

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JASON MONTEIRO,  
*Appellant*  
v.

Docket No.: D1-12-234

DEPARTMENT OF CORRECTION,  
*Respondent*

Appearance for Appellant

Jason Monteiro  
Pro Se

Appearance for Respondent

Jody A. Brenner, Esq.  
Department of Correction  
Division of Human Resources  
One Industries Drive  
P.O. Box 946  
Norfolk, MA 02056

Commissioner:

Cynthia Ittleman<sup>1</sup>

**DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION**

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Jason Monteiro (hereinafter “Mr. Monteiro” or “Appellant”), filed an appeal on August 9, 2012, regarding the decision of the Department of Correction (hereinafter “Department” or “Respondent”), to terminate his employment. Mr. Monteiro filed a timely appeal. A pre-hearing conference was held on September 4, 2012 at the offices of the Civil Service Commission (hereinafter “Commission”). At the pre-hearing conference the parties filed a stipulation in which Mr. Monteiro admitted to fraudulent acts for which he was terminated. Having admitted his actions, Mr. Monteiro seeks a modification of the Department’s discipline. The Respondent filed a

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

Motion for Summary Decision on October 3, 2012, and Mr. Monteiro responded in writing to the motion on October 12, 2012.

### **Findings of Fact**

1. Mr. Monteiro held the civil service title of Correction Officer I and had been employed in that title at the Department since July 12, 1998. At all pertinent times, Mr. Monteiro performed background checks regarding pre-employment applicants. He was a tenured civil service employee until he was terminated on July 27, 2012. (*Stipulated Facts*)
2. Mr. Monteiro had received one prior unrelated disciplinary action in 2000 resulting in a five (5) day suspension<sup>2</sup> that was not appealed to the Commission. (*Stipulated Facts*)
3. The basis for Mr. Monteiro's termination is that he deliberately fabricated and falsified documents related to numerous pre-employment background checks he conducted. He also falsely reported conducting interviews for numerous applicants. (*Stipulated Facts*)
4. Mr. Monteiro also created false names and wrote reports claiming that these non-existent individuals had provided references for applicants to the Respondent. (*Respondent's Motion*)
5. The Respondent held a hearing regarding Mr. Monteiro's alleged actions on June 13, 2012 where Mr. Monteiro did not testify. (*Stipulated Facts*)
6. The Respondent notified Mr. Monteiro of its decision to terminate his employment via letter dated July 27, 2012, finding that his actions were in violation of the Department's Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, Rule 1 and General Policy 1, and for violating the Department's Selection and Hiring Policy, 103 DOC 201. (*Stipulated Facts and Respondent's Motion: Exhibit A*)

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<sup>2</sup> The Stipulation does not indicate the reason for the discipline but the Respondent's Motion avers that it was for a different reason than the matter in this case.

7. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, General Policy 1 indicates: “Nothing in any part of these rules and regulations shall be construed to relieve an employee of his/her primary charge concerning the safe-keeping and custodial care of inmates or, from his/her constant obligation to render good judgment and full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations, and policy issued by the Commissioner, the respective superintendents, or by their authority.” (*Respondent’s Motion*)
8. Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, Rule 1 indicates: “You must remember that you are employed in a disciplined service which requires an oath of office. Each employee contributes to the success of the policies and procedures established for the administration of the Department of Correction and each respective institution. Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent.” (*Respondent’s Motion*)
9. Department’s Selection and Hiring Policy, 103 DOC 201 indicates: “The background investigation shall include, but not be limited to, the following: a criminal records check (local police departments, Massachusetts Board of Probation, National Criminal Information Center (NCIC), National Law Enforcement Telecommunications System (NLETS), Registry of Motor Vehicles, FBI fingerprints), and Warrant Management System (WMS) check; past employment check (minimum of five (5) years, if applicable), character reference check (minimum of one (1) reference); summary report write-up; and

all original documentation pertaining to applicable entrance requirements.”

*(Respondent’s Motion)*

10. The Respondent has in the past terminated other employees for Rule 1 and General Policy violations. This includes past employees who have submitted fraudulent medical certifications, submitted fraudulent illness certification forms, failed to complete work on background investigations and stolen a small amount of gasoline, and a recruit who falsely identified himself as a police officer, along with others who violated General Policy 1 and Rule 1, resulting in their termination. *(Respondent’s Motion: Exhibit A)*
11. Mr. Monteiro acknowledged his wrong-doing and admitted to the misconduct after learning of his termination and acknowledged that it had been going on for approximately one year at the pre-hearing conference. *(Stipulated Facts)*
12. Mr. Monteiro filed an appeal with the Commission on August 9, 2012.

### **Discussion**

#### *Summary Decision Standard*

Section 1.01(7)(h) of the applicable standard adjudication Rules of Practice and Procedure at 801 CMR provides that, “When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues”. 801 CMR 1.01(7)(h). The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. See Catlin v. Board of Registration of Architects,

414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980).

*Applicable Law*

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.

#### *Respondent's argument*

The Respondent argues that the termination was justified based on the admitted misconduct. The security and integrity of the Department was severely compromised by the failure of Mr. Monteiro to conduct thorough and accurate background investigation of candidates

who would potentially be working in the Department's facilities. Mr. Monteiro's actions violated both the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, specifically General Policy I and Rule 1, as well as the Department's Selection and Hiring Policy which details the process in conducting a proper background investigation of applicants. While there have been no instances provided by the Department in which other employees also specifically falsified documents related to job applicant background searches, the Department has terminated the employment of other employees for similar fraudulent misconduct, as well as other misconduct, in violation of both Rule 1 and General Policy 1.

#### *Appellant's Argument*

Mr. Monteiro does not deny his misconduct but only asks that another form of discipline be imposed instead of termination. He was going through a tough time in his personal life at the pertinent times as he and his wife were at the beginning stage of their separation. He acknowledges that he was not focused on his work load but will respect whatever decision the Commission reaches.

#### *Analysis*

Since Mr. Monteiro has stipulated to the allegations, there is no genuine issue of material fact precluding summary decision in favor of the Department that it had just cause to discipline him. In this situation, Mr. Monteiro was terminated for substantial misconduct, in this case, deliberately fabricating and falsifying job application documents for as long as a year. It is admirable that Mr. Monteiro has been willing to admit to his misconduct, although he apparently did not do so until after the Department terminated his employment.

Mr. Monteiro only asks for a penalty other than termination be imposed upon him. The Commission's "power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from partisan political control." Police Commr. of Boston v. Civil Serv. Comm'n., 39 Mass.App.Ct. 594, 600 (1996). Others who have committed fraudulent acts have also been terminated. In addition, there is no other evidence of bias or other inappropriate action taken by the Department. 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." Burns v. Fall River Public Schools, 24 MCSR 117, 120 (2011); e.g., Falmouth v. Civil Serv. 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). Since the facts are stipulated and we make no contrary fact findings, modification of the discipline is unwarranted.

Mr. Monteiro's case is admittedly somewhat unique in that he has admitted his wrongdoing, albeit belatedly. In addition, the wrongdoing did not involve one instance of fraud but apparently a number of such instances over a nearly one (1) year period, which compromised Department security and integrity through the hiring process by failing to vet Correction Officer candidates as required. However, the Respondent has, on numerous occasions, terminated employees for General Policy 1 and Rule 1 violations, which are the same regulations Mr. Monteiro violated. Some of those terminations involved one form of fraud or another, including one employee who submitted fraudulent medical certification, one who submitted fraudulent

illness certification forms, and one who failed to complete work on background investigations and stole a small amount of gasoline. Based on this information, the Commission cannot find that Mr. Monteiro's actions were less egregious than those employees similarly terminated and that the Department's decision to terminate his employment, based on his misconduct, was inappropriate.

### CONCLUSION

For the above reasons, the Respondent's Motion for Summary Decision is granted and the Appellant's appeal under Docket No. D1-12-234 is hereby *dismissed*.

Civil Service Commission

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Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on February 20, 2014.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:

Jason Monteiro

Jody A. Brenner, Esq. (for Respondent)