COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PAMELA SCANLON,
Appellant,

v.

No. D-06-31

MASSACHUSETTS
DEPARTMENT OF
CORRECTION,
Respondent.

Attorney for the Appellant:

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Attorney for the Respondent:

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Commissioner:

Daniel M. Henderson[1]

DECISION

The Appellant, Pamela Scanlon (hereafter "Appellant"), pursuant to G.L. c. 31 §43, filed an appeal with the Commission on February 7, 2006, claiming that the Appointing Authority, Department of Correction (hereafter "DOC") did not have just cause to impose

[1] The Commission acknowledges the assistance of Legal Intern Kate Borgondy in the preparation of this Decision.

a five (5) day suspension for conduct in violation of DOC Rules 6(a), 6(d), 12(a) and 19(b) . The appeal was timely filed. A hearing was held on March 26, 2008. As no written notice was received from either party, the hearing was declared private. The witnesses were sequestered. One audiotape was made of the hearing.

FINDINGS OF FACT

Fourteen (14) exhibits were agreed upon and entered into evidence at the hearing. Based on these exhibits and the testimony of the Appellant and Deputy Superintendent Alvin Notice; I make the following findings of fact:

1. The DOC called the Appellant on direct as the first witness.
2. On December 1, 2005, the Appellant was a tenured civil service employee in the position of Correction Officer I. The Appellant has been employed by the DOC since November 3, 1991. (Testimony of Appellant)
3. DOC employees are subject to a set of Rules and Regulations. The Appellant received the Rules and Regulations Governing All Employees of the Massachusetts DOC (hereinafter "Blue Book"). (Exhibits 4 & 5, Testimony of Deputy Superintendent Alvin Notice's)
4. The Appellant's husband was also a correction officer at Northeastern Correctional Center (hereinafter "NECC") during this period. Shortly before December 1, 2005, the Appellant's husband appealed a disciplinary demotion from the DOC along with 3 other correction officers and succeeded in that appeal and having those demotions reversed. (Testimony of Appellant)

5. Inmates in groups—with a maximum of 8—regularly go out on work crews under the supervision of a correction officer from NECC. The officer assigned to a work crew is referred to as a Community Work Crew supervisor. A post order identifies the duties of a Community Work Crew Supervisor, requiring specifically that those duties include "pat search[ing] each inmate prior to placement in the vehicle." (Exhibit 9)
6. On December 1, 2005, the Appellant worked the 7:00 A.M to 3:00 P.M. shift, and had been assigned the position of Community Work Crew Supervisor. Since 1991, the Appellant had frequently been assigned as Community Work Crew Supervisor. (Testimony of Appellant)
7. The Massachusetts Department of Personnel Administration Classification Specification for a Correctional Officer describes the duties of a correctional officer, but also fails to indicate if an inmate search should be done by a member of the same gender when feasible. (Exhibit 11)
8. In her assignment as Community Work Crew Supervisor, the Appellant had never been required to pat-search the male inmates prior to leaving the facility when male corrections officers were present and available to perform the pat-searches on the male inmates. (Testimony of Appellant)
9. The formal policy and practice of the Massachusetts Department of Correction is that when a strip search is performed on an inmate, is to have a C.O. of the same gender conduct the strip search. (Testimony of Deputy Superintendent Alvin Notice) The DOC's policy for fully clothed pat-searches is Policy 506.05. (Exhibit 12) Policy 506.6 does not specify whether correction officers of the same

10. This situation was not an emergency, but a routine and controlled occurrence at NECC. (Exhibits 6, 8, and Testimony of Appellant)
11. I find that the practice at the NECC prior to December 1, 2005 was, in fact, to have a male officer pat down a male inmate, absent an emergency situation or other extenuating circumstances. (Testimony of Appellant)
12. On December 1, 2005, Lt. Lennon was acting as the shift commander and supervising the Appellant as she prepared the inmate work crew for departure. (Testimony of Appellant). This was Lt. Lennon's first time working in this particular supervisory role or at least on her shifts. (Testimony of Appellant)
13. Lt. Lennon did not testify at the hearing.
14. Two days previous on November 28, 2005, Superintendent James Saba sent Lt. Lennon an e-mail with personal and political overtones of bias, specifying for Lt. Lennon to monitor the Appellant particularly. (Testimony of Appellant)
15. The email came into the Appellant's possession because Lt. Lennon gave it to her approximately 2 weeks before the Commission hearing, saying that "he hoped it would help" her in the hearing. (Testimony of Appellant)
16. On December 1, 2005, at approximately 7:45 AM., Lt. Lennon informed the Appellant that she would have to participate in patting down her work crew. (Testimony of Appellant)

17. The Appellant questioned Lt. Lennon by stating that it was her understanding that when male officers were present and available, she did not have to pat search the male inmates. She also asked Lt. Lennon if there had been a change in policy for this situation but Lennon refused to answer her. (Testimony of Appellant) At this time there were approximately 10 to 12 male officers standing in the gym/lobby area. (Testimony of Appellant)
18. The Appellant attempted to address Lt. Lennon reasonably and respectfully. The Appellant asked the Lt. to let her first contact her Union Representative, but Lt. Lennon refused this request. (Testimony of Appellant) The Appellant also told Lt. Lennon that the pat-searches had already been conducted by Wilkerson, Cronin and another male Correction Officer. (Testimony of Appellant) When Lt. Lennon refused to omit her from pat searching the inmates she asked to be sent home. (Exhibit 13, Testimony of Appellant)
19. This interaction between Lt. Lennon and the Appellant took place in the main Gym area, where approximately 6 inmates and 10 to 12 NECC Corrections Officers were gathered in preparation to leave for community work crew assignments. (Testimony of Appellant, Exhibits 6, 8)
20. The interaction between Lt. Lennon and the Appellant was in plain view and within hearing distance of the inmates as well as several COs. (Testimony of Appellant)
21. It is noted that “pat searches” require the searcher to pat down the inside of the legs and to touch the buttocks and groin area. (Testimony of Appellant, Exhibit 12.)

22. Lt. Lennon's incident report (Exhibit 6) suggests he spoke in a discreet manner to the Appellant, although both her Incident Report (Exhibit 8) and her testimony before the Commission was that Lt. Lennon spoke in a forceful manner,("getting all over me") readily apparent and observable to all those present, including inmates. (Testimony of Appellant) The Appellant's interpretation of being victimized is further bolstered by the fact that immediately after the incident, while outside the premises, the Appellant called her union representative, President Ken Ferullo. The Appellant believed that Ferrullo immediately attempted to contact Dep. Superintendant Alvin Notice regarding this matter.(Testimony of Appellant)
23. The DOC did not introduce any evidence from her regular shift commander that the Appellant had ever failed to perform any of her assigned duties or responsibilities, including pat searching departing inmates. (Exhibits and testimony)
24. The Appellant became very upset over this incident and was still upset when she returned later in the day to write her report concerning the incident. (Testimony of Appellant)
25. The Appellant testified in a straight forward manner. She presented herself in an appropriate manner. Her testimony rang true, including becoming emotional when recalling and testifying about the incident. I find the Appellant's testimony truthful and credible—and not having the opportunity to observe the demeanor of Lt. Lennon on cross examination because he did not testify—I find that the inmates and correction officers both observed the interaction and heard the

26. Deputy Superintendant Alvin Notice, the DOC's investigating officer of this incident, only interviewed the Appellant but failed to interview any of the numerous other percipient witnesses. He also failed to interview Sgt. Walsh or Lt. Lennon despite both having written reports concerning this incident. He was unaware that there was a claim that the inmates had been previously searched by named male Officers. Dep. Sup. Notice did not attempt to determine whether there had been an established practice at NCCC to exempt female CO's from pat searching male inmates departing on community work crews. This very limited investigation, which focused exclusively on the Appellant and Lennon without any reasonable effort to interview percipient and material witnesses who might either rebut or corroborate the Appellant's version, was an attempt by the DOC to avoid substantive evidence in its own investigation. (Testimony of Notice)
27. Prior to December 1, 2005, the Appellant was never instructed, warned or notified that her duties in performing her job were substandard. Specifically, the Appellant had not been approached regarding her past practice of not personally pat-searching male inmates—under normal circumstances—before the community work crews left the institution grounds. (Testimony of Appellant)
28. When a party fails to call a critical witness without explanation, the fact finder is

See Commonwealth v. Figueroa, 413 Mass. 193, 199 (1992) (reiterating availability of adverse inference when party fails to call witness). "Where a party has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed towards, the party, and who can be expected to give testimony of distinct importance to the case, the party would naturally offer that person as a witness. If, then, without explanation, he does not do so, the [fact finder] may, if they think reasonable in the circumstances, infer that person, had he been called, would give have give testimony unfavorable to the party…." Figueroa, 413 Mass. at 199, quoting Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986). The DOC has not proffered any showing to explain why they did not call Lt. Lennon, notwithstanding the critical importance of his testimony regarding 1) what he said to the Appellant, 2) how she responded, 3) what prior direction he received from the Superintendent regarding the Appellant, and 4) who could observe or overhear the interaction. In light of this failure, I do draw an adverse inference that had Lt. Lennon testified, his testimony would have been unfavorable to the DOC's hard-line position that the Appellant simply refused a direct order. See Figueroa, 413 Mass. At 199 (explaining adverse inference that testimony would have been unfavorable had the person testified). (Administrative notice, Exhibits and testimony)

29. Under the totality of the circumstances of this matter, including the reasonable inferences drawn there from; it is found that the Appellant was targeted by the DOC for retaliation, possibly due to her husband's successful appeal of his

30. On or about January 23, 2005, the Appellant was notified by the DOC that she was suspended for 5 days for conduct characterized as in violation of Rules 6(a), 6(d), 12(a) and 19(b) of the Blue Book, pursuant to M.G.L. c. 31 § 41. (Exhibits 2, 4, and administrative notice).
31. Rule 6(a), which states in part, "[c]orrectional 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. You should control your temper, exercise the utmost patience and discretion…" (Exhibits 2, 4, and administrative notice)
32. Rule 6(d) states, in part, "[r]elations between supervising and subordinate employees should be friendly in aim yet impersonal and impartial to such a degree that no subordinate employee may justly feel themselves favored or discriminated against. Supervising employees may express appreciation for good job performance as well as criticism for faulty execution of orders. You shall readily perform such duty as assigned, and must exhibit at all times, the kind of respect toward your superior which is expected and required in correctional service." (Exhibits 2, 4, and administrative notice)
33. Rule 12(a) states: "[e]mployees shall exercise constant vigilance and caution in the performance of their duties. You shall not divest yourself of responsibilities

34. Rule 19(b), which states, “[e]fforts will be taken to ensure that orders are reasonable and considerate, however, if you disagree with the intent or wording of an order, time permitting, you may be heard and the order withdrawn, amended, or it may stand. Without such prompt action on your part, no excuse will be tolerated that you did not comply with the order because it was faulty, unworkable, or for any other cause.” (Exhibits 2, 4 and administrative notice)

CONCLUSION

The DOC failed to meet its burden of demonstrating reasonable justification for the Appellant’s suspension. See City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997) (explaining Civil Service Commission role to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken”). The Appointing Authority’s 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). 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). However, the DOC can not claim the interaction amounted to an "order"—that the Appellant was not at liberty to question or refuse without repercussions—as subterfuge to provoke the Appellant or construct a scenario to impose an unfair penalty on her. The Massachusetts Appeals court has noted that when the Commission considers if there was reasonable justification for an action, the Commission must "focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions. When there are… overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention" by the Commission. Id. at 304, see also Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800-01 (2004) (identifying Commission intervention appropriate when the action not triggered by neutral policy). The weight of the evidence supports the Appellant's claim that the pat-search "order" was an artifice designed to harass her in reaction to her husband's successful appeal of the DOC demotion, and therefore the subsequent suspension was not for good cause.

Former Deputy Superintendent Alvin Notice testified that there was not a formal or informal department policy of preferring correction officers pat-search inmates of their same gender. However, the Appellant testified that over her 14 year tenure working as a Community Work Crew Supervisor, she had never been required to pat-search male inmates when other male officers were available. The facts as found strongly indicate that *in daily practice* at NECC, the clear and pervasive preference is to have correction

officer's pat-search inmates of the same gender, notwithstanding the absence of a codified, formal policy stating as much.

The Commission finds it disastrous to the DOC's case, that Lt. Lennon, the percipient and operative witness to the events that spawned the Appellant's suspension, did not testify at the hearing. His absence was left unexplained by the DOC. When a party fails to call a critical witness without explanation, the fact finder is free to draw an adverse inference. See Commonwealth v. Figueroa, 413 Mass. 193, 199 (1992) (reiterating availability of adverse inference when party fails to call witness). "Where a party has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed towards, the party, and who can be expected to give testimony of distinct importance to the case, the party would naturally offer that person as a witness. If, then, without explanation, he does not do so, the [fact finder] may, if they think reasonable in the circumstances, infer that person, had he been called, would give have give testimony unfavorable to the party…." Figueroa, 413 Mass. at 199, quoting Commonwealth v. Schatvet, 23 Mass. App. Ct. 130, 134 (1986). The DOC has not proffered any showing to explain why they did not call Lt. Lennon, notwithstanding the critical importance of his testimony regarding 1) what he said to the Appellant, 2) how she responded, 3) what direction he received from the Superintendent regarding the Appellant, and 4) who could observe or overhear the interaction. In light of this failure, the Commission does draw an adverse inference that had Lt. Lennon testified, his testimony would have been unfavorable to the DOC's hard-line position that the Appellant simply refused a direct order. See Figueroa, 413 Mass. At 199 (explaining adverse inference that testimony would have been unfavorable had the person testified).

The accumulated facts indicate that Lt. Lennon, in a new assignment, was acting without necessity and contrary to practical considerations in a deliberate attempt to target and provoke the Appellant, as possibly urged by Superintendent Saba. Further, it would be reasonably expected of a person filling a new role at an institution—as Lt. Lennon was doing on the morning of December 1—that the common practice would be followed or at least determined rather than attempt to forcefully establish a new, different practice. Instead, the established practice even if informal was intentionally shifted in order to create an opportunity to target the Appellant.

In insubordination cases the concept of "obey now and grieve later" is frequently argued by the appointing authority, if the employee is a member of a union as here. (See Beal, et. al. v. Boston Public Schools, 18 MCSR 57 (2005); Ouillette v. City of Cambridge, Civil Service Case No. D-03-123 (September 14, 2006) (citing concept of "obey now, grieve later"). However, if the circumstances are such that there is no compelling reason for the order to be carried out as directed and there are obvious and compelling reasons that the order be respectfully declined; and a reasonable alternative suggested, or a recognized authority is asked to intervene without disruption or delay and a clearly stated reason(s) for declining the order is given; then depending on the circumstances, the declination might be determined to be proper.

There is sufficient evidence here to support that: 1.) The ordered task had already been completed by others and/or a reasonable alternative was readily available 2.) The order was not based on emergency or necessity but instead an attempt to provoke, 3.) The order called for a breach of long established practice, which practice had apparently been

acquiesced to by the appointing authority, 4.) The order was given by a person new to that particular assignment, and 5.) Carrying out the order as directed would have caused embarrassment or some other discernable harm.

Under the circumstances, based on the credible evidence in the record the DOC did not have reasonable justification to warrant the Appellant's suspension. On December 1, 2005, while numerous male officers were available, and Lt. Lennon held a forceful if not aggressive conversation with the Appellant in the presence of those correction officers as well as inmates. The Appellant had not been notified previously that she was performing her job as Community Work Crew Supervisor unsatisfactorily, or specified that she needed to pat-down the male inmates regardless of the availability of male correction officers. Also, the Appellant testified under oath before the Commission that she told Lt. Lennon the pat-searches had already been conducted by Sgt. Wilkinson and two other named correction officers. The fact that this conversation took place in front of so many others—including inmates in the Appellant's charge—and without any prior notice suggests that the interaction was designed to embarrass, shame, and provoke the Appellant.

The Commission notes the unique timing in this first nonemergency occurrence of requiring a female corrections officer to pat-search the male inmates—which necessarily involves touching the inmate's groin area—as the appellant's husband, also a correction officer at NECC, had recently successfully appealed a disciplinary demotion. Further supporting the Appellant's claim that she was subjected to unfair treatment is Superintendent Saba's email sent only 2 days before this incident to Lt. Lennon, directing him to closely monitor the Appellant. These facts further suggest that, in daily practice,

supervisors ordered male officers to conduct the pat searches of male inmates, and this only changed after the Appellant's husband succeeded in an appeal. Considering the sequence of events and the failure of the DOC to have Lt. Lennon testify, the Commission is hard pressed to swallow the Appointing Authority's version of these events.

The DOC attempts to analogize this situation as one similar to a correction officer found to be sleeping in a wall tower, a clear violation of DOC Rules, claiming that because he has been sleeping everyday in the tower for the past year, it has become a practice for which he can't be disciplined. This analogy fails however, for a few distinct reasons: 1) it was reasonable for the Appellant to conclude that same gender officers would pat down same gender inmates because it was the repeated and consistent practice at NECC, 2) the formal practice for other types of searches emphasize a same-gender requirement, if the situation is not an emergency, and 3) common sense suggests, in the setting of a prison, avoiding a situation where officers of the opposite gender pat down the inmates. On the other hand, common sense certainly would *not* support a correction officer sleeping on his post, nor would it be reasonable to assume bad behavior unpunished in the past is immune from future consequences. However, there has been no suggestion that the Appellant's work crews left NECC without being pat-searched, only that when male officers were available over the last 14 years, the preference was to have the male correction officers conduct the pat-searches.

The DOC confidently relies heavily on prior decisions by the Civil Service Commission to urge deference for the penalty imposed due to insubordination; however, the confidence is misplaced. For instance, in Steven Rosado v. Department of Correction,

20 MCSR 264, (Apr. 19, 2007), the Appointing Authority had imposed two separate 2 day suspensions on the Appellant for unprofessional behavior, including removing his shirt while working, watching television, and constructing a cardboard paddle to use to chide female inmates. The Rosado case is readily distinguishable from the present appeal, in that in Rosado the correction officer was clearly acting outside both the bounds of the intent and language of the DOC rules, whereas in the present situation the Appellant was acting reasonably and in conformity with a long standing practice at NECC and the common sense application of DOC rules. Additionally, the record in Rosado does not contain any suggestion that the Appointing Authority was acting upon a motivator besides the incidents themselves, whereas in the Appellant's situation it plainly appears that other prompts may have been the true motivation behind the December 1, 2005 interaction with Lt. Lennon. See Town of Falmouth at 800-01 (explaining Commission should intervene when there is undertones of political control or bias).

For all of the above stated reasons, the Commission determines that by a preponderance of credible and reliable evidence in the record the DOC failed to establish just cause for imposing a suspension on the Appellant.

The Appellant's appeal on Docket D-06-31 is hereby ***allowed.*** For all the above stated reasons the Appellant shall be returned to her position without any loss of pay or other benefits.

Civil Service Commission,

_____

Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor, Commissioners) on July 23, 2009.

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. 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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:
Stephen C. Pfaff, Atty.
Jeffrey Bolger.