

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

DAVID CHIARADONNA,
Appellant

v.

**LYNN DEPARTMENT
OF PUBLIC WORKS,**
Respondent

Case No.: D-12-235

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

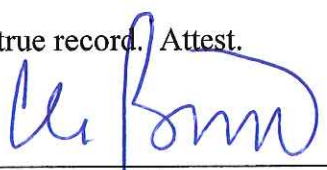
Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Commission received and reviewed the written objections of the Appellant. The Respondent did not file a response to the Appellant's written objections.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Lynn Department of Public Works to suspend the Appellant for three (3) days is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 9, 2014.

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)(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:

Wayne Soini, Esq. (for Appellant)

David Grunebaum, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

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Docket Nos.: D-12-235, CS-12-652

DAVID CHIARADONNA,
Petitioner

v.

CITY OF LYNN
DEPARTMENT OF PUBLIC WORKS,
Respondent

Appearance for Petitioner:

Wayne Soini, Esquire
AFSCME, Council 93
8 Beacon Street
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Appearance for Respondent:

David F. Grunebaum, Esquire
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Administrative Magistrate:

Angela McConney Scheepers, Esq.

SUMMARY OF TENTATIVE DECISION

The City of Lynn Department of Public Works had just cause to suspend the Appellant for three days. The discipline imposed constituted progressive discipline for the Appellant's third instance of insubordination. I therefore recommend that the Civil Service Commission dismiss the appeal.

TENTATIVE DECISION

INTRODUCTION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, David Chiaradonna (Appellant) appealed the decision of the Commissioner of the City of Lynn Department of Public

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CIVIL SERVICE COMMISSION

Works (DPW) to suspend him for three days without pay from his position as a Motor Equipment Operator (MEO) Welder.

The Appellant filed a timely appeal. A pre-hearing was held on September 25, 2012 at the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. On November 1, 2012, pursuant to 801 CMR 1.01(11)(c), a Magistrate from the Division of Administrative Law Appeals (DALA) conducted a full hearing at the Commission in accordance with the Formal Rules of the Standard Rules of Practice and Procedure. 801 CMR 1.01.

The Appellant testified on his own behalf. The Respondent called Manny Alcantara, Acting Commissioner of the City of Lynn DPW, Anthony Gately, Supervisor of the City of Lynn DPW Motor Equipment Repair and Peter Barry, Foreman of the City of Lynn DPW. The hearing was digitally recorded. As no notice was received from either party, the hearing was declared private. The witnesses were not sequestered.

Thirty-three exhibits were admitted into evidence. I admitted the Appellant's appeal form as Exhibit 34. Both parties submitted post-hearing briefs on December 3, 2012, whereupon the administrative record closed.

FINDINGS OF FACT

Based on the exhibits submitted at the hearing and the testimony of the following witnesses, I make the following findings of fact:

1. The Appellant David Chiaradonna, a MEO welder, has worked for the DPW since 2000. He studied welding fabrication at Lynn Technical High School before graduating in 1975. (Exhibit 28; Testimony of Appellant.)
2. The Appellant holds a Commercial Driver's License (CDL) for the operation of motor vehicles. (Testimony of Appellant.)

3. On May 22, 2008, Larry Donahue, Street Supervisor, conducted the Appellant's personnel evaluation. He gave the Appellant an "outstanding" in all areas and wrote:

Dave is the quiet, easy going type and gets along well with other employees. Has demonstrated versatility in assignments as well as most permanent employees. Has shown initiative and possess all the qualities one would expect of an employee.

(Exhibit 30.)

4. The DPW Commissioner is the appointing authority of the DPW. (Exhibits 26, 27 and 29.)

5. On October 7, 2009, the Appellant received a one-day suspension for insubordination due his conduct on October 1, 2009. At 7:15 a.m., the Appellant's immediate supervisor, Foreman Peter Barry, asked him to change the gutter broom on the sweeper. Peter Barry is a working foreman, and has been employed by the DPW for twenty-five years. Foreman Barry reports directly to Anthony Gately, the Supervisor of Motor Equipment Repair. Supervisor Gately has worked for the DPW for twenty-eight years, and oversees repairs of motor vehicles and welding of all city equipment. (Exhibits 26 and 28; Testimony of Gately, Testimony of Barry.)

6. Instead of changing the broom, the Appellant told Mr. Barry that he would get to it when he had completed his current task. When Mr. Barry insisted that the Appellant change the broom right away, the Appellant became upset, left the garage and his assignments, and punched out after asking the dispatcher to mark him sick for the rest of the day. (Exhibit 26; Testimony of Gately, Testimony of Barry.)

7. In an October 7, 2009 letter from DPW Commissioner Jay J. Fink, the Appellant was advised that his outburst had created a hostile work environment, that he had left his assigned duties, and that he had requested sick leave without just cause. The Appellant was

further advised that any future instances would result in additional disciplinary measures up to and including termination. (Exhibit 26.)

8. On December 29, 2009, the Appellant was suspended for three days for insubordination due to conduct on December 19, 2009. At 11:00 a.m., the Appellant was directed by Supervisor Gately to fix the sanding unit for Truck #230. Instead of complying, the Appellant said that he would file a grievance because the highway personnel were already eating. When Supervisor Gately insisted that he finish his assignment, the Appellant became upset and vocalized his displeasure for several minutes. (Exhibit 27; Testimony of Gately, Testimony of Barry.)

9. In a letter dated December 29, 2009, Commissioner Fink advised the Appellant that his December 19, 2009 actions constituted insubordination towards his supervisor and had created a hostile work environment. He was informed that his actions would not be tolerated and must stop. The Appellant was further advised that any future instances would result in additional disciplinary measures up to and including termination. The Commissioner stated that in the future, the Appellant must carry out his instructions even if he did not agree with them, and file a grievance after the fact. The three-day suspension was later reduced to two days by agreement. (Exhibit 27.)

10. At the weekly meeting for department head on Monday, May 7, 2012, Acting Commissioner Manny Alcantar asked Supervisor Gately to have new covers made and tack welded onto two light poles in Frey Park. The light poles bounded two corners of a basketball court. Because the original covers had been bolted on to the light poles, they had been easily taken off and the wires inside the light poles removed for their copper content. Without the

covers, the exposed and damaged wires created a safety hazard. (Exhibit 28; Testimony of Alcantara; Testimony of Gately; Testimony of Barry.)

11. That same day, Supervisor Gately passed this order on to Foreman Barry, who in turn instructed the Appellant that same day to make the covers and tack weld them to the light poles. (Exhibits 25 and 28; Testimony of Gately; Testimony of Barry.)

12. Between May 7, 2012 and May 9, 2012, the Appellant went out to Frey Park to measure the holes and to create a template for the covers. (Testimony of Appellant.)

13. That same week of May 7, 2012, Acting Commissioner Alcantara asked Supervisor Gately for an update on the light pole covers. Supervisor Gately checked in with Foreman Barry. On Thursday, May 10, 2012, Foreman Barry asked the Appellant if he had completed the job. (Exhibit 25; Testimony of Alcantara Testimony of Gately, Testimony of Barry.)

14. The Appellant responded that he had not completed the assignment because he was unable to back up the welding trailer in close proximity to the light poles. The welding trailer was attached to a DPW pick-up truck, and contained the welding machine and welding cables necessary for performing the welding. The positive welding cable was 197 feet long, and the negative cable was 102 feet long. (Exhibits 2-5, 9-11, 14, 15, 20-23, 25; Testimony of Appellant; Testimony of Barry.)

15. Frey Park is bounded by Oak Street, Dungeon Avenue and Walnut Street. It was possible to enter the park from Walnut Street or Oak Street in order to reach the two light poles. Once inside the park, there were paved paths wide enough for the operation of the welding machine trailer. There was also enough driving space on the paved paths and the grassy area of

the park to operate the welding trailer, turn around and return to the street without any need to reverse. (Exhibits 10-12, 14 and 24.)

16. Frey Park is frequented by children and families. (Testimony of the Appellant.)

17. The Appellant had never used the welding trailer. Before May 2012, the welding machine and cables had been installed on a larger DPW truck as one unit, rather than an attached trailer. (Exhibit 25; Testimony of Appellant; Testimony of Barry.)

18. Foreman Barry asked no further questions and walked away. He informed Supervisor Gately that the covers had not been welded to the light poles. (Testimony of Appellant; Testimony of Gately, Testimony of Barry.)

19. On Friday, May 11, 2012, the Appellant had made covers for the light poles, but to be used with bolts. He painted those covers and left them on a counter in the DPW office. (Exhibits 7, 8, 25 and 28; Testimony of Alcantara Testimony of Gately, Testimony of Barry.)

20. Also on Friday, May 11, 2012, Supervisor Gately asked the Appellant if he had tack welded the covers onto the light poles. The Appellant responded that he had not because he could not back up the welding trailer. The Appellant did not offer any further explanations nor did he raise any safety issues with Mr. Gately at this point. He did not tell Supervisor Gately that he had not bolted the covers on the light poles. (Exhibit 25; Testimony of Gately; Testimony of Appellant.)

21. The wires inside the two light poles remained exposed from May 7 until the morning of May 12, 2012. (Exhibits 25 and 28; Testimony of Appellant.)

22. On Saturday, May 12, 2012, DPW mechanic Brian Mapes was sent to Frey Park to tack weld the covers onto the light poles. Mr. Mapes had been working for DPW for less than one year. Mr. Mapes operated the DPW pick-up truck with the attached welding trailer. When

he arrived at Frey Park, there were no covers on the light poles. Mr. Mapes returned to the DPW office in order to manufacture them. Mr. Mapes then returned to the park, and using the welding machine and welding cables, tack welded the covers to the light poles. This entire operation took less than two hours. (Exhibits 7, 12, 16, 18, 25 and 32; Testimony of Gately.)

23. By letter dated June 6, 2012, Acting Commissioner Alcantar informed the Appellant that he would be suspended for five days. The Appellant was further advised that he had already been suspended twice for instances of insubordination towards his supervisors, that his actions would not be tolerated and must stop, and that any future instances would result in additional disciplinary measures up to and including termination. (Exhibit 25; Testimony of Alcantara.)

24. On June 12, 2012, the Appellant requested a hearing, and on July 9, 2012, a disciplinary hearing was held before Hearing Officer Michaels Marks. Mr. Marks found that although the Appellant testified that it was impossible to maneuver the DPW pick-up truck with the attached welding trailer in order to complete his assignment, another employee was able to perform the same task. The Hearing Officer took note of the Appellant's two previous instances of insubordination and found that the city had met its burden and provided just cause for a suspension based on the Appellant's insubordination. However, because the Appellant was expert in his craft and had received an outstanding evaluation in 2008, he reduced the five-day suspension to three days. (Exhibit 28.)

25. By letter dated August 1, 2012, Acting Commission Alcantara accepted the findings and recommendation of the Hearing Officer and imposed a three-day suspension on the Appellant. (Exhibit 29; Testimony of Alcantara.)

26. The Appellant filed a timely appeal with the Commission on August 7, 2012.
(Exhibit 34.)

CONCLUSION AND ORDER

A. *Applicable Legal Standards*

A tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L. c. 31, § 41, may appeal to the Commission under G.L. c. 31, § 43, which 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, however, 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 town, 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." *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983)." *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823-24 (2006). See *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, *rev. den.*, 390 Mass. 1102 (1983), and cases cited.

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 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 (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); *Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev. den.*, 390 Mass. 1102 (1983).

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. *Beverly v. Civil Serv.*

Comm'n, 78 Mass. App. Ct. 182, 189, 190-91 (2010), *citing Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824-26 (2006). *See also Methuen v. Solomon*, Docket No. 10-01813-D, at *10 no. 7 (Essex Sup. Ct. July 26, 2012). The Commission owes “substantial deference” to the appointing authority’s exercise of judgment in determining whether just cause was shown.

Moreover, 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. *Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 797-99 (2004).

B. Just Cause for Disciplining the Appellant

I find that City of Lynn Department of Public Works has proven by a preponderance of the evidence that it had just cause to discipline the Appellant.

On Monday May 7, 2012, Appellant was directed to replace the previously bolted covers on two light poles in Frey Park with covers that were tack welded on. He failed to do so. In the meantime, two lights poles in a park frequented by city dwellers had open areas with exposed wires.

By Thursday, May 10, 2012, Acting Commissioner Alcantara assumed that the job had been completed. When the Appellant’s immediate supervisor, Foreman Barry, asked Appellant if he had completed the job, the Appellant said that he was unable to do so because he could not maneuver the pick-up truck with the attached welding trailer close enough to the light poles. It must be noted that the Appellant held and continues to hold a Commercial Driver’s License (CDL). Foreman Barry asked no further questions, but relayed this information to his supervisor, Supervisor Gately. The Appellant did not inform either supervisor that he had not bolted on covers, and that the wires remained exposed.

On Friday, May 11, 2012, Supervisor Gately asked Appellant whether he had tack welded the covers, and again Appellant responded that he had not done so as he could not back up the trailer. The Appellant did not raise any safety issues, so neither Foreman Barry nor Supervisor Gately offered assistance.

Although Appellant has never been asked to use the pick-up truck with the trailer, he had a CDL. It is not unreasonable that an employee with a CDL should be expected to drive and back up a truck with the trailer, even in a relatively confined space.

The Appellant testified to the risks and inherent dangers in operating and backing up the pick-up truck with the attached welding trailer without protruding antennas, a mirror that was not broad enough and without a "hitch ball" in front that would allow him to drive the trailer forward instead of backing up. The Appellant testified that he was also concerned with endangering any children in the park, given the size of his truck and trailer. The Appellant's concerns are not credible.

During May 7-11, 2012, it is likely that school was in session. Any children in the park would be under the age of five and likely supervised. The evidence also supports the conclusion that it was possible for the pick-up truck to enter Frey Park from either Oak Street or Walnut Street, operate on the paved path within Frey Park, turn around, and return to either street without the need to back up the trailer. Even if the Appellant were unable to get close to the light poles, the welding cables extended to 102 and 197 feet long. The Appellant testified that management had not suggested that he extend the relatively long welding cables in order to reach the light poles. On Saturday, May 12, 2012, mechanic Brian Mapes - who had worked for the DPW less than one year - performed the assigned work without the need for any backing up. The task from start to finish took Mr. Mapes less than two hours. The Appellant was a veteran

of the DPW, on the job for twelve years. It is not credible that someone of the Appellant's expertise and experience could not have completed this apparently easy assignment. The Appellant's actions on May 7-12 were another instance of his pattern of insubordination.

The Appellant has been involved in two previously documented instances of insubordination. He received a one-day suspension on October 9, 2009 after he refused to follow Foreman Barry's order to change the gutter broom on a sweeper. When he continued on his current task, Foreman Barry repeated his order. The Appellant then became upset, left his assignment, punched out, and instructed the dispatcher to put him out as sick for the remainder of the day.

The Appellant was disciplined on December 29, 2009 after defying Supervisor Gately's order to fix the sanding unit for Truck #230. Appellant responded that he would file a grievance because the highway personnel were already eating. When Mr. Gately repeated himself, the Appellant became upset and vocalized his displeasure for several minutes. As a result, he received a three day suspension which was later reduced to two days by agreement. On both occasions, the Appellant was warned that his actions had created a hostile work environment, his actions would not be tolerated and must stop and any future instances would result in additional disciplinary measures up to and including termination. The Commissioner stated that in the future, the Appellant must carry out his instructions even if he did not agree with them, and file a grievance after the fact: in popular parlance – obey now, grieve later.

Appellant's record of discipline reflects a pattern of insubordination. Here, Appellant failed to follow the relatively simply instruction, which took the DPW employee who ended up actually doing the work a total of two hours to complete the task. Foreman Barry and Supervisor

Gately were already acquainted with the Appellant's insubordination from the previous two instances of his insubordination.

The Appellant's failure to replace the covers of two light poles at Frey Park created a safety hazard, as the wires were left in the open and exposed. His failure to complete the work exposed wires for five more days than necessary, thus needlessly endangering the public.

The original five-day suspension was already modified by the Hearing Officer at the section 41 hearing, and falls within the principle of progressive discipline. The Appellant's previous suspensions, less than three months apart in 2009, were for one day and two days.

There is no evidence that the appointing authority's decision was based on political considerations, favoritism or bias. Thus the Department's decision to discipline the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the City of Lynn Department of Public Works had just cause to suspend the Appellant David Chiaradonna for three days. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Angela McConney Scheepers
Administrative Magistrate

DATED: **OCT 29 2013**