

The Commonwealth of Massachusetts

Decision mailed: 11/7/11
Civil Service Commission
JB

SUFFOLK, ss.

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

MICHAEL KELLY,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

Case No.: D1-10-181

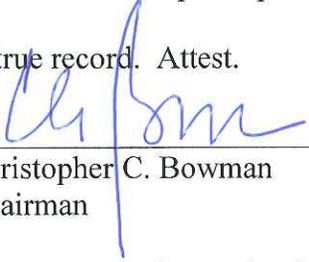
DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on November 3, 2011 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 24, 2011. On September 21, 2011, the Commission received written objections to the Magistrate's recommended decision from the Appellant. On October 14, 2011, the Respondent's Response to Appellant's Objection to the Recommended Decision.

A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner - No; Marquis, Commissioner - Yes; and Stein, Commissioner - Yes, [McDowell -not participating]) on November 3, 2011.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten 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)(I), 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-day time limit for seeking judicial review of this Commission order or decision. *See Curley v. Lynn*, 408 Mass 39, 41-42 (1990).

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 to:
Steven Panagiotes, Esq. (for Appellant)
Amy Hughes, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



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Michael Kelly v. DOC
D1-10-181

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THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

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August 24, 2011

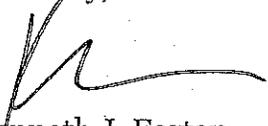
Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Michael Kelley v. Department of Correction
DALA Docket No. CS-10-839
CSC Docket No. D1-10-181

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Kenneth J. Forton
Administrative Magistrate

KJF/mbf

Enclosure

cc: Amy Hughes, Esq.
Steven W. Panagiotes, Esq.

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2011 AUG 25 P 2 39
COMMUNICATIONS SECTION
DIVISION OF ADMINISTRATIVE LAW APPEALS

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Michael Kelley,
Appellant

v.

Docket No. D1-10-181
DALA No. CS-10-839

Department of Correction,
Respondent

Appearance for Appellant:

Steven Panagiotis, Esq.
2 Ashby State Road
Fitchburg, MA 01420

Appearance for Respondent:

Amy J. Hughes, Esq.
Department of Correction
One Industries Drive
Norfolk, MA 02056

Administrative Magistrate:

Maria A. Imparato, Esq.

SUMMARY OF DECISION

The Department of Correction had reasonable justification to terminate the Appellant for his violations of the Professional Boundaries Policy and Rules 6(b) and 8(b) of the Blue Book when he disseminated information about a co-worker's medical leave, and for his violations of General Policy I and Rules 1, 6(a) and 8(c) of the Blue Book when he failed to promptly report telephone contact with former inmates to the Superintendent, DOC Department Head or Commissioner, and when he wrote a confidential report and letters to the Superintendent and Commissioner containing disparaging remarks about co-workers and superiors, in light of his last chance warning issued in December 2008.

RECOMMENDED DECISION

Michael Kelley has filed a timely appeal under M.G.L. c. 31, s. 43 of the July 20, 2010 decision of the Respondent, Department of Correction (DOC) to terminate him from his position

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OFFICE OF THE ATTORNEY GENERAL
LEGAL SERVICES DIVISION

of Correction Program Officer I (CPO I) for disseminating personal medical information of DOC employees to other staff members, in the presence of an inmate or inmates; failing to report promptly receipt of several phone calls from two former inmates; filing a confidential incident report containing disparaging comments about DOC's mission and its employees; and submitting letters to members of the DOC administration containing disparaging remarks about DOC employees.

I held a hearing on December 17, 2010, continued to March 10, 2011, at the office of the Division of Administrative Law Appeals, 98 North Washington Street, Boston, MA. The hearing was private because neither party filed a written request to make it public.

I admitted documents into evidence. (Exs. 1 – 29.)¹ The Appellant testified on his own behalf as did Steven J. O'Brien, of MCI Plymouth. Testifying on behalf of the Respondent were: Dana St. Jean a Correction Program Officer (CPO) for the DOC at North Central Correctional Institution (NCCI) at Gardner; Christine Dodd, CPO D in the Internal Affairs Unit of DOC; Mark McCaw, a Lieutenant with the Internal Affairs Unit of DOC; and James Saba, Superintendent of NCCI at Gardner.

There are two volumes of stenographic transcript of the hearing.

The record closed on June 3, 2011 with the filing of post-hearing briefs.

FINDINGS OF FACT

1. Michael Kelley, age 52, worked for the DOC from 1982 to July 20, 2010 when he was terminated. He worked as a CPO I at NCCI Gardner. (Tr. II, 377; Ex. 4.)

¹ I marked exhibits 1-28 at hearing. Post-hearing I received the Appellant's calendars from 1/1/09 to 6/30/10, which I marked as Exhibit 29. The parties agreed to submit a series of documents to be marked as Exhibit 27. The parties did not submit Exhibit 27. The Appellant's attorney did not submit a transcript of the Internal Affairs telephone interview of former inmate JC.

2. Mr. Kelley has been diagnosed with bipolar disorder for which he takes Abilify, Paxil and Lamictal. Mr. Kelley was at one time prescribed Ambien for sleep. (Tr. II, 386; 393-394; Ex. 25.)
3. Mr. Kelley stopped taking Ambien in or about March 2010. (Tr. II, 471.)
4. Mr. Kelley has never requested a reasonable accommodation from the DOC with respect to his bipolar disorder. (Tr. II, 424.)

Prior Discipline

5. Mr. Kelley's prior discipline is as follows: 1) On December 5, 2008 Mr. Kelley received a three-day suspension and a final warning when he sent a copy of the book How to Win Friends and Influence People to his supervisor in an attempt to harass her, lied repeatedly when questioned, and submitted an incident report with a false statement; 2) On October 24, 2007, Mr. Kelley received a written reprimand for taking vacation time that he did not have; 3) On June 21, 2007, Mr. Kelly received a written reprimand for abuse of sick leave; 4) On November 15, 2005, Mr. Kelley received a written reprimand for bringing his personal cell phone into the institution and leaving it unattended; 5) On August 15, 2005, Mr. Kelley received a ten-day suspension for making verbal threats to physically assault a Deputy Superintendent; 6) On May 3, 2005, Mr. Kelley received a five-day suspension for punching in another employee's time card to "help him out;" 6) On February 18, 2005, Mr. Kelley received a written reprimand for leaving his radio unattended; 7) On June 6, 2002, Mr. Kelley received a four-day suspension for refusing a direct order of his Shift Commander to staff Control, and for leaving the institution without working the shift; 8) On June 11, 2001, Mr. Kelley received a written reprimand for documenting that nine inmates had been breathalyzer screened when the breathalyzer was not in service; 9) On June 26, 2000, Mr.

Kelley received a written reprimand for failing to provide satisfactory medical evidence to support an absence; 10) On August 29, 1997, Mr. Kelley received a five-day suspension for failing to maintain his post, and for his participation and coordination of an institution-wide conspiracy to evade the proper count process by accepting and processing invalid official 3:30 a.m. major inmate count slips; and 11) On August 30, 1984, Mr. Kelley received a written reprimand for negligence in properly recording his time worked. (Ex. 1.)

Dissemination of medical information

6. ^{DS} D~~onna St. Jean~~ is a CPO at NCCI Gardner. Sometime in 2009, Ms. S ~~Jean~~ was on a medical leave for one month to have breast reduction surgery after surviving breast cancer. When she returned from her leave, an inmate, GM, said that he knew she had been out to get breast reduction and he knew that her fiancé had leukemia. (Testimony, S ~~Jean~~ Tr. I, 46; Exs. 8, 11.)
7. Ms. S ~~Jean~~ asked the inmate how he knew this information and the inmate said, "Michael Kelley. He told a lot of people." (Testimony, St. Jean, Tr. I, 46; Exs. 8, 11.)
8. Later in the day, Ms. S ~~Jean~~ saw Mr. Kelley in the records room and asked him, "Why would you tell inmates my personal business?" Mr. Kelley said, "Well, they asked where you were." (Testimony, St. Jean, Tr. I, 47; Exs. 8, 11.)
9. Ms. S ~~Jean~~ told her supervisor about the events. Ms. S ~~Jean~~ prepared a written report of the event dated October 5, 2009 at the request of her supervisor. (Tr. I, 47-48; Ex. 8.)
10. On October 20, 2009, Chief of Investigative Services Paul Oxford initiated an investigation of Ms. S ~~Jean~~'s report of October 5, 2009, and assigned the case to Christine Dodd, a CPO D in the Internal Affairs Unit. On November 17, 2009, Ms. Dodd interviewed inmate GM regarding Ms. S ~~Jean~~'s allegations. GM denied that Mr. Kelley told him directly why Ms.

S [REDACTED] was out of work. GM said another inmate told him that Mr. Kelley “told everybody” about Ms. S [REDACTED]’s breast reduction. (Tr. I, 71-72; Exs. 10, 11.)

11. On November 17, 2009, Ms. Dodd interviewed Mr. Kelley. Mr. Kelley denied that he had told inmates about Ms. S [REDACTED]’s medical procedure and her fiancé’s illness. Mr. Kelley acknowledged that he spoke with staff about the issues, and suggested that inmates probably overheard him. (Tr. I, 70; Exs. 10, 11.)
12. In a confidential incident report prepared by Mr. Kelley and directed to Superintendent Saba on November 20, 2009, Mr. Kelley stated: “As I sit here trying to figure out why Donna would think I put her medical issues out there. (sic) It makes no sense. I give to every fund raising she does. I just gave 2 days ago. The only thing I can think of is when I made re-entry calls for 2 of her inmates, because she hates doing. (sic) I don’t know if she thought I was doing it to make her look bad. Remember she was worried about it coming back to bite her on the butt.” (Ex. 9.)
13. Ms. Dodd concluded that the charge of disseminating Ms. S [REDACTED]’s and her fiancé’s medical information had been sustained, and that the dissemination violated 103 DOC 225 Professional Boundaries Policy; section 6(b) of the Blue Book concerning Interpersonal Relationships Among Employees; and section 8(b) of the Blue Book concerning Conduct Between Employee and Inmate. Ms. Dodd concluded that based on inmate GM’s testimony, it was not clear whether Mr. Kelley directly disseminated the information to inmates, or whether he was overheard by inmates when he spoke with staff about the information. (Tr. I, 66-67, 70-72, 83-84; Ex. 10.)
14. 103 DOC 225.02 prohibits “discussing the personal life or issues of any employee, including one’s self, with an inmate or in the presence of an inmate.” (Ex. 7.)

15. Sometime after the close of this investigation, a poster soliciting DNA swabs from DOC employees in contemplation of a bone marrow transplant for Ms. S█████'s fiancé was posted in the NCCI Gardner lobby. Inmates on work crews pass through the lobby. (Tr. I, 74-75.)

Contact with Former Inmates

16. On either Christmas Day of 2009, or New Year's Day of 2010, a former inmate who had been paroled called Mr. Kelley at Mr. Kelley's home to wish him happy holidays and to thank Mr. Kelley for the help he had given him while he was an inmate. (Tr. II, 388-389.)
17. On January 12, 2010, Mr. Kelley told his supervisor, Suzanne Tenney, a CPO II, about the conversation. Ms. Tenney is not a Superintendent, nor a DOC Department Head nor a Commissioner. (Tr. II, 389-390; Ex. 12.)
18. About an hour later, Ms. Tenney instructed Mr. Kelley to write a report of the incident. On January 13, 2010, Mr. Kelley prepared a report indicating that he had received a call from the former inmate JC. (Tr. II, 391; Ex. 13.)
19. Mr. Kelley's report then stated, "I know the DOC hates to think an ex-con would ever like or respect a DOC staff member, and that we're not only suppose (sic) to hate inmates but ex-inmates also That philosophy goes against my Christian believes. (sic) ... I notice to (sic) that usually the staff that hates inmates or other groups of people, blacks, Jews, arabs, fat people, etc., have the most screwed up home lives, and really should probably be doing time. ... I don't regret that [the former inmate] called me, I only regret that I told staff, because it wasn't a big deal to me. I keep forgetting that many/most DOC employees have zero integrity and character, and so to get ahead in this Dept. they turn to being rats, cowards, kissass's and liars. So Sir that my story." (Ex. 13.)
20. Mr. Kelley was not under the influence of Ambien when he wrote this report. (Tr. II, 445.)

21. On January 20, 2010, Paul Oxford, Chief of the Office of Investigative Services initiated an investigation of Mr. Kelley with respect to the telephone call from the former inmate and with respect to disparaging remarks about staff contained in his report. The investigation was assigned to Lt. Mark McCaw. (Ex. 22.)
22. On February 9, 2010, Lt. McCaw interviewed Mr. Kelley. James Saba, Superintendent of NCCI at Gardner, sat in for part of the interview. During the interview, Mr. Kelley indicated that he is required to see a psychiatrist and to keep taking his prescribed medication as the result of a prior disciplinary matter. When asked by Lt. McCaw what would happen if he stopped taking his medication, Mr. Kelly made reference to a day in or about 2005, prior to his bipolar diagnosis, when he was sent home from work. "I knew when I left here that day, when I had to go home; I remember going down Route Two, a car coming off the exit and cutting me off. I pulled up beside him, no lie Mark, I was gonna drive it off the road until I realized it was a woman with two kids. If it was a guy, I probably would have. It scared me. You know, I used to fantasize about stabbing Mr. Mendonsa." (Tr. II, 432,434; Ex. 22, p. 6; Ex. 24.)
23. Superintendent Saba reported Mr. Kelley's remarks to his own supervisor, Deputy Superintendent DiPaolo. As a result, Mr. Kelley was detached from the DOC with pay by letter of February 10, 2010, pending the results of an investigation. Mr. Kelley was directed to remain available for questioning during normal business hours. Mr. Kelley was required to surrender his DOC identification card and badge. (Tr. II, 208-211; Ex. 14.)
24. By memorandum of February 11, 2010, Mr. Oxford notified the Captain of the Fitchburg Police Department that Mr. Kelley possessed a Class (C) license to carry. "Kelley has recently become the subject of an investigation by the Department of Correction and was

interviewed on 9 February 2010. During the recorded interview Kelley told the investigator he was taking medication to control his temper and made the comment he 'used to fantasize about stabbing' another DOC employee. I am notifying your Department so you may consider a status review of Kelley's License to Carry." (Ex. 15.)

25. By memo of February 18, 2010, Commissioner Clarke's administrative assistant notified Mr. Oxford that she had answered the Commissioner's telephone and said the Commissioner was not there, but she would take a message. The caller identified himself as Michael Kelley and said something to the effect of "he's killing me." (Ex. 16.)
26. On February 18, 2010, Mr. Kelley sent a letter to Superintendent Saba informing him that the Fitchburg Police had come to take Mr. Kelley's guns away. "This was due I believe to Mr. Clarke's overblown issue with me. I've (sic) find this amazing because I've heard he isn't even a US citizen, yet he has the authority to take my second amendment rights way. I've never threatened anyone with them or about them, nor would I. This only strengthens my believe (sic) that Mr. Clarke and others in management positions have been out to get me, one because of how I treat all people the same, and two due to the medication I'm on. ... Then you have D [REDACTED] S [REDACTED] who was so mad at me for helping one of her caseload inmates on his parole issue, that she ran with some rumor of me telling an inmate she had her boobs reduced, this is crazy the whole institution knew it. Well that's about it for now." Mr. Kelley was not under the influence of Ambien when he wrote this letter. (Ex. 17; Tr. II, 435.)
27. On February 18, 2010 at 9:37 p.m., Mr. Kelley faxed a letter to Commissioner Clarke that reads in part: "What ever your PERSONAL beef with me is, I wish you'd tell me. All want (sic) to do is go to work and do my job. But instead you and a few of your yes men/woman

have attacked me over and over. ... You've been out to either fire me or kill me and you know it. You hide behind the Blue Book, a farce, only Jesus could keep it. ... But with me sir, I fight back. Its (sic) my greatest weakness, REVENGE. You keep pushing and pushing, hoping I snap and hurt some one or myself. But that's the old me. I won't let you do that me. (sic) ... So please stop and have your butt kisses stop the lying." Mr. Kelley was under the influence of Ambien when he wrote this letter. (Ex. 18; Tr. II, 430-440.)

28. On February 18, 2010 at 9:37 p.m., Mr. Kelley faxed a letter to Dr. Naparstek, a physician to whom the DOC had previously sent Mr. Kelley for evaluation. The letter reads in part: "I honestly believe that certain people in the DOC want me out of the DOC so bad, they wouldn't care if killing me was the way they did it. I believe in my heart that this includes, possibly Commissioner Mr. Clarke himself. ... Sir, don't get me wrong, I'm not in any way afraid to die, in fact my family would be financially better off if I did die. So if the DOC causes my death, so what. But I will say this, that in NO way will I let the DOC drive me to lashing out. I'm not a threat to anyone." This letter was written under the influence of Ambien. (Ex. 19; Tr. II, 441-442.)

29. On February 22, 2010 at 6:51 p.m., Mr. Kelley faxed a letter to Assistant Deputy Commissioner DiPaolo. The letter reads in part: "I don't understand how you found probable cause that I spoke to staff about D [REDACTED]'s boob reduction job. ... She is one of the laziest CPOs I've ever met. And believe me I've met way to (sic) many though this could be the DOC managements fault, since it's unwritten policy of RULE BY FEAR has most staff afraid to do anything. ... If I was a junky or a boozer the DOC would send me to Florida to get help. Us mentally ill, hey who cares. We've all seen how the DOC cast aside its

mentally ill staff. Specially those with 25yrs or more.” Mr. Kelley was under the influence of Ambien when he wrote this letter. (Ex. 20; Tr. II, 449.)

30. On March 2, 2010 at 2:51 p.m., Mr. Kelley faxed a letter to Commissioner Clarke. The letter reads in part: “I’m still in a state of shock that all this bull is from a meeting over a classified incident report I made to the super over a phone call from an ex-inmate.” Mr. Kelley goes on to state, “But you do have some dangerous fools around you, if I may I’ll use the nicknames given them over the years: There’s 1. Dirty Duval, more skeletons (sic) the Arlington National Cemetery. 2. Mr. Spencer The poster boy for the Anti-Affirmative action kooks. 3. Mr. Dipaolo a guy whose (sic) had his face buried in more ASS than M. Chambers and J. Jamieson together. 4. Also theres (sic) your head of HRD K. Heatherson, are you kidding me, she hates DOC grunt employees as much or worse than Duval, Spencer and/or Dipaolo. ... Since Gov. Weld every DOC Commissioner has been guilty of this exact problem Let a DOC employee say what he or she believes and you guys pull out that Blue Book as though it came from GOD. You pull out ALL stops to rid yourself of Truth Seekers. You (DOC) could care less if the HONEST persons (sic) life is DESTROYED. ... Every time I know one of those farce commissioners hearing is going on, I day dream that this Army Officer would show up there and rip apart the DOC management & its policies. Again sir, hopefully you WON’T use my 1st amendment right against me. ... Sir if you would in a show of Good Faith, help me get my guns back.” Mr. Kelley was under the influence of Ambien when he wrote this letter. (Ex. 21; Tr. II, 460-461.)

31. During an interview with Lt. McCaw on March 3, 2010, in answer to whether he had heard from other former inmates other than JC, Mr. Kelley said he had heard from former-inmate DS on several occasions. On March 5, 2010, Lt. McCaw interviewed DS who indicated that

he had called Mr. Kelley at the jail several times since DS had been paroled to ask for help in obtaining the welding certificate he had earned in jail. Mr. Kelley did not report these contacts until his interview with Lt. McCaw. (Tr. II, 400-402; Ex. 23.)

32. By letter of April 12, 2010, Commissioner Clarke issued a Notice of Charges and Hearing to Mr. Kelley, finding probable cause to find that Mr. Kelley disseminated personal medical information of DOC employees to other staff members, in the presence of an inmate or inmates, in violation of Rules 6(b) and 8(b) in the Blue Book, and in violation of 103 DOC 225, the Professional Boundaries Policy. (Ex. 2.)
33. By letter of May 20, 2010, Commissioner Clarke issued a Notice of Charges and Hearing to Mr. Kelley, finding probable cause to find that Mr. Kelley had received a telephone call at home from a former inmate and failed to promptly report it; received several telephone calls from another former inmate and failed to report the contacts; submitted a confidential incident report on January 13, 2010 that contained disparaging remarks about DOC and its employees; and submitted letters to the DOC administration that contained disparaging remarks about DOC employees. Mr. Kelley's conduct was deemed to be in violation of General Policy I, Rule 1, Rule 6(a) and Rule 8(c) of the Blue Book. (Ex. 3.)
34. By letter of July 20, 2010, Commissioner Clarke terminated Mr. Kelley from employment for disseminating personal medical information of DOC employees to other staff members in the presence of inmates in violation of Rules 6(b), 8(b), and the Professional Boundaries policy, 103 DOC 225; and failing to promptly report a telephone call from an inmate while at home; failing to report several phone calls from another former inmate; submitting a confidential incident report containing disparaging remarks about DOC employees; and submitting letters

to the DOC administration containing disparaging remarks about DOC staff, in violation of General Policy I, and Rules 1, 6(a) and 8(c). (Ex. 4.)

35. By letter of December 15, 2010, Mr. Kelley's psychiatrist Paul M. Epstein, M.D. indicated that Mr. Kelley suffers from bipolar disorder. "This disorder is characterized by significant mood symptoms causing marked distress or impairment in social, occupational, or other important areas of functioning. Symptoms frequently include a decreased need for sleep, pressured speech with excessive talk, racing thoughts, easy distractibility, psychomotor agitation, and expansive feelings. This can then alternate with depressed feelings unpredictably and acutely." (Ex. 25.)
36. Dr. Epstein noted that Mr. Kelley no longer takes Ambien. Dr. Epstein opined, "Ambien in itself is known to cause dissociative symptoms where people unpredictably do things and they are fully unaware that they do them ... [I]t's possible that some of his behavior could have been a function of dissociative symptoms that could have been part of the side effect profile of Ambien. ... Michael's bipolar hypomanic ailments could very well have had a direct impact on his behavior on the job ... [I]t is quite possible that dissociative symptoms from the Ambien could also have played a role in his erratic behavior ..."
- (Ex. 25.)
37. Mr. Kelley received two commendations in his position of CPO I. One commendation was for capturing an escaped inmate, and the second commendation was for Pride in Massachusetts when he brought out a crew of inmates to clean up certain roads in the City of Fitchburg. (Tr. II, 378.)

CONCLUSION AND RECOMMENDATION

The DOC has proved by a preponderance of the evidence that there was just cause to terminate Michael Kelley from his position of CPO I at NCCI at Gardner.

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). 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 rule of law. *Id.* at 304, quoting *Selectmen of Wakefield v. Judge of First District Court of E. Middlesex*, 389 Mass. 508, 514 (1983).

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). 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).

It is inappropriate for the Civil Service Commission to modify an employee's discipline where it finds the same core of consequential facts as the appointing authority regarding the misconduct of the employee, but makes different subsidiary findings of fact. *Town of Falmouth*, 61 Mass. App. Ct. at 797 (2004).

Dissemination of medical information

The Appointing Authority had reasonable justification to discipline the Appellant for dissemination of medical information of D [REDACTED] S [REDACTED] and her fiancé. The Appellant's action violated 103 DOC 225, the Professional Boundaries Policy, and Rules 6(b) and 8(b) in the Blue Book.

When the Appellant was questioned by Ms. S [REDACTED] on her first day back at work about why he told inmate GM about Ms. S [REDACTED]'s surgery and her fiancé's cancer, the Appellant said, "They asked where you were." I consider this statement an admission by the Appellant that he, in fact, spoke to inmates about Ms. S [REDACTED]. The Appellant now denies that he spoke with inmates and insists that he spoke only to other staff and that inmates may have overheard. The inmate GM, when interviewed, clearly did not want to discuss the situation, but he finally admitted that other inmates told him that the Appellant told them about Ms. S [REDACTED].

In either scenario, that is, whether the Appellant spoke directly with inmates, or whether inmates overheard him speaking with staff, the Appellant violated the Professional Boundaries Policy that clearly prohibits "discussing the personal life or issues of any employee, including one's self, with an inmate or in the presence of an inmate" in section 225.02.

The Appellant violated Rule 6(b) which instructs DOC employees to "be particularly discreet in your interest of the personal matters of any co-worker, or when discussing personal matters of yourself or another."

The Appellant violated Rule 8(b) which instructs DOC employees, "You shall not discuss ... the affairs of any employee while in the presence or hearing of an inmate."

Failure to report promptly contact with former inmates

The Appointing Authority had reasonable justification to discipline the Appellant for failing to report promptly the telephone call he received from inmate JC during the holidays, and the telephone calls with former inmate DS received at the jail, in violation of General Policy I, and Rules 1, 6(a) and 8(c).

General Policy I requires all DOC employees to "render good judgment, full and prompt obedience to all provisions of law and all orders ... issued by the Commissioner, the respective Superintendents, or by their authority."

Rule 1 provides in part that DOC "[e]mployees should give dignity to their position ..."

Rule 6(a) provides among other things that all DOC employees must "treat each other with mutual respect, kindness, and civility, as become 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" in order to best meet correctional goals and objectives.

Rule 8(c) provides in part, "You must not associate with, accompany, correspond or consorts with any inmate or former inmate except for a chance meeting without specific approval of your Superintendent, DOC Department Head or the Commissioner of Correction. Any other outside inmate contact must be reported to your Superintendent, DOC Department head or Commissioner of Correction."

Although Rule 8(c) does not articulate a time period in which a report is to be submitted to the Superintendent, DOC Department Head or Commissioner, General Policy I requires a

DOC employee honor his "constant obligation" to provide "prompt obedience" to all provisions of law.

The holiday telephone call from former inmate JC was not a "chance meeting" because former inmate JC planned the telephone call, even though the Appellant might not have expected the call. The Appellant should have promptly reported the call to the Superintendent, DOC Department Head or the Commissioner. The Appellant, after waiting twelve days (assuming the telephone call was placed on New Year's Day 2010, or waiting longer if the telephone call was placed on Christmas Day 2009), verbally reported the incident to his immediate supervisor Sue Tenney who is not a Superintendent, DOC Department Head or a Commissioner. When instructed by Ms. Tenney to write a report of the contact, the Appellant waited until the next day and then filed a written report.

In addition, the Appellant received several telephone calls while at work from former inmate DS who required help obtaining his welding certificate. The Appellant did not report these calls to the Superintendent, DOC Department Head or the Commissioner; the information was provided by the Appellant during his interview with Lt. McCaw.

The Appellant violated General Policy I and Rule 8(c) by not reporting the telephone contacts promptly, and by not reporting those contacts to the appropriate person. He failed to "give dignity to his position."

Disparaging remarks

The Appellant's confidential report disparaged Ms. S [REDACTED] and his letters to the DOC Superintendent and Commissioner disparaged DOC staff. Only portions of these letters have been cited above in the findings of fact. The Commission is encouraged to read each missive in its entirety to get the full flavor of the disparagement. The Appellant blames these letters not on

his bipolar disorder, but on Ambien, a sleep medication, alleging that he had no memory of writing these letters until the next day when his wife would show them to him.

I find the Appellant's argument to be unconvincing because the letters that were not written under the influence of Ambien are identical in tone and insult to the letters written while under the influence of Ambien.

The letters indicate a failure to "render good judgment" under General Policy I, a failure to given dignity to his position under Rule 1, and a failure to treat his co-workers with "mutual respect, kindness, and civility" under Rule 6(a).

In view of the fact that the Appellant had received a final warning in December 2008, and in view of his violation of the DOC rules enumerated above, I recommend that the Civil Service Commission affirm the action of the Appointing Authority.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Maria A. Imperato

Maria A. Imperato
Administrative Magistrate

DATED: **AUG 24 2011**