COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

KRIS DUQUETTE,

Appellant

v.

D-02-81

DEPARTMENT OF CORRECTION,

Respondent

Appellant's Attorney:

Timothy J. Ebacher, Esq.
45 Merrimack Street: Suite 310
Lowell, MA 01852
(978) 454-8484
tebacher@verizon.net

Respondent's Attorney:

Elizabeth Day, Esq.
Assistant Labor Counsel
Department of Correction
70 Franklin Street
Boston, MA 02110-1300
(617) 727-3300, ext. 167
ejday@doc.state.ma.us

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Kris Duquette (hereafter "Duquette" or "Appellant'), is appealing the decision of the Appointing Authority, the Department of Correction (hereafter "DOC" or "Appointing Authority), terminating him

from his position as Correction Officer I on February 5, 2002 for authoring a crude and derogatory picture aimed at a Captain at the Department of Correction. The appeal was timely filed. A hearing was held on August 7, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Two tapes were made of the hearing. All witnesses, with the exception of the Appellant, were sequestered.

FINDINGS OF FACT:

Sixteen (16) joint exhibits were entered into evidence at the hearing. The record was kept open for the Appointing Authority to provide records of discipline imposed on other employees for making racial comments or committing racial acts for the five years prior to the Appellant's termination. That information was subsequently provided and is entered as Exhibit 17. Based on the documents submitted into evidence and the testimony of:

For the Appointing Authority:

- DOC Captain Alvin Notice;
- DOC Captain Brian McDonald;
- DOC Correction Officer Crystal Johnson;
- DOC Captain Thomas Quinlivan;
- DOC Lieutenant Stan Chamallas;

For the Appellant:

- Kris Duquette, Appellant

I make the following findings of fact:

1. The Appellant, Kris Duquette, was a tenured civil service employee of the Department of Correction in the position of Correction Officer I at the time of the

incident on January 19, 2002. He had been employed by DOC for approximately four (4) years. (Exhibit 1: Stipulated Facts)

2. Prior to the disciplinary action taken against him on February 5, 2002, the Appellant was suspended for one (1) day on September 18, 2000 for "poor schedule adherence" and suspended for three (3) days on October 24, 2000 for "no call / no show". (Exhibit 13)
3. While attending the DOC's Training Academy, the Appellant received a copy of the "Rules and Regulations Governing All Employees of the Massachusetts Department of Correction." (Exhibit 1: Stipulated Facts; Exhibits 14 & 15)
4. Alvin Notice is currently a Deputy Superintendent at the Northeast Correctional Center and has worked for DOC for 24 years. At the time of the incident, he held the rank of Captain and was serving as a shift commander at MCI Shirley. Mr. Notice is African-American. (Testimony of Notice)
5. DOC General Policy, Rule 1 states in part, "Employees should give dignity to their position and be circumspect in personal relationships regarding the company they keep and places they frequent." (emphasis added) DOC General Policy, Rule 6 states in part, "In your working relationships with co-workers you should treat each other with mutual respect, kindness and civility, as become correctional professionals." (Exhibit 14)
6. In January 2002, the Appellant was assigned to the 11:00 P.M. to 7:00 A.M. shift at MCI Shirley. (Testimony of Appellant, Exhibit 1: Stipulated Facts)

7. On January 18, 2002, the Appellant reported for duty on the 11:00 P.M. to 7:00 A.M. shift at MCI Shirley with co-worker (and then-girlfriend) Lisa Gleason. (Testimony of Appellant, Exhibit 1: Stipulated Facts)
8. Shortly after their arrival at 11:00 P.M., the Appellant and Gleason (who is now his wife) requested leave for the upcoming shift, a practice that is allowed if the shift commander determines there is sufficient coverage. (Testimony of Appellant)
9. The 3:00 P.M. to 11:00 P.M. shift commander on January 18, 2002, then-Captain Notice, notified Ms. Gleason that she was scheduled to appear for a hearing at the conclusion of her shift, so her request was denied. (Testimony of Appellant and Notice)
10. The Appellant, standing next to Ms. Gleason, then said, "you should just go home sick". (Testimony of Appellant and Notice)
11. Notice then ordered both the Appellant and Ms. Gleason to their posts. The Appellant complied with the order and reported to the B-2 housing unit. (Testimony of Appellant, Notice and Exhibit 1: Stipulated Facts)
12. The Appellant testified before the Commission that he was "mad" at then-Captain Notice and felt as if Notice was "picking on us". (Testimony of Appellant)
13. While on duty, the Appellant drew a picture depicting a black person with large lips and bulging eyes with a penis in his mouth with the inscription, "Notice is a cunt". (Testimony of Appellant, Exhibit 12)
14. The Appellant testified that he put the cartoon on a podium where he was working and that he meant to throw it away before anyone saw it. (Testimony of Appellant)

15. Although the podium is in view of a surveillance camera that can be seen by other employees of the Department of Correction, there was no evidence presented to the Commission showing that anyone viewed the cartoon via the surveillance camera.
16. The next day, on January 19, 2002, then-Captain Notice was again assigned as Shift Commander for the 3:00 P.M. – 11:00 P.M. shift. (Testimony of Notice)
17. While making rounds, Notice checked the log book located on the podium in the B-2 housing unit. When Notice picked up the log book, a piece of paper fell on the floor and he saw the name "Notice" on it. (Testimony of Notice)
18. After making his rounds, he called the B-2 housing unit and asked the correction officer assigned to the unit about the piece of paper. The correction officer indicated that she had thrown it away. Notice told her to retrieve the paper from the trash and then went back to the B-2 housing unit to look at it. At that point, he saw the offensive cartoon. (Testimony of Notice)
19. Notice testified before the Commission that he was "pretty upset" at the "very offensive" cartoon. Notice, an African-American, testified, "its hitting home when I see something like this" and that the cartoon reminded him of a troubling time in his career many years ago at MCI Gardner when he used to see the words "Notice is a nigger" on the wall. (Testimony of Appellant)
20. Notice filled out an incident report regarding his discovery of the cartoon which triggered an internal investigation by DOC. (Testimony of Appellant, Exhibit 2)
21. Notice testified that he never saw the Appellant after filling out the incident report, the Appellant never apologized to him and that he (Notice) was never informed of

any attempt by the Appellant to meet with him in order to apologize. (Testimony of Appellant)

22. DOC Captain Brian McDonald was assigned to investigate this matter. As part of that investigation, he interviewed the Appellant on January 23, 2002. The Appellant admitted that he drew the cartoon in question. (Testimony of McDonald, Exhibit 4)
23. Captain Thomas Quinlivan was the 11:00 P.M. – 7:00 A.M. Shift Commander at MCI Shirley at the time and he testified before the Commission that he met with the Appellant after becoming aware of the incident report, but he was not responsible for the investigation. Quinlivan testified that the Appellant acknowledged authoring the cartoon and said it was a joke. Quinlivan suggested that the Appellant apologize to then-Captain Notice. Sometime after that meeting, the Appellant told Captain Quinlivan that he wanted to apologize to Captain Notice, but, to the best of his knowledge, the apology never took place. (Testimony of Quinlivan)
24. Lieutenant Stan Chamallas was the Appellant's supervisor in January 2002 and he (Chamallas) reported to then-Captain Notice. During his testimony, Chamallas described Notice as a quiet, mild-mannered person. Asked if he had any discipline issues with the *Appellant*, Chamallas replied, "no". (Testimony of Chamallas)
25. The Appellant testified before the Commission and described his own actions as, "stupid and very embarrassing", but testified that the cartoon was not meant to be a racial slur. The Appellant testified that he wanted to apologize to Notice, but was under the impression that Notice "didn't want me near him" as a result of authoring the cartoon. (Testimony of Appellant)

26. Under cross-examination, counsel for DOC asked the Appellant why he didn't apologize to Notice at the DOC disciplinary hearing or, over the past four years, send Notice some communication apologizing. The Appellant did not have an answer for those questions, but testified that he planned on apologizing to Notice during his testimony before the Commission. As witnesses were sequestered as part of the hearing, Notice was not present when the Appellant testified. Counsel for DOC, unsatisfied with that response, asked the Appellant why he didn't apologize to Notice when he saw him in the lobby of the Commission offices prior to the hearing. The Appellant testified that he congratulated Notice on his recent promotion in the lobby, but wanted to apologize publicly to Notice during the Commission hearing. (Testimony of Appellant)
27. On January 23, 2002, the Appellant was detached with pay and without prejudice, pending an investigation. (Exhibit 1: Stipulated Facts, Exhibit 8)
28. By letter dated January 25, 2002, Mr. Duquette was notified that he was being charged with departmental rules violations and that a hearing was scheduled for February 5, 2002. (Exhibit 1: Stipulated Facts, Exhibit 9)
29. On February 5, 2002, a DOC disciplinary hearing was held charging the Appellant with violations of the General Policy and Rules 1 and 6 of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction. (Exhibit 1: Stipulated Facts)
30. Following the DOC disciplinary hearing, the Appellant was terminated from his position as a correction officer by letter dated February 6, 2002. (Exhibit 1: Stipulated Facts, Exhibit 10)

31. In the five years prior to the Appellant's termination, three other correction officers were disciplined for incidents involving racial remarks. In January 1998, DOC suspended a correction officer for five days for stating to a black correction officer on Martin Luther King Day, "In keeping with tradition, I would like to wish you Happy James Earl Ray Day." In March 2001, another correction officer was suspended for five days for writing (in reference to an inmate) on a paper towel, "he was going to say he's just a stupid niger (sic)". In the March 2001 case, the correction officer initially denied being the author of these racial remarks. In August 2001, DOC terminated a recruit in the training academy for making racially insensitive remarks. In a cover letter that accompanied these records, DOC argues that the five day suspensions do not establish disparate treatment as these officers: 1) "had significantly longer service than the Appellant" (8 years and 15 years respectively as opposed to the Appellant with 4 years); and 2) the discipline was handled at the institution level – as opposed to the Appellant's case which was referred to the DOC Commissioner. Both of the correction officers suspended for five days had been suspended previously on at least one occasion. (Exhibit 17)
32. The Appellant filed a timely appeal with the Civil Service Commission. (Exhibit 11)

CONCLUSION

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). *See* Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct.

473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

There is no dispute that the Appellant is the author of the offensive and derogatory cartoon. He acknowledged being the author when first confronted by the Department of Correction and he confirmed this during his testimony before the Commission.

The cartoon, which depicts a black man with large lips and bulging eyes with a penis in his mouth, under the caption, "Notice is a cunt", is beyond offensive. It shocks the conscience of any reasonable person who looks at it -- and it clearly took its toll on DOC Deputy Superintendent Alvin Notice, an African American man who is a 24-year veteran of DOC. Four years after the incident, Notice was still visibly upset by the incident.

While the Appellant was remorseful during his testimony before the Commission, he has never apologized to Notice during the four years since the incident occurred. His testimony that he was unable to effectuate the apology rings hollow. In four years, the Appellant could have, at a minimum, sent a note or some other form of communication to Notice expressing his regret. He did not.

If the Commission decides to modify a penalty, it must provide explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep**.** 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission**.** 39 Mass. App. Ct. 594, 602 (1996)**.** When the

Commission modifies an action taken by the appointing authority, it must remember that the 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. Id. at 600. Town of Falmouth v. Civil Service Commission**.** 61 Mass. App. Ct. 796, 801 (2000).

DOC produced a record of all discipline taken against DOC employees in the five years prior to this termination that were related to racial remarks. Those records show that two tenured correction officers were each suspended for five days for an incident involving racial comments. In one of these cases, a correction officer who had been previously suspended on two occasions during his 15 year tenure with DOC, was suspended for five days for writing the racially offensive "n word" in reference to an inmate, which he initially denied writing. DOC argues that the two five-day suspensions do not establish disparate treatment as both of those officers had significantly longer service and the discipline was handled at the institution level, as opposed to being referred to the Commissioner. The issue of *who* at DOC meted out these five-day suspensions is not relevant in regard to disparate treatment. DOC is the Appointing Authority and *all* disciplinary actions taken by the Appointing Authority in regard to similarly situated individuals must be considered when determining whether or not there is any evidence of disparate treatment. In regard to years of service, the Appellant in this case had just under four years of service while the correction officer who received a five-day suspension for writing the "n" word had been employed by DOC for approximately 15 years at the time of the incident. The correction officer who made the callous and imbecilic remarks regarding "James Earl Ray Day" had eight years of service at the time

of the incident. The correction officer who was terminated for making racially offensive remarks was a recruit who lacked tenure during his probationary period.

The difference in years of service, in addition to other aggravating factors, distinguish this case from those in which the 5-day suspensions were issued. The offensive cartoon in this case was directed at the Appellant's *superior*, a Captain who was serving as shift commander – and was written in a retaliatory mode just after the Appellant's then-girlfriend and fellow correction officer had her request to go home denied by Captain Notice. While authoring a racist cartoon is, on its own, repugnant, it is particularly troubling when directed toward a superior officer within a paramilitary organization such as the Department of Correction. Previous Commission decisions have well-established that officers must comport themselves in a professional and exemplary manner in order to ensure the efficient and orderly operation of a paramilitary organization. Captain Notice's decision to disallow a fellow officer's request for leave and ordering the Appellant to his post was met with one of the more inappropriate responses imaginable by the Appellant. Put simply, such a response can not stand, particularly in a paramilitary organization. Further, the cartoon's offensive nature on racial grounds is compounded by its explicit pornographic depiction.

Finally, the Commission finds that the referenced five-day suspensions in the two other cases, while not pending before the Commission, were grossly insufficient given the facts involved. The Commission will not use those cases as a guide (or moral compass) to lower the bar on what is considered appropriate discipline against individuals who use racist statements or illustrations as a weapon against others in the workplace. One would have hoped that this century's workplace had been purged of such offenses;

this case clearly illustrates that it has not. There is no place for such behavior in the workplace and there is no place for Kris Duquette --or any others that would engage in such behavior-- at the Massachusetts Department of Correction.

DOC has proven, by a preponderance of the evidence, that it had just cause for terminating Kris Duquette from his position as a correction officer for violating General Policy and Rules 1 and 6 of the DOC rules and regulations. There is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him.

For all of the above reasons, the appeal under Docket No. D-02-81 is hereby ***dismissed***.

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Christopher C. Bowman, Commissioner

By a 3-1 vote of the Civil Service Commission (Guerin-YES, Bowman-YES, Marquis-YES; Taylor-NO) on October 19, 2006.

A true record. Attest:

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Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Elizabeth Day, Esq.
Timothy Ebacher, Esq.