

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MICHAEL BURNS,
Appellant

v.

G2-18-147 (Bypass Appeal)
D-19-017 (Discipline Appeal)

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Michael Burns

Appearance for Respondent:

Norman Chalupka, Esq.¹
Joseph S. Santoro, Labor Relations Advisor
Department of Correction
P.O. Box 946, Industries Drive
Norfolk, MA 02056

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Michael D. Burns (Appellant), filed two (2) appeals with the Civil Service Commission (Commission). The first appeal, filed under G.L. c. 31, §2(b), contested the Department of Correction (DOC)'s decision to bypass him for promotional appointment to Correction Officer II (CO II) for "pending discipline". Subsequent to the Appellant filing that bypass appeal, DOC completed its internal investigation and suspended the Appellant for one (1) day. The Appellant then filed an appeal with the Commission under G.L. c. 31, § 43 to contest the suspension. The two (2) appeals were subsequently consolidated and I held a full hearing

¹ Attorney Chalupka has retired from DOC. This decision will be sent to Attorney Earl Wilson at DOC.

regarding both matters on March 15, 2019.² DOC submitted a Motion to Dismiss and an Amended Motion to Dismiss the bypass appeal, which were taken under advisement.

The hearing was private. The full hearing was digitally recorded and both parties received a CD of the proceeding.³

FINDINGS OF FACT:

I entered eleven (11) exhibits from the Respondent regarding the discipline appeal, plus three (3) post-hearing exhibits, and seven (7) exhibits from the Respondent regarding the bypass appeal. I entered five (5) exhibits from the Appellant that applied to both the bypass and discipline appeals. Based on the documents submitted into evidence and the testimony of:

Called by DOC:

- Alfred Saucier, Deputy Superintendent of Operations, Massachusetts Treatment Center
- Patrick Smith, Superintendent's Special Investigator, Massachusetts Treatment Center

Called by the Appellant:

- Michael Burns (Appellant)

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

² The Standard Adjudicatory Rules of Practice and Procedures, 801 CMR §§ 1.00 (formal rules) apply to adjudication before the Commission with Chapter 31 or any Commission rules taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

1. The Appellant works as a Correction Officer (CO I) at the Massachusetts Treatment Center of the DOC (DOC or Agency). He has been employed with DOC since 2013 (Appellant Testimony).
2. In June 2018, the Appellant's name was ranked 7th on Certification No. 05558 for Correction Officer II (CO II). (Resp. Ex. B-6, B-6).
3. No candidate with the rank of 8th or below from Certification No. 05558 was promoted to CO II. (Resp. Ex. B-6).

Prior Discipline

4. On September 12, 2017, an informal complaint was filed against the Appellant. The basis of the complaint involved the Appellant removing items belonging to Inmate A from the refrigerator used by residents. This was alleged to have occurred on multiple occasions. (App. Ex. 1)
5. The inquiry into the September 12, 2017 informal complaint was extended to a formal investigation on October 17, 2017. (Resp. Ex. D-9). Patrick Smith, who has conducted over 100 investigations and interviews, investigated the September 2017 complaint about the Appellant. (Smith Testimony at 1:16).
6. The investigator determined that the practice and policy in the unit provides that inmates may store items in the refrigerator overnight when the items are stored in the original container and are clearly marked with the resident's name. (Resp. Ex. D-9).
7. As part of the inquiry, the Appellant was interviewed on September 14 and 20, 2017. (Resp. Ex. D-9). During the interviews, the Appellant stated that he had removed Inmate A's items from the refrigerator on September 12, 2017, as well as in the past. This interview was not recorded (Appellant Testimony). Video surveillance showed the Appellant in September

2017 removing items that were improperly stored, and that he also removed items belonging to Inmate A that were properly stored. (Resp. Ex. D-9).

8. As result of the investigation, in his Memorandum to the Superintendent, the investigator wrote that by removing items belonging to Inmate A from the refrigerator on September 12, 2017, the Appellant was not acting in accordance with institutional rules, policies, or procedures. He wrote that the complaint should be sustained because the Appellant's actions violated General Policy I and Section 8 (Conduct between Employee and Inmate) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (DOC Rules). (Resp. Ex. D-9).
9. On October 31, 2017, the Appellant was issued a Letter of Reprimand for removing Inmate A's items from the unit refrigerator. The Reprimand specified the violations and DOC Rules. (Resp. Ex. D-9).
10. No discipline other than the Letter of Reprimand issued as a result of the September 12, 2017 incident. (Appellant Testimony).

Discipline Relating to Promotion/Bypass

11. A complaint regarding the Appellant was filed in June 2018. The same person who had previously filed a complaint, Inmate A, stated that, on March 18, 2018, the Appellant removed soda, drinks and apple juice, which was part of Inmate A's diabetic snack, from the unit refrigerator. Inmate A claimed that this conduct was "ongoing" and had continued even after a similar matter had been investigated earlier. (Resp. Ex. D-6)
12. The complaint also stated that, on March 20, 2018, the Appellant told Inmate A that he would discipline Inmate A, search Inmate A's cell, and "lock him up" if Inmate A continued to file complaints against him. (Resp. Ex. D-6)

13. The investigation was conducted by Investigator Smith. Video footage showed the Appellant removing items belonging to Inmate A and placing the items on top of the refrigerator on March 18, 2018 and on March 19, 2018. (Smith Testimony; Resp. Ex. D-6). Additionally, video footage from March 20, 2018 showed the Appellant walking to Inmate A's cell and talking to Inmate A at approximately 8:30 P.M. (Smith Testimony, Resp. Ex. D-6).
14. On June 4, 2018, the Appellant was interviewed about the Appellant removing Inmate A's items from the refrigerator in March. (Resp. Ex. D-6). The Appellant had union representation at the interview. (Appellant Testimony). The Appellant stated that he had removed Inmate A's items from the refrigerator. He stated that Inmate A was insolent to him and that he wanted to make a point that Inmate A could not be disrespectful towards him. (Resp. Ex. D-6; Appellant Testimony).
15. The investigator took into account the Appellant's interview, the allegations in the complaint, and videos of the room where the unit refrigerator was located. (Resp. Ex. D-6).
16. In his Memorandum to the Superintendent dated June 11, 2018, the investigator found that the Appellant had violated Sections 1,12(a) and 19(c) of the DOC Rules; #28 of the SDP/Temporary Civil Commitment Orientation Handbook, Unit Regulations and Room Standards (detailing use of refrigerator); and MTC Procedures 103 DOC 400.01. These state, in relevant part:
- Nothing in... these rules and regulations shall be construed to relieve an employee of his/her... constant obligation to render good judgment full and prompt obedience to all provisions of law, and to all orders not repugnant to rules, regulations and policy...
 - Employees should give dignity to their position...
 - Employees shall exercise constant vigilance and caution in their duties,
 - Retaliation or harassment of any kind against inmates for exercising their rights, filing a grievance, or otherwise lodging a complaint shall not be tolerated and is strictly prohibited.

17. The Memorandum and Superintendent's review of the Memorandum were completed by June 11, 2018. (Resp. Ex. D-5).⁴
18. On November 29, 2018, the MTC Superintendent imposed a one-day suspension on Mr. Burns which he served on January 29, 2019. (Resp. Ex. D-4). The suspension was imposed in accordance with DOC's progressive discipline as detailed in section 230.04 of the Discipline and Termination Policy 103 DOC 30. (Resp. Ex. B-2).
19. The Appellant appealed the one-day suspension to the Agency and a hearing was held on December 17, 2018. (Resp. Ex. D-Resp. Post-Hearing Ex. aa). On December 28, 2018, the discipline decision was upheld. (Resp. Ex. B-3, B-4).
20. The Appellant received the DOC's discipline decision by the time of the full hearing at the Commission.⁵

Promotion/Bypass

21. On August 22, 2018, DOC decided not to promote the Appellant from a CO I to a CO II because of "pending discipline." (Resp. Ex. B-6).
22. The DOC decision regarding the promotion was made within a month after the investigator wrote his memorandum of findings to the Superintendent, which had not yet resulted in discipline. (Resp. Ex. D-7; B-6).
23. The DOC Discipline and Termination Policy 103 DOC 230 states that the DOC "shall consider an employee's discipline history prior to a transfer, promotion, or reassignment and *they may be denied based on the date of the incident which resulted in discipline being*

⁴ On June 11, 2018 the Superintendent sent a letter to the former Chief, Internal Affairs, requesting the review of the Category I investigation and approval to proceed with a one-day suspension for Mr. Burns. (Resp. Ex. D-5).

⁵ The Commission issued a procedural order after the pre-hearing conference, on November 27, 2018, ordering, among other things, that the DOC decide whether to impose discipline on the Appellant and must conduct a hearing and issue a final decision if the Appellant decided to appeal the discipline. At hearing, no witness explained why the Appellant's discipline pending for such a long time, from June 2018 until the pre-hearing conference at the Commission on November 27, 2018.

imposed.” (Resp. Ex. B-2). The DOC’s practice is to disqualify an employee for promotion if discipline is pending against the employee. (Resp. Ex. B-6).

24. When candidates are tied on a Certification, DOC used a tie-breaking method based on the candidates’ seniority at DOC, based on date of hire. (Resp. Ex. B- 6).

Legal Standard

The Commission’s purpose is “to guard against political considerations, favoritism, and bias in governmental employment decisions When there are, in connection with personnel decisions, 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.”

Town of Falmouth v. Civil Serv. Comm’n., 61 Mass. App. Ct. 796, 800 (2006) (quoting Cambridge v. Civil Serv. Comm’n., 43 Mass. App. Ct. 300, 304 (1997)) *rev. den.* 426 Mass. 1102 (1997).

Disciplinary Appeals

Under G.L. c. 31, § 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Serv. Comm’n., 447 Mass. 814, 823 (2006). The role of the 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.” Cambridge at 303. Further, as the Massachusetts Supreme Judicial Court stated in Falmouth v. Civ. Serv. Comm'n., 447 Mass. 814 (2006): “After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], § 43 (‘The commission may also modify any penalty imposed by the appointing authority.’) Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides

whether ‘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.’ Falmouth, 447 Mass. at 823, citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

An agency’s action is justified if it is done “upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge at 303. “Unless the commission’s findings of fact differ significantly from those reported by the [appointing authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” Falmouth, 447 Mass. at 823 (citations omitted). When 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. Falmouth v. Civil Serv. Comm’n., 61 Mass.App.Ct. 796, 800 (2004).

Applicable Law When Candidates Are Tied on a Certification

“The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass” Paolantonio v. Dep’t. of Correction, 32 MCSR 249, 250 (2019), citing Edson v. Reading, 21 MCSR 453 (2008); *see* Bartolomei v. Holyoke, 21 MCSR 94 (2008); Coughlin v. Plymouth, 19 MCSR 434 (2006); Kailas v. Fran'din School Dep’t., 11 MCSR 73 (1998); Servello v. Dep’t. of Correction, 28 MCSR 252 (2015); *see also*

Thompson v. Civil Service Comm'n., Suffolk Superior Ct. No. MICV 1995-5742 (1996)

(concluding that selection among tied candidates does not present a bypass).

Analysis

As a preliminary matter, the Appellant was not bypassed for promotional appointment. As referenced above, the Commission has long held that choosing from among tied candidates on a Certification does not constitute a bypass. It is undisputed that no candidate ranked below the Appellant was promoted to CO II. Rather, DOC, pursuant to its rules and established policy, declined to promote the Appellant because there was discipline pending against the Appellant at the time. Instead of promoting the Appellant, DOC promoted a candidate with whom the Appellant was tied. That the promoted candidate had less seniority than the Appellant, an established tie-breaking policy at the DOC, does not constitute a bypass since the Appellant had a pending discipline against him during the promotion process and he was tied with the selected candidate. For these reasons, the Appellant's bypass appeal is *dismissed*.

That turns to the Appellant's appeal regarding his one-day suspension. DOC, by a preponderance of the evidence, has shown that there was just cause to impose this discipline against the Appellant. The evidence shows that the Appellant did not follow policy and procedure and he targeted one inmate in particular by removing that inmate's items from the refrigerator on multiple occasions. An inquiry by DOC in the Fall of 2017 into the reason the Appellant removed two items that were properly marked with Inmate A's name and were in their original packaging resulted in a Letter of Reprimand to the Appellant. The Letter specified that, after removing Inmate A's items from the refrigerator, the Appellant did not inform Inmate A, did not document his actions, and provided reasons for doing these actions that were not credible.

In March 2018, the Appellant again removed items from the unit refrigerator that belonged to Inmate A. The investigator found that the Appellant had violated the same rules he had violated in September 2017. The Appellant's testimony in the DOC hearing and the hearing at the Commission, though consistent, did not offer a clear explanation of the reason he removed Inmate A's belongings but not items belonging to other inmates. Rather, the Appellant described how Inmate A's behavior was difficult to manage. The Appellant believed that his actions in March 2018 did not warrant discipline because they were relatively minor incidents and because he had the authority to determine which items should be thrown away. The Appellant's assertions about his authority to remove Inmate A's items from the unit refrigerator are incorrect. In fact, the Appellant should have known that continuing to remove Inmate A's items from the refrigerator, under the circumstances as described here, violated DOC Rules.

Repeatedly targeting one inmate with conduct for which the Appellant had received a Letter of Reprimand demonstrates not only the Appellant's lack of good judgment, but his propensity to disregard rules which he knew he had already violated. A one-day suspension is warranted and in keeping with DOC's progressive discipline policies.

Conclusion

For all of the above reasons, the Appellant's bypass appeal under Docket No. G1-18-147 is ***dismissed*** and the Appellant's disciplinary appeal under Docket No. D-19-017 is ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman

Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

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)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Michael Burns (Appellant)

Earl Wilson, Esq. (for Respondent)