COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
617.727.2293

MARIO DELGADO,
Appellant,

v.

D1-12-282

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Melinda T. Willis, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford Law Dept.
133 William Street
New Bedford, MA 02740

Commissioner:

Christopher C. Bowman

DECISION

Procedural History

Pursuant to G.L. c. 31, § 43, the Appellant, Mario Delgado (Mr. Delgado), filed a timely appeal with the Civil Service Commission (Commission) on October 3, 2012, contesting the decision of the City of New Bedford (City) to terminate him as a Motor Equipment Operator (MEO) from the City's Department of Public Infrastructure (Department). A pre-hearing conference was held at the UMASS School of Law in North Dartmouth on November 9, 2012. A full hearing was held at the same location on January 11, 2013. Neither party requested a public hearing, so the hearing was deemed private. The witnesses were sequestered. The

hearing was digitally recorded and the parties were provided with a CD of the hearing[1]. The parties submitted post-hearing briefs on February 15, 2013.

Summary

By a preponderance of the evidence, the City has shown that there was just cause to terminate Mr. Delgado from his position as an MEO for engaging in inappropriate conduct in the workplace, shortly after signing a Last Chance Agreement and agreeing to a 30-day suspension for similar behavior.

FINDINGS OF FACT

Based on the nine (9) exhibits entered into evidence, the stipulations of the parties, the testimony of:

Called by the City:

- Jose Colon Garcia, MEO, City of New Bedford;
- Dennis G. Monty, Water Construction Foreman, City of New Bedford;
- Ronald H. Labelle, Commissioner of Public Infrastructure, City of New Bedford;

Called by Mr. Delgado:

- Mario Delgado, Appellant
- Coury Garside, Appellant;

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

1. On May 21, 2007, Mr. Delgado was appointed as an MEO by the City. He was a permanent, tenured civil service employee until his termination. (Stipulated Fact and Exhibit 1)

[1] Should either party need a written transcript of the hearing, the CD should be used for this purpose.

2. Upon his appointment, Mr. Delgado received a copy of the City's Anti-Discrimination and Anti-Harassment Policy. (Exhibit 2)
3. On January 20, 2009, Mr. Delgado received a written warning for not responding to a snow emergency. (Exhibit 3)
4. On January 12, 2011, Mr. Delgado received a written warning for inappropriate use of City radios, being disrespectful and lying to a supervisor. (Exhibit 4)
5. Sometime prior to August 23, 2012, many employees who worked with Mr. Delgado told the City's Commissioner of Public Infrastructure, Ronald Labelle, that Mr. Delgado was a bully; that he antagonized them; used sexual slurs toward them; and that they feared Mr. Delgado. (Testimony of Commissioner Labelle)
6. On August 23, 2012, in lieu of termination, Mr. Delgado received a 30-day suspension and signed a Last Chance Agreement as a result of threatening a fellow employee, being disrespectful to and bullying other employees, including the use of sexual slurs and connotations. (Exhibits 5 and 6 and Testimony of Commissioner Labelle)
7. The August 23, 2012 Last Chance Agreement, in addition to imposing a 30-day suspension, called for Mr. Delgado to obtain services from the Employee Assistance Program (EAP) and submit a letter verifying his fitness for duty and compliance with any recommendations from the EAP. The Last Chance Agreement also states that, "I understand this is my final warning. If there is future discipline, my Employer will follow all requirements in accordance with MGL, Chapter 31 and Union Contract." (Exhibit 5)
8. On the morning of August 31, 2012, eight (8) days after signing the Last Chance Agreement and while on suspension, Mr. Delgado drove his daughter to work at the Department of

Public Facilities, which was in the building adjacent to his workplace at the Department of Public Infrastructure. (Testimony of Delgado)

9. When en route, Mr. Delgado observed the automobile of co-worker Jose Colon Garcia parked outside the Public Infrastructure garage. At 7:11 A.M., Mr. Delgado, using his personal cell phone, called Mr. Colon Garcia and asked him if he could bring his work boots out to him. (Testimony of Mr. Delgado and Exhibit 9)

10. After receiving the call, Mr. Colon Garcia retrieved Mr. Delgado's work boots from the top of Mr. Delgado's locker, exited the garage and brought the boots to Mr. Delgado, who was sitting in the driver's seat of his automobile on the opposite side of Liberty Street, directly across from the garage. (Testimony of Mr. Colon Garcia)

11. After Mr. Colon Garcia gave the boots to Mr. Delgado, Mr. Delgado said words to the effect, "thanks to these two motherfuckers, I've got to do my 30 days."[2]

12. Mr. Delgado's comment was referring to Roland St.Pierre and Daniel Ortiz, two co-workers who Mr. Delgado had asked to corroborate his version of events regarding the incidents that resulted in his 30-day suspension and Last Chance Agreement. (Testimony of Mr. Delgado)

13. Neither Mr. St. Pierre or Mr. Ortiz were standing outside or visible to Mr. Delgado or Mr. Colon Garcia when the comment was made. (Testimony of Mr. Delgado and Mr. Colon Garcia)

14. At some point after 7:11 A.M. on August 31, 2012, Mr. Colon Garcia spoke to Mr. Ortiz and told him about his conversation with Mr. Delgado. (Testimony of Mr. Colon Garcia)

---

[2] I carefully reviewed the testimony of both Mr. Colon Garcia and Mr. Delgado in regard to the exact words that were used on the morning of August 23, 2012. The significant conflict in their testimony is whether Mr. Delgado used the words "these two fucking guys" (as Mr. Delgado states) or "these two mother fuckers" (as Mr. Colon Garcia states). I credited the testimony of Mr. Colon Garcia because it rang true to me and because Mr. Colon Garcia had a vivid memory of the words and did not want to repeat them before the Commission because of his religious background.

15. Dennis Monty, a Water Construction Foreman, approached Mr. Delgado to discuss the matter with him. (Testimony of Mr. Colon Garcia)

16. Since Mr. Colon Garcia has difficulty with the English language, Mr. Monty typed up what Mr. Colon Garcia told him and read it back to him to ensure it was accurate. Mr. Monty then submitted the written report to his supervisor, Zeb Arruda. (Testimony of Mr. Colon Garcia and Mr. Monty)

17. Mr. Monty's written statement, dated August 31, 2012, states, in its entirety:

> "ON FRIDAY AT 7:50 AM JOSE COLONE APPROACHED ME AS I WAS ENTERING THE LIBERTY STREET SHOP AND TOLD ME THAT MARIO DELGARDO (sic) CALLED HIM OVER TO HIS TRUCK AT 7:15 AM TO ASK HIM TO GET HIS WORK BOOTS FROM THE BLDG. JOSE WENT AND GOT MARIO HIS WORK BOOTS AND WHEN HE GAVE THEM TO HIM MARIO SAID TO JOSE SEE THOSE TWO MOTHER FUCKERS OVER THERE MEANING ROLAND ST. AND DANNY ORTIZ (sic) THEY ARE THE ONES THAT GOT ME MY 30 DAYS. JOSE THEN TURNED AND WALKED AWAY AND MARIO DROVE OFF."
> (Exhibit 6)

18. At some point after August 31, 2012, Commissioner Labelle spoke with Mr. Monty about his written statement and Mr. Monty's conversation with Mr. Colon Garcia. Based on his discussion with Mr. Monty and his review of the written statement, Commissioner Labelle concluded that Mr. Delgado had *pointed at* Mr. St.Pierre and Mr. Ortiz while making his remarks about them. (Testimony of Commissioner Labelle) Commissioner Labelle, who was a sequestered witness, was still under this mistaken impression as of the day of the hearing before the Commission. (Testimony of Commissioner Labelle)

19. By letters dated September 17th and 18th, 2012, Commissioner Labelle notified Mr. Delgado of a disciplinary hearing, eventually held on September 27, 2012, to determine if Mr.

Delgado should be terminated for "continued[d] … inappropriate conduct in the workplace." (Exhibit 6)

20. After conducting a hearing on September 27, 2012, Commissioner Labelle notified Mr. Delgado that he was terminated. The notice to Mr. Delgado states in pertinent part that: "… [S]ix days after I agreed to reduce your termination to a 30 day suspension and Last Chance Agreement, you came to the workplace and continued the same intimidating and hostile conduct. The incident report is attached together with a copy of the Anti-harassment policy and your signature confirming receipt." (Exhibit 8)

21. The City's Anti-Discrimination and Anti-Harassment Policy states in pertinent part:

> "The City of New Bedford will not tolerate harassing conduct that affects employment conditions, that interferes unreasonably with an individual's performance or that creates an intimidating, hostile or offensive work environment.
>
> Harassment of employees occurring in the workplace, or in other settings related to employment, will not be tolerated. Further, any retaliations against an individual who has complained about harassment or retaliation against individuals for cooperating with an investigation of a harassment complaint is similarly unlawful and will not be tolerated.
> (Exhibit 2)

LEGAL STANDARD

G.L. c. 31, § 43, provides:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An 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 v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). 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." School Comm. v. Civil Service Comm'n, 43 Mass. App.Ct.486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "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).

ANALYSIS

Mr. Delgado began his employment as an MEO with the City in 2007. His disciplinary record began shortly thereafter, with a written warning in 2009 for not responding to a snow emergency; a written warning in 2011for inappropriate use of City radios and being disrespectful to a supervisor; and a 30-day suspension, accompanied by a Last Chance Agreement in 2012, for threatening a fellow employee, being disrespectful to and bullying other employees and using sexual slurs and connotations.

Eight (8) days after signing the Last Chance Agreement, Mr. Delgado parked across the street from his workplace and asked a co-worker to bring out his boots. During this exchange, Mr.

Delgado referred to two other co-workers as "motherfuckers" and pinned the blame on them for his 30-day suspension. After a hearing, the City terminated Mr. Delgado for continued inappropriate behavior.

Mr. Delgado argues that the City did not show that he engaged in intimidating and hostile conduct; that his remarks did not constitute "discriminatory harassment"; and that his remarks do not warrant the harsh penalty of termination.

I was not persuaded by Mr. Delgado's testimony that his remarks to Mr. Colon Garcia were nothing more than casual comments to a co-worker. Rather, he was engaging in precisely the same behavior that resulted in his then-*ongoing* suspension. Commissioner Labelle, a 24-year veteran of the City's public works hierarchy, spoke passionately about the right of employees to work in a safe environment, free of threats – and bullies. While Commissioner Labelle mistakenly concluded that Delgado had *pointed at* the two (2) employees in question, I credit his testimony that the comments alone, given the timing and context in which they were delivered, constituted inappropriate behavior that warranted termination.

Whether or not Mr. Delgado's comments constituted "discriminatory harassment" is not determinative here. "The issue is not whether [the employee] could have been civilly sued for his behavior … but rather whether the [Appointing Authority] could reasonably conclude that his conduct violated the [Last Chance] Agreement." Hollie v. Mass. Highway Dep't and Civ. Serv. Comm'n, Suffolk Superior Court No. 04-0239 (2006). There is ample evidence to support the City's conclusion that it did. Even Mr. Delgado acknowledges that his comments, made to a co-worker, were specifically in reference to two (2) other co-workers who he blamed for not backing him up during the prior disciplinary proceedings. The comments, made while parked across the street from his workplace while on suspension, sufficiently justify the City's

conclusion that Mr. Delgado was continuing to engage in the same bullying tactics that resulted in his 30-day suspension.

The record also shows that the decision to terminate Mr. Delgado was consistent with progressive discipline. He had received two prior written warnings, one of which was related in part to being disrespectful to a supervisor. Further, as referenced throughout this decision, Mr. Delgado was *actively serving* a 30-day suspension for engaging in the same conduct shown to have occurred here only eight (8) days after signing a Last Chance Agreement. The City's decision to terminate Mr. Delgado was warranted and necessary to ensure a safe work environment for his former co-workers.

Conclusion

For all of the above reasons, Mr. Delgado's appeal under Docket No. D1-12-282 is ***dismissed***.

Civil Service Commission

_____

Christopher C. Bowman
Chairman

By a 2-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Ittleman, Commissioner – Yes; and McDowell, Commissioner – No [Marquis, Stein – Absent]) on March 7, 2013.

A True Record. Attest:

_____

Commissioner

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.

Notice to:
Melinda Willis, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Respondent)