

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DAVID CAIRA,
Appellant

v.

D1-15-112

CITY OF WALTHAM,
Respondent

Appearance for Appellant:

Stephen M. Winnick, Esq.
Winnick & Sullivan LLP
134 Main Street
Watertown, MA 02472

Appearance for Respondent:

Bernadette D. Sewell, Esq.
City of Waltham
119 School Street
Waltham, MA 02451

Commissioner:

Christopher C. Bowman¹

DECISION

On June 18, 2015, the Appellant, David Caira (Mr. Caira), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Waltham (City) to terminate him from his labor service position of special heavy motor equipment operator in the City's Department of Public Works for violation of rules related to: dereliction of duty, unauthorized and illegal use of a City vehicle, on-duty illegal activity inconsistent with duties and obligations as a City

¹ The Commission acknowledges the assistance of Law Clerk Demetreos Spanos in the drafting of this decision.

employee, off-duty illegal activity inconsistent with duties and obligations as a City employee.

On July 21, 2015, I held a pre-hearing conference at the offices of the Commission. A full hearing was conducted at the same location on September 18 and 28, 2015.² As there was no request by either party for a public hearing, the full hearing was declared private and all of the witnesses were sequestered. CDs were made of the digitally-recording hearing. A copy was retained by the Commission and both parties were provided with copies as well.³ At my request, the parties made closing arguments in lieu of submitting post-hearing briefs.

FINDINGS OF FACT:

The City entered twelve (12) exhibits (1–12) and Mr. Caira entered two (2) exhibits (13–14). Based upon the documents entered into evidence, the testimony of:

Called by the City:

- Michael Chiasson, Director of Public Works, City of Waltham;
- Scott Marchand, Police Officer, City of Newton Police Department;
- Adam Lord, Police Officer, City of Waltham Police Department;

Called by Mr. Caira:

- No witnesses.⁴

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 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.

⁴ As discussed at the full hearing, I have drawn an adverse inference based on Mr. Caira's failure to testify on his own behalf.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Mr. Caira is fifty (50) years old and currently lives in Waltham. (Exhibit 6)
2. Michael Chiasson (Mr. Chiasson) is the Director of Consolidated Public Works for the City and has served in that capacity for four (4) years. (Testimony of Mr. Chiasson)
3. Mr. Caira was hired by the City's Public Works Department, also known as Consolidated Public Works (CPW), in 2001. He served as a special heavy motor equipment operator (SMEO) from 2006 until his termination on June 3, 2015. (Stipulated Facts)
4. Mr. Caira was reprimanded for excessive absences by a letter dated January 5, 2004. (Exhibit 11)
5. On February 13, 2012, Mr. Caira was verbally reprimanded for extended lunch breaks. (Exhibit 12)
6. Scott Marchand (Detective Marchand) is a sixteen (16)-year veteran with the Newton Police Department and a member of the Suburban Middlesex County Drug Task Force (SMCDTF). (Testimony of Detective Marchand)
7. Detective Marchand is trained and experienced in investigating drug transactions/distributions as part of the SMCDTF and has personally conducted hundreds of undercover drug transaction/distribution stings. (Testimony of Detective Marchand)

8. Detective Marchand was familiar with Mr. Caira and knew he had a prior possession of cocaine charge in 2001. (Testimony of Detective Marchand)
9. In early 2013, the SMCDTF received information that Mr. Caira was allegedly distributing drugs while he was working for the City of Waltham. (Testimony of Detective Marchand; Exhibit 8)
10. On February or March of 2013, Detective Marchand was conducting surveillance in Waltham and saw Mr. Caira parked in his work truck on Hill Street. (Testimony of Detective Marchand)
11. Detective Marchand observed a person known to police as a drug dealer, who was also under investigation for drug distribution, operating a vehicle that pulled up behind Mr. Caira's parked City truck. Mr. Caira then exited his City truck and approached the driver's window of the person known to police as a drug dealer. Detective Marchand then observed behavior that was consistent with a hand-to-hand drug transaction.⁵ (Testimony of Detective Marchand)⁶
12. Detective Marchand ran the person known to police as a drug dealer's plate and determined that his vehicle was registered to a different individual, whose mailing address was the same as Mr. Caira's residence.⁷ (Testimony of Detective Marchand)
13. The drug dealer was arrested for possession and trafficking in cocaine. (Testimony of Detective Marchand; Exhibit 8)

⁵ A hand to hand drug transaction is a very quick meet where a drug dealer and a drug user meet, touch with cupped hands exchange and then separate. (Testimony of Detective Marchand)

⁶ Detective Marchand did not author a report reflecting his observation on Hill Street between Mr. Caira and the well-known drug dealer. (Testimony of Detective Marchand)

⁷ Driving vehicles registered to other individuals is a common practice used by drug dealers in an attempt to conceal their identity and evade police detection. (Testimony of Detective Marchand; Exhibit 6)

14. Adam Lord (Detective Lord), is a ten (10)-year veteran of the Waltham Police Department and is also a member of the Suburban Middlesex County Drug Task Force (SMCDTF). (Testimony of Detective Lord)
15. The SMCDTF received information that a person known to police as a drug dealer was allegedly conducting drug transactions with Mr. Caira in the Auto Zone in Waltham. (Testimony of Detective Lord; Exhibits 3, 8)
16. On May 15, 2013, Detective Lord conducted surveillance at the Auto Zone in Waltham. He observed Mr. Caira drive into the parking lot in a City truck and remain in the City truck. A couple of minutes later, a vehicle operated by a person known to police as a drug dealer pulled into the Auto Zone parking lot and parked. The person known to police as a drug dealer then exited the vehicle and walked into the store. At that point, Mr. Caira also exited his City vehicle and went into the store as well. Shortly thereafter, the person known to police as a drug dealer came out of the store, and, one minute later, Mr. Caira exited the store. Neither Mr. Caira nor the person known to police as a drug dealer was carrying any bags that would indicate that they made a purchase from Auto Zone. (Testimony of Detective Lord)
17. On May 15, 2013, Detective Lord continued his surveillance at the Auto Zone parking lot and observed a vehicle with three individuals pull into the parking lot and park in the Southwest corner of the lot near Dunkin Donuts. Detective Lord recognized two of the individuals, who he knew to be substance abusers. One of the individuals exited the van, went to the front of the Dunkin Donuts, and began looking in the windows as if he was looking for someone. He then stayed outside on the sidewalk looking around. Five minutes later, Mr. Caira pulled into the lot, driving his

own vehicle, and parked next to the vehicle occupied by individuals known to police as substance abusers. Mr. Caira then exited his vehicle and the individual waiting outside the Dunkin Donuts immediately went over to Mr. Caira. Detective Lord observed a hand-to-hand transaction in the parking lot after which Mr. Caira and the individual both entered the Dunkin Donuts. Mr. Caira left shortly thereafter carrying a coffee. The individual that went in with Mr. Caira remained inside the Dunkin Donuts for about fifteen (15) minutes. Detective Robinson, who was also on surveillance at the Auto Zone, went into Dunkin Donuts but did not see the individual. Detective Robinson, however, observed that there was a line to use the bathroom and assumed that the individual was in there since he subsequently saw the individual leaving the store and getting back into the blue Chevy Astrovan. (Testimony of Detective Lord; Exhibits 4, 6, 8)

18. In August 2013, the SMCDTF continued its surveillance of Mr. Caira on the basis of the complaint that he was involved in drug transactions while at work in his City of Waltham truck. (Testimony of Detective Lord; Exhibits 5, 6, 8)
19. On August 7, 2013, the SMCDTF observed Mr. Caira leaving the Waltham Public Works Department on a City mower. Mr. Caira drove the mower to the back of his residence in Waltham where he parked it and went inside for approximately an hour and a half. Mr. Caira then drove the City mower directly back to the City yard and signed out for a half vacation day. Approximately thirty (30) minutes later, Mr. Caira was observed leaving the City yard in his own car, making two stops and then arriving to his home in Waltham once again. Shortly thereafter, an individual driving a Chevy Camaro arrived at Mr. Caira's residence. The individual exited the vehicle

and got into Mr. Caira's car, and they both left. The SMCDTF team kept Mr. Caira and the individual under surveillance and followed them to a Home Depot parking lot in South Attleboro. The SMCDTF officers were in separate cars, communicating with each other by radio. One of the officers was parked two rows away and able to observe Mr. Caira's car. Mr. Caira and the individual remained in the car for ten minutes. At this point, the officers observed a Nissan Maxima, which they were familiar with, operated by another well-known drug dealer, whose registration and license had the same address as Mr. Caira's. The well-known drug dealer got out of his car and walked toward the store. Mr. Caira also got out of his car and started to walk towards the store. As Mr. Caira and the well-known drug dealer approached the store to enter, they were closer together and made gestures with their heads and their eyes met. The individual that was in Mr. Caira's vehicle remained in the car. Two detectives surveilled inside the Home Depot and although they saw both men walk up different aisles, they lost sight of them at some point and never saw them meet up. Mr. Caira and the well-known drug dealer were inside the store for only a few minutes. Mr. Caira and the well-known drug dealer exited the store without making any apparent purchases. The well-known drug dealer got into his car and left. Mr. Caira got into his car and pulled out but pulled over and stopped in the access road to the store. The surveillance by SMCDTF officers continued and nothing was seen passing between Mr. Caira and the individual in the car with him. While they were pulled over on the access road, the individual in the car with Mr. Caira was seen putting something to his mouth and pulling it away as if it were a plastic knotted bag that he was ripping open with his mouth. The officers were aware that heroin and

cocaine are typically packaged in sandwich bags, and knotted tightly and that they have to be opened with teeth or with a knife or scissors. The SMCDTF team followed Mr. Caira and the individual back to Newton. When Caira's car approached Rowe Street in Newton, they were able to stop Mr. Caira by safely boxing his car in. All officers approached Caira's car and identified themselves; their badges were around their necks. As the officers approached on foot, they made no observations of any drug transactions, saw no furtive gestures, could see Mr. Caira's hands for the most part, and watched for weapons for their own safety. The officers knew from their training and experience that drug users try to get rid of drugs by ingesting them so they got the men out of the car and cuffed them, took them to the side of the road and searched the car. Detective Lord found an open plastic bag with a brown substance like heroin, located between the driver's seat and the driver's door. Under the driver's seat, Detective Lord found a cigarette pack containing a knotted plastic bag; the substance tested positive for cocaine on the scene. Nothing was found under the area where the individual that was in Mr. Caira's car had been sitting. Mr. Caira was arrested and charged with possession and intent to distribute a Class A substance (heroin); possession of a Class B substance (cocaine); and conspiracy to violate drug laws. (Testimony of Detective Lord, Detective Marchand; Exhibits 5, 6, 8) On September 24, 2014, the criminal charges were amended and the intent to distribute charge was dropped. (Exhibit 7)

20. On August 8, 2013, Mr. Caira was placed on paid administrative leave due to his arrest on felony charges. (Testimony of Michael Chiasson; Exhibit 13)

21. On November 7, 2013, Mr. Caira was notified that a hearing would be conducted by the appointing authority, or by a hearing officer designated by the appointing authority, on Wednesday, November 20, 2013, to determine whether there was just cause to discharge from his position as a SMEO. (Exhibit 1)
22. The City charged Mr. Caira with dereliction of duty, unauthorized and illegal use of a City vehicle, on-duty illegal activity inconsistent with duties and obligation of a City employee, and off-duty illegal activity inconsistent with duties and obligation of a City employee. (Testimony of Michael Chiasson; Exhibits 1, 2, 9, 10)
23. On November 2013, Mr. Caira was placed on unpaid administrative leave due to an agreement reached with the City. He received his last paycheck on November 27, 2013. (Testimony of Mr. Chiasson; Exhibit 13)
24. Upon request from the Middlesex District Attorney, the City postponed the hearing until April 22, 2015. (Testimony of Michael Chiasson; Exhibits 9, 10)
25. On September 24, 2014, Mr. Caira admitted to sufficient facts regarding possession of 4.4 grams of heroin and 2.99 grams of cocaine. (Exhibit 9) He was placed on probation through March 24, 2016; required to pay court fees; receive treatment for substance abuse; remain drug free and submit to drug tests. (City Exhibit 7)
26. On February 24, 2015, the City notified Mr. Caira in an amended notice that a hearing would be held by the appointing authority, or by a hearing officer designated by the appointing authority, on Wednesday, March 4, 2015, to determine whether there was just cause to discharge from his position as a SMEO. (Exhibit 2)
27. The March 4, 2015 hearing was postponed and held on April 22, 2015. (Exhibits 2, 9, 10)

28. On April 22, 2015 a hearing was held to determine whether just cause existed to discipline Mr. Caira for each of the charges set forth in the amended notice of February 24, 2015. (Exhibit 9, 10)
29. On June 3, 2015, Mr. Caira was sent notice that he had been terminated from his employment with the City as a SMEO. (Exhibit 10)
30. On June 18, 2015, Mr. Caira timely appealed the decision of the appointing authority to the Commission.

Legal Standard

G.L. c. 31, § 43 provides, in pertinent part:

“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 (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 (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).

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. (2006) and cases cited. However, “[t]he 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 at 823, quoting internally from Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

Analysis

The evidence here is overwhelming and largely uncontested. Mr. Caira, both on and off-duty, was observed engaging in behavior that is consistent with someone buying and/or selling illegal drugs. He was subsequently arrested and charged with various felony offenses. Mr. Caira admitted to sufficient facts regarding charges related to the

possession of cocaine and heroin. He is now on probation and subject to various conditions, including random drug testing.

As noted in the findings, two highly trained police officers, whose testimony I found credible, observed Mr. Caira engage in behavior that they concluded was criminal conduct, while on duty and in possession of a City-owned vehicle. Specifically, in March 2013, a police detective observed Mr. Caira park a City truck on a street in Waltham; approach the vehicle of a person known to police as a drug dealer, and engage in a hand-to-hand transaction.

In May 2013, another police detective observed Mr. Caira drive a City truck into the parking lot of the local Auto Zone. After a person known to police as a drug dealer walked into the Auto Zone, Mr. Caira followed him into the store. Both men departed within one (1) minute of each other with no evidence that they made a purchase at the store.

Based on the credible testimony of the police detectives, both of whom have many years of experience as part of the regional drug task force, and based on the adverse inference I drew from Mr. Caira's failure to testify, I have concluded that it is more likely than not that Mr. Caira, on the two (2) occasions referenced above, engaged in the sale or purchase of illegal drugs during the work day and while he was in the possession of a City truck.

Later that same day in May 2013, Mr. Caira, now driving his own vehicle, drove into the nearby Dunkin Donuts parking lot shortly after a person known to police as a substance abuser had arrived at the store, appearing to look for someone. Mr. Caira approached the person known to police and was seen engaging in another hand-to hand

transaction.

In August 2013, Mr. Caira was again under surveillance and was followed to a Home Depot parking lot in South Attleboro. Again, he was observed meeting up with someone known to police as a drug dealer, entering the Home Depot and then exiting the store without appearing to have made any purchases. Shortly thereafter, Mr. Caira, who was driving his own vehicle, was pulled over by police who found cocaine and heroin in the vehicle. Mr. Caira was arrested and subsequently admitted to sufficient facts regarding the possession of cocaine and heroin.

Collectively, these actions support all of the charges put forth by the City in support of disciplining Mr. Caira. Among the most egregious behavior, which, standing alone, provides just cause for disciplining Mr. Caira, is his illegal conduct while on duty and in possession of a City vehicle. Mr. Caira's actions constituted substantial misconduct which adversely affected the public interest by impairing the dignity and efficiency of public service.

Having determined that it was appropriate to discipline Mr. Caira for his misconduct, I must determine if the City was justified in the level of discipline imposed – termination.

“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.” Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

The Commission is also 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 Commission, 447 Mass. 814, 823 (2006) and cases cited.

Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee’s discipline to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

Mr. Caira argues that the discipline imposed here, termination, is more severe than the punishment meted out to other City employees who also engaged in serious misconduct. In support of this argument, Mr. Caira submitted redacted disciplinary records related to numerous other City employees covering an approximately ten (10)-year period. I have reviewed each of those documents in their entirety.

Those records include a wide range of misconduct. Among the more serious misconduct included in the records is: theft of paint from the DPW (demotion and suspension); excessive absenteeism (3-day suspension); failure to maintain hoisting license (demotion and suspension); use of a racial slur (4-day suspension and last chance agreement); taking of metals from City property (verbal reprimand); theft of road salt (discipline unknown).

While all of the misconduct of other employees referenced above is of a serious nature, I do not find any of the misconduct to be comparable to what has been proven here, including engaging in buying and / or selling illegal drugs while on-duty and while in possession of a City vehicle. The substantial misconduct that took place here cannot be overstated and warrants termination.

Conclusion

For these reasons, Mr. Caira's appeal under Docket No. D1-15-112 is hereby *denied*.

Civil Service Commission

Christopher Bowman

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan and Stein, Commissioners) on November 12, 2015.

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:

Stephen M. Winnick, Esq. (for Appellant)
Bernadette D. Sewell, Esq. (for Respondent)