

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

STEPHEN McDONNELL,
Appellant

v.

D-05-125

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

James W. Simpson, Esq.
Merrick, Louison & Costello, LLP
67 Batterymarch Street
Boston, MA 02110

Respondent's Attorney:

Elizabeth Day, Esq.
Assistant Labor Counsel
Department of Correction
70 Franklin Street, Suite 600
Boston, MA 02110-1300

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Stephen McDonnell (hereinafter "Appellant"), is appealing the decision of the Respondent, Department of Correction (hereinafter "DOC") as Appointing Authority, in terminating his employment for violating Rule 7(c) of the Rules and Regulations of the Massachusetts Department of Correction and Massachusetts Correctional Institution - Concord (hereinafter "MCI-Concord") Post Orders. The appeal was timely filed. A full hearing was held at the

offices of the Civil Service Commission on September 27, 2005. Three (3) tapes were made of the hearing. Both parties submitted post-hearing briefs. As no notice was received from either party, the hearing was declared private. Twenty-four (24) joint exhibits were stipulated to by the parties and entered into the record.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1-24), and the unsequestered testimony of the Appellant, Superintendent of MCI-Concord Peter A. Pepe, Jr. and Captain Edward McGonagle of the DOC Office of Investigative Services, I make the following findings of fact:

1. The Department of Correction is the employer and Appointing Authority of the Appellant. (Stipulated)
2. At all relevant times, the Appellant was an employee (Correction Officer I) of the DOC, assigned to MCI-Concord. (Appellant Testimony; Exhibits 5 and 6)
3. The Rules and Procedures of the Department of Correction set forth rules of conduct for employees of the DOC, including but not limited to the General Policy, which provides, in pertinent part:

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, from his/her constant obligation to render good judgment [and] full and prompt obedience to all provisions of law, and to orders not repugnant to rules, regulations, and policy issued by the

Commissioner, the respective Superintendents, or by their authority.
(Exhibit 4)

4. Rule 7(c) of the Rules and Procedures of the Department of Correction provides, in pertinent part:

7. GENERAL CONDUCT - EMPLOYEES

(c) Any department of Correction or institution employee who is found sleeping at his/her post during the course of their official duties, or otherwise flagrantly, wantonly, or willfully neglecting the duties of his/her office shall be subject to immediate discipline up to and including discharge.
(Exhibit 4)

5. Respondent acknowledged receipt of a copy of the Rules and Procedures of the Department of Correction by letter dated July 21, 1997. (Exhibit 5)
6. MCI-Concord is a level-4, medium security prison. Pursuant to DOC policy, the Superintendent of an institution with a security rating level of 4, 5 or 6 may designate an area, or areas, within the institution as the Special Management Unit (hereinafter "SMU").¹ The SMU is used to house inmates placed into administrative segregation, protective custody, and/or disciplinary detention. (Exhibit 10)
7. The management of the SMU, and the conditions of an inmate's confinement, are detailed in 103 CMR 423. Generally, an inmate's movement in the SMU is severely restricted; they are allowed out of their cells one hour per day for recreation and three times per week to shower. (Id.)

¹ In various reports and documents submitted into evidence, the SMU is variously referred to as the Segregation Unit, Dept. #9 and the J-1 Unit.

8. The Post Orders and Special Instructions Addendum for the SMU set forth multiple directives regarding the specific duties attendant to working in the SMU. These directives included, but were not limited to, the following:

1. It is essential that all Officers assume responsibility for the completion of all duties...and to constantly remain alert.
 2. Conduct all unit counts per policy 103 DOC 501.18 and 103 CON 512 - Inmate Accountability.
 3. Maintain surveillance of inmates.
 4. Maintain IMS² log screens recording all counts, checks..etc.
 5. Conduct rounds in the unit at regular intervals (half hour minimum)
 6. Be alert of any/all security violations.
 7. Ensure all reports generated...are complete, correct, accurate and submitted in a timely manner.
 8. Officers shall physically check all cell doors, locks, controls...
 9. Ensure that all "trap" (i.e. "sallyport") doors to your area are locked.
 10. Physically and visually inspect all cell doors at all counts.
- (Exhibits 7, 8)

9. The Appellant signed the Post Order Acknowledgement Sheet for the SMU on June 28, 2004. As provided in the document, an officer's signature indicates that he has "reviewed the entire post order for the above named post on the date(s) indicated." (Exhibit 9)

10. The SMU at MCI-Concord is a thirty (30) cell unit. Ten (10) cells each are located on three (3) separate tiers. (Pepe Testimony)

² IMS refers to the Inmate Management System, which is the DOC's database used to file staff reports, and to access information about inmates. The IMS is password protected, such that no other employee could have logged on identified as the Appellant.

11. There are two (2) “sallyport” doors from the main hallway of the prison into the SMU. These sallyport doors are operated via a control panel located within the SMU. (Id.)
12. The control panel is located in a locked “cage” on the main floor of the SMU (hereinafter the “Control Room”). The unit officer maintains control of the control panel. The control panel includes indicator lights to show an officer whether a cell door is open or closed. (Id.)
13. There are two offices, a staff bathroom and a few supply closets located with the SMU. (Pepe Testimony; Exhibit 15)
14. The number of officers assigned to the SMU varies among the three shifts. The overnight shift (11:00 p.m. to 7:00 a.m.) is a one (1) officer shift because activity is light as the inmates are generally sleeping during this shift. (Pepe Testimony, Exhibit 6)
15. No sergeant or other supervisor is assigned to the SMU on the 11:00 p.m. to 7:00 a.m. shift. (Exhibits 7 and 8)
16. The SMU is under videotape surveillance. There is no time delay in the videotape of the control area. (McGonagle Testimony; Exhibit 12)

17. On June 27, 2004, the Appellant, whose regular bid position was in the Health Services Unit (hereinafter “HSU”) on the 11:00 p.m. to 7:00 a.m. shift, was assigned to the Special Management Unit (hereinafter “SMU”). The Appellant had previously worked in the SMU on at least one other occasion. (Appellant Testimony; Exhibit 6)
18. The Appellant began his shift at 10:50 p.m. and made his first security round at 10:55 p.m. (Exhibit 11)
19. The Appellant left the Control Room door unsecured on multiple occasions; while conducting a security round at 11:30 p.m. and when he entered the unit office at 11:40 p.m., 1:05 a.m., 1:08 a.m. and 1:14 a.m. (Exhibit 11)
20. At approximately 11:48 p.m., the Appellant went to one of the supply closets and returned to the office with one large bag of white towels and one large bag of buffer pads. Neither of these items was required for the Appellant’s assigned duties. (Pepe Testimony; Exhibit 12)
21. At 12:03 a.m., the Appellant entered the unit office and turned out the lights. (Exhibit 11)

22. The light in the office remained off until 1:04 a.m. Several seconds after turning the office light on, the Appellant exited the office and proceeded to the Control Room. (Exhibit 11)
23. A video surveillance tape confirmed that the Appellant did not leave the office during the one (1) hour period from 12:03 a.m. to 1:04 a.m. (Exhibit 12)
24. Thirty (30) minutes after the Appellant entered the office and turned the lights off, an oscillating fan in the Control Room fell over onto a cement floor. (McGonagle Testimony; Exhibit 11)
25. Inmates yelled to the Appellant to turn the fan off because it was making an excessive amount of noise. However, the Appellant did not respond to the inmates' yelling, nor did he respond to the overturned fan. (Exhibits 11 and 12)
26. During the one (1) hour period in which the Appellant was in the office with the lights off, the inmate in cell 5³ escaped from his cell three (3) times. First, the inmate ran down to a second inmate's cell door and then returned to his cell. Next, the inmate left his cell and proceeded to the staff bathroom area. Then, the inmate ran from the bathroom area to the Control Room and reached

³ The inmate who escaped from cell 5 had been housed in that cell from June 15, 2004 through the date of the escape. After his escape, he was transferred to another cell in the SMU. On the morning of June 28, 2004 (the morning after the escape), a DOC locksmith conducted a check of all locking devices in the SMU, including cell 5, and determined that they worked properly. (Exhibit 11)

under the rear of the cage, near where the fan had been plugged in. Finally, he opened his cell and threw an object, later identified as a wet shirt, onto the “flats” (the main level of the SMU). (Exhibit 11)

27. The Appellant left the office at approximately 1:05 a.m. From the office, the Appellant first went to the Control Room and then to the staff bathroom. The Appellant observed running water running from the bathroom onto the “flats” area, and also observed water spraying from the fire sprinkler in the staff bathroom. (Id.)

28. The Appellant did not respond to this issue with any evident degree of emergency. (Exhibit 12)

29. Instead, the Appellant filed false reports in IMS indicating that he conducted security rounds at 12:04 a.m., 12:30 a.m. and 1:15 a.m. (Exhibit 11)

30. IMS reports are supposed to be entered contemporaneous to the incident reported. (Pepe Testimony; McGonagle Testimony).

31. However, a review of the Appellant’s log entries by the DOC’s Technology Services Division revealed that the 12:30 a.m. report was actually inserted at 1:27 a.m. and the 1:15 a.m. report was actually inserted at 2:40 a.m. (Exhibit 11)

32. In violation of the SMU post orders, the Appellant did not make the required rounds between 12:04 a.m. and 1:05 a.m. (Exhibits 8, 10, 11 and 12)
33. On June 28, 2004, the Appellant was detached without pay pending an investigation by the DOC into the inmate's escape within the SMU. (Exhibit 11)
34. Thereafter, an investigation into the June 27-28, 2004 incident was conducted by Captain McGonagle of the DOC's Office of Investigative Services. (Id.)
35. On December 15, 2004, the Appellant was served with a notice of hearing, pursuant to G.L. c. 31, s. 41. In this notice, the Appellant was charged with violations of the SMU post orders, as well as the General Policy and Rule 7(c) of the Rules and Procedures of the Department of Correction. (Exhibit 1)
36. A departmental disciplinary hearing was held on February 16, 2005. (Id.)
37. By letter dated March 18, 2005, DOC Commissioner Kathleen Dennehy notified the Appellant that sufficient evidence had been presented to sustain the charges against him and the Appellant's employment was terminated, effective immediately. (Exhibit 2)

38. Thereafter, the Appellant timely filed this appeal. (Exhibit 3)

39. The Appellant's testimony lacked credibility. The Appellant unconvincingly alleged that he was "not properly trained to work in the SMU" (despite admitting that he had worked the SMU on at least one prior occasion) and that he was being treated as a scapegoat for various failures on the part of the DOC (e.g. - not assigning a Sergeant to accompany him on his shift; faulty door locks; and broken indicator lights on the control panel). However, in pointing the finger of blame at the DOC, the Appellant notably failed to address his own negligent actions: why he did not make routine, half-hour inspections; why he remained in an unlit office for approximately one (1) hour; and why he filed untimely IMS reports. On these critical points, the Appellant was tellingly silent.

40. Superintendent Pepe credibly testified as to the physical layout and the policies and procedures of the SMU. Captain McGonagle credibly testified as to his investigation of the June 27-28, 2004 incident. Both men provided detailed and cogent information in a professional and respectful manner.

41. The credible testimonial and documentary evidence submitted into the record support the conclusion that the Appellant, in violation of the SMU Post Orders, the General Policy and Rule 7(c) of the Rules and Regulations of the Massachusetts Department of Correction, failed to make required security

rounds, failed to ensure that the doors in the unit remained locked and was grossly negligent and inattentive to his duties by staying in the unit office, with the lights out, for an extended period of time.

CONCLUSION:

The role of the Civil Service Commission (hereinafter “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). 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.” City of Cambridge 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 proper inquiry for determining if an action was justified is, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the 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). This burden must be met by a preponderance of the evidence. G.L. c. 31, §43.

It is the conclusion of this Commission that the Respondent has satisfied its burden of proving reasonable justification for terminating the Appellant's employment. Specifically, the evidence proffered by the Respondent is sufficiently reliable to warrant a reasonable mind to find that the Appellant committed the acts for which he was disciplined.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness' testimony. School Committee of Wellesley v. Labor Relations Commission, 376 Mass. 112, 120 (1978). Doherty v. Retirement Board of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

The Commission assigns little credibility to the testimony of the Appellant. Conversely, the testimony of Superintendent Pepe and Captain McGonagle was highly credible. A preponderance of the documentary and testimony evidence establishes that the Appellant, in violation of the SMU Post Orders, the General Policy and Rule 7(c) of the Rules and Regulations of the Massachusetts Department of Correction, failed to make required security rounds; failed to ensure that the doors in the unit remained locked; and was grossly negligent and inattentive to his duties by staying in the unit office with the

lights out, for an extended period of time. As a result of Appellant's negligence, an inmate escaped on multiple occasions, vandalizing the SMU and thereby threatening the health, safety and welfare of both other inmates as well as staff.

For all of the above stated reasons, it is found that the Department of Correction has conclusively established by a preponderance of the reliable and credible evidence in the record that it had just cause to terminate the Appellant for the misconduct. Therefore, the appeal on Docket No. D-05-125 is hereby *dismissed*.

Civil Service Commission

John J. Guerin
Commissioner

By vote of the Civil Service Commission (Chairman Goldblatt; Guerin, Marquis and Bowman, Commissioners) [Taylor, Commissioner absent] on February 15, 2007.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration 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 MGL ch. 30A sec. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL ch. 31 sec. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under MGL ch. 30A sec. 14 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 to:

Elizabeth Day, Esq.
James W. Simpson, Esq.