

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

JAMES CAPEL,
Appellant

v.

Docket No. D-06-104

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

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Respondent's Representative:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to the provisions of G.L c. 31 §43, the Appellant James Capel (hereinafter "Appellant") is appealing the decision of the Respondent, Department of Correction (hereinafter "DOC") as Appointing Authority, to suspend him for twenty (20) working days without pay from his employment as a Correction Officer I. In a letter dated May 6, 2006, the DOC suspended the Appellant for violating Rules 6(a), 6(b), 6(d); Rule 7(c)

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

and Rule 19(b) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (hereinafter “Blue Book”) because (1) on March 2, 2006 he failed to verbally or physically acknowledge Captain Shawn Puchalski (hereinafter “Capt. Puchalski”) and, (2) on March 3, 2006, he again failed to verbally acknowledge Capt. Puchalski. The Appellant filed a timely appeal. A hearing was held on April 10, 2008 at the offices of the Civil Service Commission (hereinafter “Commission”). Two (2) tapes were made of the hearing. Since no notice was received from either party, the hearing was declared private. Proposed decisions were filed thereinafter by the parties, as instructed.

FINDINGS OF FACT

Based on the documents entered into evidence: Joint Exhibits 1 - 7, Appointing Authority Exhibits 1 – 5, and the testimony of Capt. Puchalski, Sergeant Thomas Grillo (hereinafter “Sgt. Grillo”), and the Appellant, I make the following findings of fact:

1. On March 2 and 3, 2006, the Appellant was a tenured civil service employee in the position of Correction Officer I. The Appellant had been employed by the DOC since September 9, 1984. (Stipulated Fact)
2. On May 5, 2006, after a hearing pursuant to G.L. c. 31, §41, the DOC notified the Appellant that he was suspended for twenty (20) days for conduct which was in violation of Rules 6(a), 6(b), 6(c), 6(d); Rule 7(c) and Rule 19(b) of the Blue Book: failing to verbally or physically acknowledge Capt. Puchalski on two consecutive days. (Joint Exhibits 2, 3, 4, and 5)
3. Blue Book Rule 6(a) states, in 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.” Rule 6(b) states, in part, “Do not foster discontent or otherwise tend to lower the morale of any employee . . .” Rule 6(c) states, in part, “The duties assigned to you should demand your entire attention.” Rule 6(d) states, in part, “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.” (Joint Exhibits 3 and 7)

4. Blue Book Rule 7(c) states, in part, “Any Department of Correction ...employee who is found...flagrantly, wantonly, or willfully neglecting the duties and responsibilities of his/her office shall be subject to immediate discipline up to and including discharge.” (Id.)
5. Blue Book Rule 19(b) states, in part, “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.” (Id.)
6. Capt. Puchalski testified at the Commission hearing that he has been with the DOC since 1991 and has been consistently promoted through each of the ranks to his current rank of Captain. At the time of the incident, he was shift commander of the 11 p.m. to 7 a.m. shift at the Massachusetts Correctional Institution at Concord (hereinafter “MCI-Concord”). As such, he reported for duty approximately 40

minutes prior to his shift in order to review the roster, find out if there were any issues during the previous shift such as emergency medical trips, uses of force or problematic inmates. As the shift commander, he is responsible for the overall security of the facility. He ensures that all posts are covered, all counts are done, payroll for the shift is processed, and contact is maintained with the Administration. (Testimony of Capt. Puchalski)

7. On March 2, 2006, at approximately from the middle to the late hours of the shift, Capt. Puchalski testified that he was performing rounds and went to the West Side Unit. Sgt. Grillo was on the first floor (West Side Down) and the Appellant was on the second floor (West Side Up). He spoke to Sgt. Grillo and then proceeded to the second floor. Prior to going up the stairs, Sgt. Grillo informed him that the Appellant wanted him (Grillo) to be a witness to any interaction between the Appellant and Capt. Puchalski. (Testimony of Capt. Puchalski and Sgt. Grillo)
8. The Appellant testified at the Commission hearing that he had asked Sgt. Grillo to accompany Capt. Puchalski because at previous DOC sec. 41 hearings, the DOC had determined Capt. Puchalski's testimony to be credible but that his (the Appellant's) was not. The Appellant testified at this Commission hearing that Capt. Puchalski was "a good liar." (Testimony of Appellant)
9. Sgt. Grillo testified at the Commission hearing that he had worked with the Appellant for approximately 20 years, had been his supervisor for 2 years and found the Appellant to be a "good officer" and a "man of few words." Sgt. Grillo testified that he agreed to observe Capt. Puchalski's interactions with the Appellant because the Appellant explained to him that he had had adverse issues with a prior Captain

and Capt. Puchalski. (Testimony of Sgt. Grillo)

10. I found that Sgt. Grillo's testimony was professional, thoughtful and confident. He was credible in explaining his role in observing the interaction between Capt. Puchalski and the Appellant and I did not find that he had an allegiance to either man. His recall of the events of this incident and his steady demeanor added to the believability of his statements under oath. (Testimony and Demeanor of Sgt. Grillo)
11. Capt. Puchalski credibly testified at hearing that he was agreeable to Sgt. Grillo observing his interaction with the Appellant and proceeded to the second floor where he inquired with the Appellant as to the status of an open tier gate (grill) at the entrance to the unit and if the recent renovation/painting of the unit was still on going. He testified that he received no reply. Capt. Puchalski stated that the Appellant never even acknowledged that he had entered the floor. (Testimony of Capt. Puchalski)
12. Sgt. Grillo, who was accompanying the Captain, testified that he heard no verbal acknowledgement of Capt. Puchalski from the Appellant but that he could not see if the Appellant had physically acknowledged the Captain since he was positioned below and behind the Captain on the stairway and could not see the Appellant. (Testimony of Sgt. Grillo)
13. Having received no response to his inquiries from the Appellant, Capt. Puchalski left the area to carry on his rounds elsewhere in the facility. (Testimony of Capt. Puchalski)
14. On March 3, 2006, Capt. Puchalski again was performing rounds and went to the West Side Unit where Sgt. Grillo was on West Side Down and the Appellant was on

West Side Up. He spoke to Sgt. Grillo and then proceeded up to the second floor. Again, Sgt. Grillo followed him up the stairs as an observer. Capt. Puchalski saw the tier grill open and asked the Appellant if the grill was operational and inquired if any inmates were on the tier. He also again asked about the status of the renovation/painting project. Again, Capt. Puchalski asserted that the Appellant gave no reply of any kind nor did he acknowledge the Captain's presence. Capt. Puchalski then told the Appellant that, if it's operational, to close the grill and then he left the tier. Capt. Puchalski then wrote a report on the events of the last two nights, March 2 and 3, 2006. (Id.)

15. Sgt. Grillo testified that, once again on the second night in question, he did not hear a verbal response to the Captain's questions and directive regarding the grill closing and was not in a position to see a physical response by the Appellant. He did credibly state that the Appellant did close the grill upon the Captain's directive. (Testimony of Sgt. Grillo)

16. The Appellant testified that, on both nights, he looked directly at Capt. Puchalski and nodded his head in the affirmative when asked whether the renovation/painting project was still on going. He stated that he had never been disciplined for communicating with a superior officer in this way. Ostensibly because the Appellant physically responded to Capt. Puchalski's directive to close the grill on March 3, DOC Commissioner Kathleen M. Dennehy did not find sufficient evidence to substantiate the charge that the Appellant refused to physically acknowledge the Captain on that occasion. (Testimony of Appellant and Joint Exhibit 3)

17. Capt. Puchalski stated that he goes on rounds as shift commander about three times

per week. When he is on rounds, he inquires with all officers on post as to how it's going or if there are any issues. He testified that his interactions with the Appellant had been "terse to business like" during the time period leading up to the incidents in question. However, he stated that on the nights of March 2 and 3, 2006, he was inquiring as to the status of the tier and the work being done on the open grill could have been a security issue if there had been inmates moved onto the tier that he was not aware of. During the course of a shift, there are events that can occur that only the area lieutenants, sergeants or correction officers have knowledge of. Passing this information on to the shift commander only during rounds and inquiries regarding tiers and units or other operational issues is not out of the ordinary. In this case, the inquiry was made because the counts do not reflect inmate moves but only the amount of inmates in a unit and there was no way of the Captain knowing if there were inmates on the tier that was being renovated. (Testimony of Capt. Puchalski, Appointing Authority Exhibit 1)

18. I found, contrary to the Appellant's bold assertion that he is a "good liar," that Capt. Puchalski was professional, straightforward and unhesitant in his testimony. He did not embellish his version of events to gain any sort of advantage, even though the situation boiled down to his word basically competing with the Appellant's. He kept an even, confident tone during both direct examination and some difficult cross-examination. This ability to maintain his composure was an indication of reliable and credible testimony. (Testimony and Demeanor of Capt. Puchalski)

19. The Appellant testified at the Commission hearing that he started working for the DOC on September 9, 1984. He retired in May 2007 due to health problems. He

admits to having prior discipline of a Letter of Reprimand for tardiness on March 17, 1993, a five-day suspension on November 7, 2005 for violations of General Policy 1 and Rule 19 when he failed to appear relative to an investigation and a ten-day suspension for failure to follow a direct order. (Testimony of Appellant)

20. The Appellant further testified that there had been renovation on West Side Up for about a week prior to the incidents in question. The painting duties were performed by inmates during the 7 a.m. to 3 p.m. and 3 p.m. to 11 p.m. shifts. All the inmates were moved out of the tier. On March 3, 2006, the paint crew informed him (the Appellant) that the grill had been ajar because it had been painted. (Id.)
21. The Appellant stated that, on March 2 and 3, 2006, he was made aware of Capt. Puchalski coming to the unit by a call from Sgt. Grillo. The Appellant stated that, on March 2, 2006, when Capt. Puchalski inquired if the renovation was still on going, he (the Appellant) nodded because there was no need to answer. On March 3, 2006, the Appellant saw Capt. Puchalski coming from the grill and asked again if the construction was still going on and, again, he (the Appellant) nodded. (Id.)
22. When asked by this hearing officer why he didn't simply answer the Captain verbally regarding the status of the grill, the Appellant maintained that he did not have to reply when Capt. Puchalski inquired if the grill could be closed because there was a wet paint sign on the side of the grill and he "should have seen it." (Testimony of Appellant and Appointing Authority Exhibits 3, 4, and 5)
23. I found, as Sgt. Grillo aptly described him, that the Appellant was a "man of few words." I also found that he was a man of unnecessarily "no words" when his superior officer was asking simple but important questions of him. A "few words" on

March 2 and 3, 2006 would have helped his cause by quickly satisfying his supervisor and no doubt prevented this discipline from occurring. I find that the Appellant deliberately remained silent to protect himself from saying something that he thought might cause him harm. He had testified that he was concerned that previous tribunals had found him to be less credible than Capt. Puchalski. He clearly did not want his word to be measured against Capt. Puchalski's were he to be disciplined again. Regrettably, the Appellant caused a boomerang effect by saying nothing and being disciplined for his silence. (Testimony and Demeanor of Appellant)

24. I find that the Appellant's assertions that he was a victim of disparate treatment were unsubstantiated by any evidence and were unpersuasive. The Appellant and Capt. Puchalski clearly did not have a cordial working relationship but, as Capt. Puchalski testified, he never recommended disciplining the Appellant for being "terse" because that complies with the DOC communication policies. An officer is not required to be "polite and friendly," he added. (Testimony of Capt. Puchalski and Appellant)

25. I find that, despite his reticence in providing simple answers, the Appellant appropriately complied with Capt. Puchalski's directive to close the grill on March 3, 2006 and, therefore, the allegation pursuant to Blue Book Rule 19(b) is not sustained.

26. I find that all the other allegations against the Appellant were sustained.

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 established "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).

The Commission finds that, by a preponderance of the credible evidence presented at this hearing, the DOC has sustained its burden of proving just cause to suspend the Appellant for twenty (20) days without pay. Even without substantiating the charge of disobeying an order, pursuant to Blue Book Rule 19(c), the credible and corroborating testimony of Capt. Puchalski and Sgt. Grillo was sufficient to sustain all other allegations. The Appellant's rationale to engage in this misconduct, which easily could have been avoided, far outweighed any motive that Capt. Puchalski may have had to recommend unfair punishment or disparate treatment of the Appellant. The twenty (20) day suspension is consistent with the principles of progressive discipline.

Therefore, for all the reasons stated herein, the appeal on Docket No. D-06-104 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman Yes; Marquis, Commissioner – Yes; Taylor, Commissioner - Yes; Henderson, Commissioner – No; Stein, Commissioner - No) on July 10, 2008.

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:
John A. Morrissey, Esq. (for Appellant)
Kerry A. Rice (for Appointing Authority)