

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293

DAVID BRITES,
Appellant

v.

D1-16-163

CITY OF PITTSFIELD,
Respondent

Appearance for Appellant:

Anthony Torres
Teamsters Local 404
115 Progress Avenue
Springfield, MA 01104

Appearance for Respondent:

Fernand J. Dupere, Esq.
Dupere Law Offices
94 North Elm Street
Suite 307
Westfield, MA 01085

Commissioner:

Christopher C. Bowman

DECISION

On October 11, 2016, the Appellant, David Brites (Mr. Brites), pursuant to G.L. c. 31, §§ 41-45, filed this appeal with the Civil Service Commission, contesting the decision of the City of Pittsfield (City), to terminate his employment as a Water and Sewer Maintenance Worker. On November 8, 2016, a pre-hearing conference was held at the Springfield State Building in Springfield, MA and a full hearing was held at the same location on January 11, 2017.¹ The hearing was digitally recorded and the parties received a CD of the proceeding.² The parties

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

² 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 the

submitted post-hearing briefs on February 16, 2017 (Appellant) and February 17, 2017 (Respondent). For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

The City submitted thirty-four (34) exhibits and Mr. Brites submitted twenty-six (26) exhibits. Based on these exhibits, the testimony of the following witnesses:

Called by the City:

- Michael Taylor, Director of Personnel, City of Pittsfield;
- Brian Stack, Superintendent of Water and Sewer, City of Pittsfield;
- Leslie Renzi, Administrative Assistant, City of Pittsfield;
- Bruce Collingwood, Commissioner of Public Works and Utilities;

Called by Mr. Brites:

- David Brites, 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.

1. Mr. Brites has been employed by the City's Water Department as a Water and Sewer Maintenance Worker since December 4, 2000. (Stipulated Fact) His duties included replacing fire hydrants, working on water, sewer and drain lines and other duties. (Testimony of Mr. Brites)

Employment History

2. On June 9, 2009, Mr. Brites received a written warning for leaving a worksite to pay a utility bill. (City Exhibit 11)

substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. On January 13, 2010, Mr. Brites was suspended for three (3) days for taking unpaid leave without permission. The January 13, 2010 letter to Mr. Brites from the Commissioner of Public Works and Utilities stated in part:

“On November 30, 2009, you were absent from work and submitted an unpaid leave request for this day on December 1, 2009. Scheduled unpaid leave requires the preapproval from me and the Mayor in this situation. You did not request preapproval before taking the day off. In addition, you received a letter dated October 5, 2009 from me regarding unpaid leave requests where it was stated very clearly that future unpaid leave requests of this type would not be approved.” (City Exhibit 18)

4. On September 18, 2012, Mr. Brites received a warning for leaving the work area without permission. (City Exhibit 19)
5. On October 30, 2013, Mr. Brites received a warning for personal use of a City dumpster. (City Exhibit 20)
6. On October 1, 2014, Mr. Brites was suspended without pay for failing to maintain required licenses for the position he holds. (City Exhibit 21)
7. On February 10, 2015, Mr. Brites received a warning for excessive absenteeism. (City Exhibit 24)
8. In March 2015, Mr. Brites received a 5 ½ hour suspension for leaving the work area without permission. (City Exhibits 25 & 26)
9. On August 17, 2016, Mr. Brites received a warning for failing to answer an employee cell phone when his supervisor was calling him and for failure to help a fellow City employee. (City Exhibits 27-29)
10. On August 22, 2016, Mr. Brites received a warning for failing to meet work standards. (City Exhibit 30)

11. Mr. Brites has received multiple letters of appreciation for work that he and other workers performed as well as his individual acts of generosity, including serving as the Easter Bunny at or around Easter at Berkshire Medical Center. (Appellant Exhibit 18)

Facts Related to Instant Appeal

Unauthorized Leave

12. As a City employee, Mr. Brites is entitled to the following paid time off annually, all of which is credited to him at the beginning of the calendar year: twenty-two (22) vacation days; twelve (12) sick days; and three (3) personal days. (Testimony of Mr. Brite)

13. At the beginning of 2016, Mr. Brites also “carried over” approximately two (2) days of unused sick time from 2015. (Testimony of Mr. Brites)

14. The applicable collective bargaining agreement (CBA) also contains a provision regarding “special leave” which states in relevant part:

“In addition to the leaves authorized above, a Department Head may authorize an employee to be absent without pay for personal reasons for a period or periods not to exceed ten (10) working days in any calendar year ...” (City Exhibit 10)

15. In May 2016, Mr. Brites submitted a request to use two (2) vacation days on Thursday, September 22nd and Friday, September 23rd, 2016 to go on an annual fishing trip in upstate New York. (Testimony of Mr. Brites)

16. Mr. Brites had a pre-planned two (2)-week vacation scheduled for Monday, July 18, 2016 through Friday, July 29, 2016. (Testimony of Mr. Brites and Appellant Exhibit 12)

17. Mr. Brites used accrued sick time on June 27th, June 28th and June 29th. (Appellant Exhibit 12)

18. While out on sick leave, Mr. Brites contacted the City and asked to substitute unpaid time for sick time. That request was denied. (Testimony of Mr. Taylor)

19. Sometime in late June, Mr. Brites filed a workers compensation claim with the City.
(Testimony of Mr. Taylor)
20. On July 5, 2016, Mr. Brites completed an “injured employee report” stating that he had incurred an injury on the job on 6/21/16; that he had reported it on 7/1/16. Under “dates of treatment”, Mr. Brites wrote: “6/26/16, 6/27 to 7/30 2016 Admitted to BMC”. (Appellant Exhibit 13)
21. Mr. Brites was out of work between July 1, 2016 and Sunday, July 17, 2016. (Testimony of Mr. Brites and Appellant Exhibit 12)
22. On July 13, 2016, a medical professional from Berkshire Medical Group, P.C. penned a letter stating in relevant part: “The above named patient has been under my care for epigiotilis. Please excuse my patient from work. He will return to work at the completion of the excuse. The effective start date is 07/01/2016 for 15 days.” (Appellant Exhibit 14)
23. In a letter to Mr. Brites dated July 20, 2016, Mr. Taylor wrote: “On Friday, July 15, you provided me a note from the treating physician that excused you from work dating back to July 1, 2016, and cleared you for full duty as of July 16, 2016. Since your worker’s compensation claim has been denied, any time you have taken off from work due to your personal illness will be deducted from your accruals. You may check with your department on accruals that are currently available to you.” (Appellant Exhibit 16)
24. As of the date of the hearing before the Commission, Mr. Brites had filed an appeal of the denial of the workers compensation claim and that appeal was still pending. (Testimony of Mr. Taylor and Mr. Brites)

25. The City's time and attendance records show that, for the two (2) weeks that Mr. Brites was out of work between July 1st and July 16th, he used accrued vacation time. (Appellant Exhibit 12)
26. On Thursday, July 28th, while Mr. Brites was on vacation, he received a voicemail message from Brian Stack, the City's Superintendent of Water and Sewer, informing him (Mr. Brites) that he had exhausted his vacation time. (Testimony of Mr. Brites and Mr. Stack)
27. For Thursday, July 28th, Mr. Brites was allowed to use his remaining final 4.50 hours of vacation time and his remaining 3.50 hours of sick time. Prior to July 28th, Mr. Brites had used approximately 13 ½ sick days. (Appellant Exhibit 12)
28. As of Friday, July 29th, Mr. Brites had exhausted all of his accrued time (vacation, sick and personal). (Appellant Exhibit 12)
29. For Friday, July 29th, Mr. Brites was listed as "no pay" on the City's time and attendance records. (Appellant Exhibit 12)
30. Based on the phone call from Stacks, Mr. Brites was aware that, as of July 28th, he had exhausted all of his accrued time for calendar year 2016. (Testimony of Mr. Brites)
31. On Monday, September 19th, Mr. Brites told his supervisor, Mr. Stacks, that he "didn't know what to do" because he was out of all accrued time and he still had plans to go on his annual fishing trip in upstate New York which would require him to take off Thursday, September 22nd and Friday, September 23rd. (Testimony of Mr. Brites)
32. Mr. Stacks told Mr. Brites to contact Leslie Renzi, an Administrative Assistant in the office of Commissioner Collingwood. (Testimony of Mr. Brites) Ms. Renzi is responsible for processing the payroll. (Testimony of Ms. Renzi)

33. Mr. Brites contacted Ms. Renzi and asked her if it was possible to “borrow” time from the next calendar year or take two days off without pay. Ms. Renzi stated that she would touch base with Commissioner Collingwood and get back to Mr. Brites. (Testimony of Mr. Brites)
34. Mr. Brites received a voicemail message from Ms. Renzi stating: “Hey Dave; it’s Leslie again. They want you just to fill out a regular time off slip. You know the ones you can get from Sally just requesting time off. Okay. Thanks bye.” (Appellant Exhibit 26)
35. On Monday, September 19th, Mr. Brites completed an “employee leave request” form seeking “2 days unpaid” for September 22nd and September 23rd. He did not complete the section on the form which states: “Explanation (if applicable)”. (Testimony of Mr. Brites and City Exhibit 9)
36. Mr. Stack took the above-referenced form to Commissioner Collingwood on Tuesday, September 20th. (Testimony of Mr. Stack)
37. Commissioner Collingwood noted to Mr. Stack that Mr. Brites had not provided any reason or explanation for the request. Commissioner Collingwood wrote “denied” on the employee leave request form; along with his initials and the date (9/20/16); and handed the form back to Mr. Stack. (Testimony of Mr. Stack and City Exhibit 9)
38. On Tuesday, September 20th at 10:58 A.M., Commissioner Collingwood sent an email message to Mr. Taylor, with a copy to Ms. Renzi, stating: “Mike, See the attached request from Dave Brites for time off without pay. I denied it. He gave no reason to consider.” (City Exhibit 8)
39. On Tuesday afternoon, September 20th, Mr. Stacks returned the written denial to Mr. Brites. Upon giving the denial to Mr. Brites, Mr. Brites stated words to the effect: “I won’t be here anyway; it will come off next year’s leave.” (Testimony of Mr. Stacks)

40. Mr. Stacks told Mr. Brites that he should speak directly to Commissioner Collingwood.

(Testimony of Mr. Brites)

41. Mr. Brites did not speak with Commissioner Collingwood on Wednesday, September 21st.³

42. On Thursday, September 22nd and Friday, September 23rd, Mr. Brites called and left a voicemail message stating that he would not be reporting to work. (Testimony of Mr. Brites)

Expiration of Required License

43. While reviewing Mr. Brites's personnel file regarding the issue related to unauthorized leave, Mr. Taylor discovered that Mr. Brites had not renewed various licenses required as part of his job with the City. (Testimony of Mr. Taylor)

44. Mr. Brites is required to maintain various licenses, including a valid Class B driver's license (heavy commercial vehicles); a tanker endorsement; Class 2B hoisting license; and a catch basin cleaning license for his job. (City Exhibit 34 and Testimony of Mr. Brites)

45. These licenses, which are issued by the Department of Professional Licensure, expire every two (2) years. (Testimony of Mr. Brites)

46. Each license requires a set amount of "contact" or training hours which are offered online. (Testimony of Mr. Brites)

47. Approximately sixty (60) to ninety (90) days prior to the date upon which these licenses were about to expire, Mr. Brites would have received a reminder notice via email from the Department of Professional Licensure regarding the upcoming expirations of his licenses. (Testimony of Mr. Brites)

³ I listened (and re-listened) to Mr. Brites's testimony in which he stated that: a) Ms. Renzi told him that Commissioner Collingwood was unavailable to talk with him; and b) Ms. Renzi and Mr. Stacks told him to just make sure he "called in" on those two (2) days. I don't credit his testimony regarding either account as it was equivocal, at times inconsistent as well as illogical in regard to the alleged sequence of events.

48. Sometime in August 2016, Mr. Brites received a list of state-approved online courses that he would need to complete in order to renew his licenses. (Testimony of Mr. Brites)
49. At no time prior to September 24, 2016 did Mr. Brites take any of the required training courses. (Testimony of Mr. Brites)
50. Mr. Brites's licenses expired on September 24, 2016. (Testimony of Mr. Taylor and City Exhibits 1, 31 and 32)
51. Mr. Brites's licenses were reinstated on October 9, 2016. (Appellant Exhibit 17)
52. Bruce Collingwood was the Commissioner of Public Works and Utilities during all times relevant to this appeal. He was not aware of any other Public Works employer ever letting required licenses lapse twice, as occurred here. (Testimony of Mr. Collingwood)

Disciplinary Proceedings

53. By letter dated October 5, 2016, Mr. Taylor recommended that the City's Mayor, who is the Appointing Authority, terminate Mr. Brites's employment with the City. (City Exhibit 1)
54. By letter dated October 7, 2016, the City's Mayor notified Mr. Brites that: "Pursuant to M.G.L. chapter 31, s. 41, this letter is being sent due to my intent to terminate your employment with the City of Pittsfield. Please find enclosed investigative report, prepared by Director of Personnel Michael Taylor, indicating your absence without leave and expiration of required work licenses. Your discipline record includes multiple suspensions for related circumstances. You are entitled to a hearing before me as the appointing authority, or my designee, within ten days of such request. I have chosen Janis Akerstrom as my designee. I have also enclosed copies of M.G.L. c. 31, s. 41-45 as required by statute." (City Exhibit 2)

55. Also on October 7, 2016, the Mayor forwarded an email message to members of the City Council stating: “Earlier today, David Brites, an employee in the city’s Department of Public Utilities was served with an intent to terminate his employment. He is entitled to an appeal hearing. After the appeal a final determination will be made. The intent to terminate was made by the city’s Director of Personnel Michael Taylor and the city’s labor attorney Fred Dupere based upon the employees (sic) prior disciplinary record and certain recent events. At this time I cannot give more information because it is a personnel matter and Mr. Brites has exercised his right to appeal. (City Exhibit 3)
56. In an undated letter that I infer was sent on or shortly after October 7, 2016, Mr. Taylor informed Mr. Brites that: “On October 7, 2016, you were provided a letter indicating the City’s intent to terminate your employment. Your hearing has been scheduled for Monday, October 17, 2016 at 11AM in room 203 at City Hall. During this time, you will remain on paid administrative leave, beginning October 10, 2016, until a determination from said hearing is made.” (City Exhibit 4)
57. On October 17, 2016, Janis Akerstrom, the City’s Director of Community Development, served as a hearing officer and conducted a local hearing. (City Exhibit 5)
58. On October 24, 2016, Ms. Akerstrom recommended to the Mayor that Mr. Brites be terminated stating in relevant part that: a) “ ... Mr. Brites, who was taking no-pay leave without permission (Special Leave) and who also did not call in with a reason for his absence (under Absence without leave) did abandon his job without any identifiable explanation”; b) by choosing to “act against earlier instruction”, Mr. Brites was “insubordinate” when he failed to appear for work on September 22nd and September 23rd; and c) failing to maintain required licenses for a second time. (City Exhibit 4)

59. By letter dated October 28, 2016, the City's Mayor notified Mr. Brites that she agreed with the determinations and recommendations of the hearing officer and terminated Mr. Brites's employment with the City as of that date. (City Exhibit 6)

Applicable Civil Service Law

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).

“The commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . 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’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. 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 v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331 (1983).

Analysis

It is undisputed that, as of July 28, 2016, Mr. Brites had exhausted all of his accrued sick, personal and vacation time with the City. At least as of that point in time, Mr. Brites knew that he had a problem. He planned on taking his annual fishing trip in upstate New York in

September, which would require him to be out of work on Thursday, September 22nd and Friday, September 23rd. Based on the language in the collective bargaining agreement as well as the unequivocal language contained in a suspension letter (also related to an issue of unpaid leave) that he received in 2010, Mr. Brites knew that he would need to receive approval from the Department Head to take unpaid leave on those dates.

Yet, for several weeks after July 28th, Mr. Brites took no action to seek the approval of Commissioner Collingwood in order to determine if he could receive unpaid leave for his annual fishing trip. Instead, on Monday, September 19th, he told his supervisor that he “didn’t know what to do” about his desire to take that Thursday and Friday off even though he had exhausted all of his accrued leave. Given his disciplinary history in 2010, Mr. Brites did know what was required of him. The 2010 suspension letter specifically reminded Mr. Brites of the contract language requiring employees to file a request with their Department Head for such unpaid leave; and that is what the Administrative Assistant who processes payroll for the Department told Mr. Brites to do when he contacted her on September 19th.

On Monday, September 19th, Mr. Brites did finally submit a request for unpaid leave for Thursday, September 22nd and Friday, September 23rd. Commissioner Collingwood, acting as the Department Head, denied the request on Tuesday, September 20th. Upon being handed the denial by his supervisor on Tuesday, September 20th, Mr. Brites stated that he wouldn’t be showing up for work and that the City could take accrued time from him in 2017. His supervisor told Mr. Brites to speak directly to Commissioner Collingwood about the matter. Mr. Brites chose not to. Knowing that he had no accrued time off available to him and knowing that his request for unpaid time off had been denied, Mr. Brites faced a choice: a) work his required

shifts on Thursday, September 22nd and Friday, September 23rd; or b) go on the fishing trip and risk disciplinary action. Mr. Brites chose the latter; and the City chose to terminate him.

Mr. Brites's failure to appear for work on September 22nd and September 23rd and his neglect in letting required licenses expire for the second time in two (2) years constituted substantial misconduct which adversely affected the public interest by impairing the efficiency of public service. Thus, the City had just cause to discipline him.

Having determined that it was appropriate to discipline Mr. Brites, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was termination.

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. "The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). 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 commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

First, my findings do not differ significantly from those made by the City. Second, Mr. Brites's prior disciplinary history, including discipline for similar offenses, justifies the most severe discipline possible here: termination.

For these reasons, Mr. Brites's appeal under Docket No. D1-16-163 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 30, 2017.

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 to:
Tony Torres (for Appellant)
Fernand Dupere, Esq. (for Respondent)