odd and because one of the notes was for November 6, 2009, but the Appellant was absent on November 3rd. Devine notified Superintendent Peter Pepe of his suspicions and Pepe directed him to conduct an investigation. (Testimony of Devine)
28. Devine called the doctor’s office listed on the note and spoke with Trisha Dawson, the office manager, who stated that the Appellant had not been seen in the office on October 26, 2009 or November 6, 2009. (Testimony of Devine, Exhibit 3)
29. In addition, Pepe instructed DOC employee Jorma Maenpaa to personally go to the doctor’s office, show them the notes and verify that the signatures on the notes were not authentic. She did so and received confirmation that the notes were false. (Testimony of Devine)
30. Rule 18(b) of DOC rules and regulations state: “Employees who abuse sick leave, fail to produce satisfactory medical evidence of illness (physician’s slip) when requested, or use sick leave for personal matters not related to illness, will be denied said sick leave, and may be subject to disciplinary action up to and including discharge, in compliance with all valid collective bargaining agreements.” (Exhibit 4)
31. Article 8, Section 1(k) of the applicable collective bargaining agreement states in relevant part that “the Department’s Illness Certification Form must be completely and accurately filled out to be on an authorized leave. Failure to provide such medical evidence within

seven (7) days of its request or upon the employee's return to work may result, at the discretion of the Appointing Authority, in denial of sick leave for the day(s) involved, and/or disciplinary action." (Exhibit 5)

32. Devine interviewed the Appellant on December 11, 2009 regarding the notes. The Appellant admitted that the notes were false. When asked by Devine if he had an explanation, the Appellant stated that he had family issues that he didn't wish to discuss. (Testimony of Devine, Exhibit 3)

33. During his testimony before the Commission, the Appellant testified that he was helping his wife cope with a personal crisis as a result of a disturbing incident that she experienced. (Testimony of Appellant)

34. In a letter dated December 22, 2009, an individual by the name of Rev. Dr. Robert Stair notified DOC that he was working with the Appellant and his wife as a result of a traumatic incident that occurred on October 29, 2009. Rev. Dr. Stair states in part that "this situation created severe distress in their marriage and also in their individual lives." (Exhibit 12)

35. During his testimony before the Commission, the Appellant testified that he falsified the notes because he had some "very, very difficult issues at home" that he needed to deal with and didn't want anyone to know about them, alluding to the incident referenced in Rev. Dr. Stair's letter. The Appellant also testified that his wife had received a "disturbing phone call" on October 26, 2009. (Testimony of Appellant)

36. Asked if there was an incident that occurred on or about October 25, 2009, the Appellant's wife, Dana, testified before the Commission that she listened to a voice mail threatening the Appellant. According to Dana, this resulted in a serious argument between her and the Appellant because she felt that "the family was in jeopardy." (Testimony of Dana Orcutt)

37. Exhibit 9 is a spreadsheet produced by DOC indicating that it has terminated every individual charged with submitting fraudulent medical evidence. (Exhibit 9)

CONCLUSION

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.”

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the 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." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 923, rev.den., 426 Mass. 1102, (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, (2003); 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, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

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., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, 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).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) and cases cited.

DOC has shown by a preponderance of the evidence that it had just cause for terminating the Appellant as a Correction Officer / Head Cook. On two separate occasions, the Appellant knowingly submitted false documentation to DOC to substantiate his use of sick time. Specifically, the Appellant completed an “Illness Certification Form” in October and November 2009 indicating that he was examined by a licensed physician at St. Vincent Medical Group in Sterling, Massachusetts. Each time, he wrote a fictitious signature on the form, purporting to be a licensed physician who had examined the Appellant and determined that he was incapacitated for “confidential” reasons. In reality, the Appellant never visited St. Vincent Medical Group on the dates in question and he was never examined by a licensed physician.

The Appellant seeks to justify the submission of this false documentation by arguing that he wanted to keep the reasons for his absences confidential. His argument is flawed. First, the Illness Certification Form, which must be completed by a medical provider, specifically allows the medical provider to not disclose the nature of the illness if he/she believes “it is of a confidential nature.” (Exhibit 16) Second, the issue here isn’t whether the reasons for the Appellant’s absences were confidential. Rather, the issue is that the Appellant never visited St. Vincent Medical Group on the dates in question and he was never examined by a licensed physician on the dates in question. Yet, he submitted false documentation with a fictitious signature, claiming that he was examined by a licensed physician at St. Vincent Medical Group. No amount of revisionism on the Appellant’s part can change that.

The Appellant also asks the Commission to consider that he was under pressure as a result of a hostile work environment and a personal crisis involving his wife. Many of the allegations raised by the Appellant, including that his tires were slashed in a DOC parking lot, did not ring true to me. There were subtle, but important inconsistencies between the testimony of the

Appellant and his wife regarding the allegation of slashed tires which caused me to question whether this vandalism occurred at all. In regard to the allegation of a hostile work environment, there is no doubt that the Appellant created ill will among his co-workers. He candidly acknowledged that he “bragged” to other kitchen employees about his ability to choose better shifts than more senior employees and he penned an eyebrow-raising letter to his co-workers which included an unsupported allegation that he was handcuffed by a DOC captain after notifying the Captain about spoiled hamburger in a refrigerator.

As a result of that letter, DOC initiated its own investigation to determine if the Appellant was being harassed by fellow employees. As part of that investigation, the Appellant told DOC investigators that everything was fine and he no longer had any issues with his co-workers. While it is plausible that the Appellant made those statements solely to put the matter behind him, he has not shown, as part of this de novo proceeding that he was the victim of harassment by his fellow employees.

More broadly, the results of that DOC investigation regarding a hostile work environment, and the Appellant’s own testimony, paint a picture of an individual who exercised wildly poor judgment on several occasions. That poor judgment continued when the Appellant decided to submit fraudulent Illness Certification Forms to DOC seeking to justify two days of absence.

While I credit the testimony of the Appellant’s wife regarding the personal crisis that she confronted in November 2009, this does still not justify or excuse the Appellant’s decision to submit false medical documentation to DOC.

Finally, the Appellant has failed to show that DOC has treated any other similarly situated individuals differently. DOC records convincingly show that they regularly terminate individuals shown to have submitted false medical documentation.

DOC has proven, by a preponderance of the evidence, that it had just cause for terminating Nathan Orcutt from his position as a correction officer and there is insufficient evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him. The Appellant's appeal under Docket No. D1-10-73 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on July 14, 2011.

A true record. Attest:

Commissioner

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)(l), 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:

Stephen Pfaff, Esq. (for Appellant)

Heidi Handler, Esq. (for Appointing Authority)