

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

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

SCOTT A. CREAMER
Appellant

v.

MASSACHUSETTS
DEPARTMENT OF CORRECTION,
Respondent

Case No.: D-13-21

Appearance for Appellant:

Regina Ryan, Esq.
Louison, Costello, Condon & Pfaff, LLP
101 Summer St.
Boston, MA 02110

Appearance for Respondent:

Julie E. Daniele, Esq.
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Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Scott A. Creamer (“Appellant” or “Sgt. Creamer”), filed an appeal on January 28, 2013 contesting the decision of the Massachusetts Department of Correction (“DOC” or “Department”) to suspend him for five (5) days and reassign him to another DOC institution following events on July 10, 2012 and related matters.²

¹ The Commission acknowledges the assistance of Law Clerk David Roberson in the drafting of this decision.

² While this case was pending, on September 20, 2013, Mr. Creamer filed appeal Docket No. G2-13-214, pursuant to G.L. c. 31, § 2(b), claiming that he had been unlawfully bypassed for promotion by DOC to the position of Correction Officer III because of his alleged status on leave. On February 6, 2014, the Commission dismissed the appeal as moot because Mr. Creamer had been promoted. Following a Motion for Reconsideration of the dismissal

A pre-hearing conference was held at the offices of the Commission on February 26, 2013. A full hearing was held on March 28, 2013.³ The Department requested a public hearing. The Appellant objected but requested that witnesses be sequestered. Both requests were granted; the Appellant was not sequestered. The hearing was digitally recorded and the parties were given copies of the digital recording of the hearing. The parties submitted post-hearing briefs. For the reasons stated below the appeal is denied but the discipline is modified.

FINDINGS OF FACT

Based on Exhibits 1 through 9⁴, as well as the stipulations of the parties, the testimony of:

Called by the DOC:

- Correction Officer A
- Richard Metivier, Correction Officer
- Sergeant Pamela Majka
- Superintendent Allison Hallett
- Sergeant Frederick Fontaine

Called by the Scott Creamer:

- Sergeant Scott Creamer, Appellant
- Stephen Hocking, Correction Officer, MCOFU Grievance Coordinator

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and credible evidence and reasonable inferences therefrom, I make the following findings of fact:

of the bypass appeal, Mr. Creamer was granted the same promotional seniority date, for civil service purposes only, as other Correction Officers who were promoted from Certification #00785.

³ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission, with Chapter 31 or any Commission rules taking precedence if there is a conflict between them. There is no such conflict here.

⁴ This includes Exhibits 1 – 6, 7, 7A, 7B, 7C, and 8 and 9.

1. Sgt. Creamer was appointed to the position of Correction Officer I on September 8, 1996 and promoted to Correction Officer II on September 25, 2005. He is a permanent, tenured employee and was assigned to the Massachusetts Alcohol and Substance Abuse Center (“MASAC”) at all pertinent times. (Stipulated Facts) MASAC is a minimum security DOC institution where Officers are not armed. (Testimony of Sgt. Fontaine and Sgt. Majka)
2. On July 10, 2012, Sgt. Creamer was assigned to the Control Room at MASAC with Officer Metivier during the 3:00pm to 11:00pm shift. (Ex. 7A, Testimony of Sgt. Creamer and Officer Metivier)
3. Correction Officer A, a female officer, also worked at MASAC in July, 2012. On July 10, 2012, Correction Officer A worked on the 3:00pm to 11:00pm shift and she was assigned to Post 119, also known as the Administration Building officer position. Correction Officer A’s duties in this position include: collecting the mail at the control room, distributing it, and returning the mailbox to the control room, taking inmates to the Old Colony Correctional Center (“OCCC”) for scheduled activities and obtaining equipment for such activities, covering inmate snacks, and other assignments through the shift such as assigning in locking down one of the bigger units at 9:00pm. (Testimony of Correction Officer A)
4. On July 10, 2012 Correction Officer A entered the control room without incident:
 - a. on the first occasion, to retrieve the mail box located in the control room;
 - b. on the second occasion, to return the mail box to the control room;
 - c. on the third occasion, to obtain the van keys and the softball roster containing a list of inmates that were going to (OCCC); and

- d. on the fourth occasion Correction Officer A entered the control room to return the van keys and retrieve her work equipment. (Testimony of Correction Officer A)⁵
5. Shortly after dropping the MASAC inmates off at OCCC on July 10, 2012, Correction Officer A received a call informing her that there was a player injured during the softball game and she should pick up the MASAC inmates from OCCC. Correction Officer A and Officer Hogan entered the MASAC control room to retrieve the van keys in order to pick up the inmates. At the same time, Correction Officer A retrieved the logbook in the control room but in order to do so she had to move a lunch bag that was in front of the logbook. This was the fifth occasion on the day in question that Correction Officer A entered the control room. (Testimony of Correction Officer A)
6. When Correction Officer A and Officer Hogan returned from OCCC with the MASAC inmates, they waited in the lobby for approximately five (5) minutes, at a time when the inmates are supposed to be in a secure place, before the door to the trap area was opened. When the control room door to the trap area was opened, Sgt. Creamer processed the inmates in the computer and Officer Hogan entered the institution with the inmates. (Exs. 7A, 7C; Testimony of Sgt. Creamer, Correction Officer A, and Officer Metivier)
7. While Officer Hogan and the inmates were allowed to reenter the institution, Correction Officer A attempted to enter the control room to return the logbook and van keys and to obtain the equipment she needed to perform her job within the institution. Officer Metivier indicated to her that the Appellant had the keys and that she had to pass the logbook and van keys through the metal box in the wall of the control room in order to return them and to pick up her equipment. Correction Officer A did as Officer Metivier indicated; he retrieved the

⁵ Exhibit 7C shows other Corrections Officers entering and exiting the control room.

items from the metal box in the wall from Correction Officer A and he passed the equipment to her through the metal box. (Exs. 7A, 7C, Testimony of Correction Officer A and Officer Metivier)

8. In route to covering inmate snacks, Correction Officer A passed Shift Commander Lieutenant Gerald and informed him of the incident at the control room. Lieutenant Gerald then asked Sgt. Pamela Jane Majka to talk to Sgt. Creamer about locking the control room door. (Testimony of Sgt. Majka and Correction Officer A, Ex. 7A) Sgt. Majka has worked in the control room. (Testimony of Sgt. Majka)
9. The control room door was unlocked after Correction Officer A left. That door is usually unlocked for safety and emergency response reasons, and because of potential fire hazards. (Testimony of Sgt. Majka)
10. MASAC Post 9, "Control Room Officer-In-Charge – Additional Specific Duties," paragraph 6 provides, "Allow no other staff member or visitor into the control room area, unless so assigned or authorized by the Shift Commander, with the exception of the Superintendent, Deputy Superintendent, Director of Security, Shift Commander, Facility Supervisor, and locksmith." However, it is the practice at MASAC to permit officers to enter the control room as needed to obtain and return equipment and perform required functions. Correction Officer A's duties require her to have access to the control room area. (Ex. 3, Testimony of Sgt. Majka, Sgt. Fontaine and Correction Officer A, Exs. 5, 6, 7A)
11. At or about the July 10, 2012 incident, Correction Officer A alleged that Sgt. Creamer had, on at least a couple of occasions, called her to ask if she wanted to work overtime in a manner which she found intimidating. (Testimony of Correction Officer A) Correction Officer A filed a complaint against Sgt. Creamer. Sgt. Fontaine, the Inner Perimeter Security

(“IPS”) Commander, was assigned to conduct an investigation concerning the events. Sgt. Fontaine found that Correction Officer A’s complaints about intimidating and/or harassing phone calls were unsupported by other evidence. (Testimony of Sgt. Fontaine, Ex. 7A)

12. During his investigation, Sgt. Fontaine recorded his interviews of Sgt. Creamer, Officers Metivier, Hogan, Correction Officer A, Lieutenant Gerard, and Sgt. Majka. As part of his investigation, Sgt. Fontaine also viewed recorded camera footage from the control center and trap area and incident reports and he drafted a report about his investigation. During the interview of Sgt. Creamer, Sgt. Creamer admitted that the control room door was locked on Correction Officer A at the pertinent time on July 10, 2012 but he stated that Correction Officer A made him uncomfortable because she moved his lunch bag in order to obtain the logbooks earlier that day. (Testimony of Sgt. Fontaine, Exs. 7A, 7B) At the Commission hearing, Sgt. Creamer admitted that he was the one who locked the control room door. (Testimony of Sgt. Creamer)

13. During the investigation, Sgt. Creamer alleged that Correction Officer A had locked the control room door on him on August 27, 2012. Sgt. Fontaine reviewed the control room videotapes from the control room area for July 10, 2012 and August 27, 2012 and other dates and found that the door was locked on Correction Officer A on July 10, 2012 and that the door was not locked on Sgt. Creamer on August 27, 2012. Sgt. Fontaine found that Sgt. Creamer’s actions on July 10, 2012 departed from the normal practices of the institution. (Testimony of Sgt. Fontaine, Exs. 7A, 7B, 7C)

14. In June, 2011, there was another incident involving Correction Officer A and Sgt. Creamer. At that time, Sgt. Creamer, as supervising officer, required Correction Officer A to be the

second officer on the strip search of a male inmate.⁶ (Testimony of Correction Officer A and Sgt. Creamer) Unless absolutely necessary, female officers are not to be second officers during strip searches of male inmates. There was no emergency requiring Correction Officer A to act as the second officer at the time in question. The inmate involved in the strip search filed a grievance relating to the search. (Testimony of Sgt. Fontaine and Correction Officer A) While the matter was being investigated, the Appellant repeatedly tried to talk to Correction Officer A, who said she did not want to talk to him and felt as though she was being intimidated by the Appellant. (Testimony of Correction Officer A). Lieutenant Gerald had instructed Correction Officer A and Sgt. Creamer not to speak to each other. (Testimony of Correction Officer A and Sgt. Creamer) The DOC suspended Sgt. Creamer three (3) days for his conduct during the investigation relating to the inmate's strip search grievance. (Ex. 9; *see* Facts 24 and 25, *infra*).

15. MASAC is a relatively small institution, with sixteen (16) Correctional Officers on the 7am to 3pm shift and the 3pm to 11pm shift, and eleven (11) officers on the 11pm to 7am shift, along with some specialized staff. Based on the limited MASAC staff and the design of the MASAC facilities, DOC cannot effectively separate two officers at MASAC like the Appellant and Correction Officer A. With both Officers working in the institution, Superintendent Hallett was concerned for the safe operation of the institution and liability related thereto. (Testimony of Superintendent Hallett)

16. On December 6, 2012, Sgt. Creamer was served a Notice of Charges and Hearing that required Sgt. Creamer to attend a hearing and alleging that he harassed Correction Officer A and he was less than truthful and/or evasive during the related investigation, in violation of DOC Blue Book Rules 6(a), 6(b), (19(c) and 19(d) and DOC regulation 103 DOC 238, which

⁶ It appears that the second officer, at least a female officer, does not conduct a male strip search but monitors it.

is the DOC's Policy for the Prohibition of Sexual Assault, Domestic Assault, Domestic Violence and Harassment ("Harassment Policy") (Ex. 6)

17. DOC Blue Book Rule 6(a) provides, in pertinent part, "...Correctional goals and objectives can best be achieved through the united and loyal efforts of all employees. In your working relationships with coworkers you should treat each other with mutual respect, kindness, and civility, as become correctional professionals. ..." (Ex. 1)
18. DOC Blue Book Rule 6(b) states, in pertinent part, "Do not foster discontent or otherwise tend to lower the morale of any employee ..." (Ex. 1)
19. DOC Blue Book Rule 19(c) provides, in pertinent part, "Since the sphere of activity within an institution or the Department of Correction may on occasion encompass incidents that require thorough investigation and inquiry, you must respond fully and promptly to any questions or interrogatories relative to the conduct of an inmate, a visitor, another employee or yourself. ..." (Ex. 1)
20. DOC Blue Book Rule 19(d) provides, in pertinent part, "It is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasingly so, according to rank. ..." (Ex. 1)
21. DOC regulation 103 DOC 238.01, part of the Harassment Policy, provides, "The Commonwealth has a zero-tolerance policy for sexual assault, domestic violence and harassment occurring within our outside the workplace. It is the Department's policy that all employees work in an environment free from all forms of sexual assault, domestic violence and harassment. These acts undermine the integrity of the work place and the personal safety of the individuals." (Ex. 2)

22. DOC regulation 103 DOC 238.03(10), part of the Harassment Policy, provides, “Harassment is defined as “(sic)(i) three (3) or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that does in fact cause fear, intimidation, abuse or damage to property” (Ex. 2)⁷

23. The DOC hearing regarding events on July 10, 2012 was conducted on December 17, 2012.

By letter dated January 23, 2013, DOC Commissioner Luis Spencer informed Sgt. Creamer,

... This hearing was convened as a result of an investigation which revealed that on or about July 10, 2012, you failed to allow another officer to enter the Control room to return equipment, forcing this officer to return her equipment through a pass-through hatch. The normal practice at MASAC is to allow officers to enter the Control room to return equipment. In prohibiting this officer from entering the Control Room to return her equipment, you singled her out without valid justification. You have repeatedly intimidated the officer identified above. At this point, your actions amount to harassment of this officer. You were less than (sic) truthful and/or evasive when questioned by a Department investigator in the above referenced investigation. ... I find sufficient evidence upon which to sustain the charges as noted above. ... I find just cause to permanently reassign you to MCI-Cedar Junction effective tomorrow, January 24, 2013; you are to report to Superintendent Saba at the start of your regular shift. Additionally, I am imposing five (5) days of suspension without pay to be served on January 28, 29, 30, 31 and February 1, 2013....”

(Ex. 5)

MCI-Cedar Junction is equidistant from the Appellant’s home as it is to MASAC.

(Testimony of Superintendent Hallett)

24. The Appellant’s disciplinary record indicates:

on 1/13/2000, he incurred a one-day suspension that was held in abeyance when he “verbally threatened Capt. Duggan”;

on 9/16/2004, he incurred a five (5) day suspension that was reduced to a two (2) day suspension, which was held in abeyance for one year when he “requested another officer to relay a harassing message to an inmate”;

⁷ The text of 103 DOC 238.03(10) is identical to the definition of harassment in G.L. c. 268B, § 1, which statute authorizes victims of harassment to request a protective order in court. Unlike statutory provisions relating to domestic violence (*e.g.* G.L. c. 209A), under G.L. c. 258B, the alleged victim of harassment seeking a protective order need not be, for example, related to, or residing with the alleged abuser.

on 2/14/12, he incurred a three (3) day suspension when he “engaged in inappropriate discussion regarding another incident/intimidating/belligerent”; and

on 2/16/12, he incurred a five (5) day suspension, which was reduced to a letter of reprimand (per settlement agreement dated 8/9/12) when he “failed to follow proper procedure and policy/primary responder”.
(Ex. 8, Testimony of Sgt. Creamer)⁸

25. With regard to the Appellant’s discipline dated February 14, 2012, Superintendent Hallett

wrote to the Appellant on that date stating the reason for the discipline:

On July 5, 2011, an investigation was initiated at the request of Assistant Deputy Commissioner Karen Hetherson as a result of her receipt of allegations that you harassed a coworker. The investigation is concluded and it has been determined there is just cause for disciplinary action to be taken against you as a result of your failure to exercise good judgment in your dealings with a fellow staff person. As part of this investigation you were interviewed on December 9, 2011, and Wade Reyes was also present as union representation.

Specifically, on July 2, 2011 you engaged a correction officer in a confrontational discussion regarding an incident which occurred the week before. A witness to the incident confirms that you initiated the conversation and pursued the issue even after being advised by the officer that she did not want to speak with you. At the time you were not on duty, and reports are that you refused to leave the institution for several minutes. In addition, a witness reports that you raised your voice, were intimidating and belligerent.

Accordingly, I find sufficient evidence that your conduct was in violation of the Rules and Regulations ... specifically:

General Policy – Nothing in any part of these rules and regulations shall be construed to relieve an employee ... (ellipsis in original) from his/her constant obligation to render good judgment, ... (ellipsis in original) (Ex. 9)

6. Interpersonal Relationships Among Employees

(a) In your working relationships with coworkers you should treat each other with mutual respect, kindness, and civility, as become correctional professionals. You should control your temper, exercise the utmost patience and discretion, and avoid all collusions, jealousy, and controversies in your relationships with co-workers.

(b) Do not foster discontent or otherwise tend to lower the morale of any employee, (ellipsis in original)

⁸ Officer Hocking and the Appellant asserted that at least part of the Appellant’s disciplinary history should not appear in Exhibit 8 because the discipline was held in abeyance for one (1) year, which they understood to mean that those disciplinary actions would be removed from the Appellant’s record if there had been no additional discipline with the following year. However, the basis of this understanding was unclear and there was no documentation in support thereof.

19. Administrative Procedures

(d) It is the duty and responsibility of all institution and Department of Correction employees to obey these rules and official orders and to ensure they are obeyed by others. This duty and responsibility is augmented for supervising employees, and increasing so, according to rank.

Consequently, I find just cause for a three (3) days (sic) suspension without pay Be forewarned that any future violations of the Rules and Regulations ... may result in disciplinary action being taken against you up to and including termination. In addition, any future behavior of this type will be subject to an automatic transfer out of the facility.
(Ex. 9)

26. Sgt. Creamer did not appeal the three (3) day suspension. (Testimony of Sgt. Creamer)

27. Sgt. Creamer filed a timely appeal at the Civil Service Commission on Jan. 28, 2013.

(Administrative Notice)

DISCUSSION

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.”

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).

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). For the Commission to uphold an appointing authority's decision, it must find, based on the facts, that "there was reasonable justification for the actions 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 (1984); *See* Commissioners of Civil Service v. Municipal Court of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003); *see* McCarthy v. Brookline School Department, 21 MCSR 13, 16 (2008).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the

Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass.App.Ct. 408, 412 (2000).

“The ‘power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.’ ” Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by 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.” Falmouth at 824 (citing Police Comm'r of Boston v. Civil Serv. Comm'n, 39 Mass.App.Ct. 594 , 600 (1996)).

Analysis

A preponderance of the evidence establishes that Sgt. Creamer's conduct violated DOC DOC Blue Book Rules 6(a), 6(b), and 19(d) and that DOC had just cause to discipline him. Specifically, Sgt. Creamer violated DOC Rules when he locked Correction Officer A out of the control room on July 10, 2012. This was Sgt. Creamer's second intimidation of Correction Officer A, with the previous event involving his intimidation of Correction Officer A during the investigation related to an inmate's grievance related to a strip search. A preponderance of the evidence also establishes that Sgt. Creamer violated DOC Rule 19(c) and that DOC had just cause to discipline the Appellant. In particular, Sgt. Creamer was untruthful to Sgt. Fontaine, and/or the Appellant was not completely cooperative with Sgt. Fontaine's investigation, when the Appellant alleged that Correction Officer A had locked the door on him on August 27, 2012. However, there is insufficient evidence to support the allegation that the Appellant harassed

Correction Officer A in violation of 103 DOC 238. On that point, Sgt. Fontaine's investigation found that Correction Officer A's allegations that Sgt. Creamer made intimidating phone calls to her regarding overtime shifts were unsupported. Since DOC regulation 103 DOC 238, like G.L. c. 258B, § 1, requires a minimum of three (3) such acts to constitute harassment and only two have been proved here by a preponderance of the evidence, the allegation of harassment fails. (Ex. 6) In view of these findings at the Commission, the five (5) day suspension is modified to three (3) days.

The findings here are disturbing. On July 10, 2012, Sgt. Creamer was upset that Correction Officer A moved his lunch bag. As a result, he decided that Correction Officer A would not be allowed into the control room. He used his position in the control room to lock the door so Correction Officer A could no longer access the control room to return equipment and obtain other equipment needed to perform her tasks as a Correction Officer. Sgt. Creamer's conduct resulted in Correction Officer A being singled out in this manner and in violation of the normal practice. While Post 9 appears to restrict the number of officers who can access the control room, it is abundantly clear from the credible testimonial evidence and video recordings that officers like Correction Officer A who need to obtain and return equipment are regularly allowed access to the control room. Moreover, on the same day, Correction Officer A had entered the control room on three (3) separate instances with no complaint or trouble from Sgt. Creamer. It was only after Correction Officer A touched Sgt. Creamer's lunch bag, while she was trying to obtain the logbook she needed to perform her job, that Sgt. Creamer decided to have her locked out of the control room. A preponderance of the credible testimony and the videotape of the trap area indicate that the normal practice in MASAC was to allow Officers with the 119 assignment access to the control room. In fact, well more than a preponderance of the

credible evidence indicates that the normal practice in MASAC is to allow other officers access to the control room as their work requires, as well as to address any emergencies that may arise within the control room, and that the door is usually unlocked and open whenever inmates are not passing through the trap area. Therefore, it is clear that Sgt. Creamer's conduct contravened well-established practice that he did so in order to intimidate Correction Officer A because she had touched his lunch bag.

The July 10, 2012 incident was not the first time Sgt. Creamer intimidated Correction Officer A. Specifically, during an investigation in 2011 related to an inmate grievance regarding a strip search that Sgt. Creamer ordered Correction Officer A to monitor, he repeatedly attempted to discuss the matter with her, despite the fact that she told him she did not want to discuss it with him and they had both been told not to discuss it with each other. Female Officers in MASAC, like Correction Officer A, only monitor male inmate strip searches when there is an emergency situation and this occasion did not involve an emergency.

The Appellant argues that his reassignment from MASAC to MCI-Cedar Junction was a punitive transfer, in violation of civil service law, especially since an inmate at Cedar Junction had killed his cousin. (Testimony of Officer Hocking⁹) DOC avers that the reassignment did not change the Appellant's job and MCI-Cedar Junction was equidistant from the Appellant's home and, therefore, it was not a transfer but a permitted reassignment, especially in view of the limited staffing alternatives in a small institution like MASAC.¹⁰ In addition, DOC asserts, the Appellant's reassignment was in the best interest of institutional and public safety.

⁹ Officer Hocking testified that he worked with the Assistant Deputy Commissioner to determine where the Appellant would be reassigned but that was prior to the knowledge that the inmate who killed the Appellant's cousin would be incarcerated at MCI-Cedar Junction.

¹⁰ Superintendent Hallett testified on rebuttal that she was working to reassign Sgt. Creamer to Bay State Correctional Center in Norfolk but that Sgt. Creamer was out on leave so that Cedar Junction Superintendent James Sabo had not had a chance to discuss it with Sgt. Creamer. DOC's January 23, 2013 letter to Sgt. Creamer indicated that he was reassigned to Cedar Junction beginning January 24, 2013. Sgt. Creamer testified at the March

Section 35 of G.L. c. 31, § 35 provides, in part,

Subject to the provisions of section forty-one governing the transfer of persons who have served as tenured employees since prior to October fourteen, nineteen hundred and sixty-eight, a tenured employee may be transferred to a similar position in the same or in another departmental unit after request in writing

Id.

Section 41 of the civil service statute states, in part,

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished.

Id.

Since the Appellant has not been lowered in rank or compensation, the Commission does not have jurisdiction under section 35 regarding his reassignment. Even if the Appellant was transferred, it is clear that it had just cause to do so.

Conclusion of Commissioners Ittleman and McDowell

Based on the findings of facts and applicable law and rules, the appeal under Docket No. D-13-21 is hereby denied but the discipline should be *modified* such that the five (5) day suspension be reduced to a three (3) day suspension.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

28, 2013 Commission hearing that he worked at Cedar Junction one day but that he had not worked since that time, which may be related to the Appellant's bypass appeal referenced in n. 2, *supra*.

Prevailing Conclusion of Chairman Bowman and Commissioner Stein

We adopt the findings of fact of the hearing officer and concur with her conclusion that there is just cause to discipline Mr. Creamer. We do not believe, however, that a downward modification of the 5-day suspension is warranted. As stated in the well-reasoned analysis of the hearing officer, Mr. Creamer engaged in disturbing actions here, including, but not limited to, intimidation of a female correction officer. In doing so, he violated multiple DOC rules. This, along with a disciplinary history that shows a pattern of similar behavior, warrants DOC's decision to impose a relatively modest 5-day suspension of this superior officer.

Civil Service Commission

Christopher C. Bowman
Chairman

To allow the appeal in part and modify the suspension from 5 days to three days:

| | |
|-------------------------|-----|
| Bowman, Chairman: | No |
| Stein, Commissioner: | No |
| Ittleman, Commissioner: | Yes |
| McDowell, Commissioner: | Yes |

April 17, 2014

As a majority of Commissioners is required to allow an Appellant's appeal, the appeal is *denied* for the reasons stated in the prevailing conclusion of Chairman Bowman and Commissioner Stein

A true record. Attest:

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:

Regina M. Ryan, Esq. (for Appellant)

Julie E. Daniele, Esq. (for Respondent)