

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

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

ELLIOT CLARK,
Appellant

CASE NO. D1-08-74

v.

BOSTON HOUSING AUTHORITY,
Respondent

Appellant's Representative:

Neil Osborne, Esq.
87 Summer Street, 3rd Floor
Boston, MA 02110

Respondent's Representative:

Jay S. Koplove, Esq.
Boston Housing Authority
52 Chauncy Street
Boston, MA 02111

Commissioner:

Paul M. Stein, Commissioner

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Elliot Clark, appealed to the Civil Service Commission (Commission), from a decision of the Respondent, the Boston Housing Authority (hereinafter "BHA"), as Appointing Authority to terminate him from his position as a leased housing inspector. Mr. Clark filed a timely appeal. A pre-hearing conference was conducted on April 30, 2008 and a full hearing was held at the offices of the Civil Service Commission (hereinafter "Commission") on February 5 and February 6, 2009 before Commissioner Paul M. Stein. As no party requested a public hearing, the hearing was declared private. Witnesses were not sequestered. Twenty-one (21) exhibits were entered into the record (Joint Exhibits 1-14; Appointing Authority Exhibits 15-20; Appellant Exhibit 21). Four (4) witnesses were called by the Appointing Authority and the Appellant testified on his own behalf. The hearing was digitally recorded. Both parties subsequently submitted proposed Decisions.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits; the testimony of David Barrett, Manager of Inspections at the BHA; Marilyn O'Sullivan, Chief of Leased Housing and Occupancy at the BHA; Alyssa Glazier, Attorney for the City of Boston; Maureen Walsh, Leasing Officer for the BHA; and the Appellant himself; and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Elliot Clark, is a civil service employee who tenured employment with the BHA from May 22, 1995 through March 26, 2008. (*Testimony of Appellant; Exhibit 2*).

2. Mr. Clark started working for the BHA as a dispatcher and then became a leased housing inspector approximately four to five years later. On or about March 26, 2008, he was terminated from employment with the BHA for providing internal BHA documents to a BHA tenant which she used to perpetrate a fraud against the City; failing to report to two meetings; violating well established departmental policies and procedures; being uncooperative and withholding information about his activities and communications with the tenant. (*Exhibit 2*)

3. Mr. Clark's job duties as a leased housing inspector primarily focused on performing inspections of apartments leased by "Section 8" tenants (tenants who lease private apartments but have their rents paid in whole or in part by the BHA). His direct supervisor was Dave Barrett, BHA Supervisor of Leased Housing Inspections Department. (*Exhs. 2, 15 thru 17; Testimony of Appellant & Barrett*)

4. The main offices of the Leased Housing Department, where most staff work, are stationed, is located in BHA Headquarters at 52 Chauncey Street, Boston, MA, but the inspectors, including Mr. Clark, generally worked out of an satellite office located at 125

Armory Street, Jamaica Plain, Boston. (*Exhs. 2 thru 8; Testimony of Appellant, Barrett, Sullivan Glaizer & Walsh*)

5. An inspector is never permanently assigned to one client and performs approximately 12-14 inspections per day as assigned by the supervisor, or more if assigned to a large building. Each apartment is required by law to be inspected one time per year. During the Section 8 process, the tenant first finds a unit. They will have paperwork signed by the owner of the unit, which gets submitted to BHA Headquarters at Chauncy Street in Boston. The leasing manager generates an inspection for this apartment. This is hand delivered to the BHA Inspection Office at 125 Amory Street in Roxbury where a dispatcher receives them, logs them in and schedules an appointment. The dispatchers make the assignment as to which inspector is sent to an inspection. Inspectors are normally kept in the same geographical area. (*Testimony of Barrett*)

6. Inspectors are on the street all day. They are put on notice to notify their supervisor about what records, if any, they can receive. Some records have to be subpoenaed as they are protected. The records of tenants are kept behind a locked door and no inspector is allowed access to the files without permission. Any inspector that needs to see any paperwork that is filed away must make a request to his supervisor, David Barrett or Mr. Wendell Phillips, BHA Director of Inspections.. Inspectors do not have access to computers or typewriters. (*Testimony of O'Sullivan; Barrett; Exhibit 7, Exhibit 8*)

7. Ms. Tynekia Smith (Smith) was a Section 8 participant with the BHA. She worked for the City of Boston ("City") in the Human Resources Department as a receptionist located at City Hall. (*Testimony of Glazier*)

8. Ms. Smith lived at a few different apartments over several years. Mr. Clark was assigned to perform inspections of Ms. Smith's apartment in 2006. After 2006, Mr. Clark did not perform

any inspections on Ms. Smith's apartment and had no reason to have direct contact with her on any BHA business. (*Testimony of O'Sullivan; Testimony of Appellant*)

9. Ms. Smith's participation in the Section 8 program was endangered when she was evicted from her Magazine Street apartment by her then landlord for non-payment of rent. Eviction by a landlord for such reason is grounds to terminate a Section 8 participant from the program. (*Testimony of O'Sullivan; Testimony of Walsh, Exhibit 10*)

Events of February 2007

10. Mr. Clark testified that he remembered making a few visits to inspect Ms. Smith's Centre Street apartment while she was home, and that he never met Ms. Smith again after the inspections. Mr. Clark never did an inspection of Ms. Smiths' Magazine Street apartment. (*Testimony of Appellant*)

11. Mr. Clark testified that he remembers Ms. Smith calling him in February 2007 because she was involved in a hearing where she was losing her Section 8 voucher and was not home for an inspection. Mr. Clark claimed he recommended Ms. Smith call Mr. Barrett and gave her Mr. Barrett's telephone number to call regarding the policies of the hearing. Mr. Clark had further conversations with Ms. Smith where she stated that she did not contact Mr. Barrett and asked Mr. Clark for further help. She asked Mr. Clark if she could have someone call him regarding the hearing. Mr. Clark agreed and gave her the landline phone number at the BHA. No one ever called Mr. Clark about a hearing. (*Testimony of Appellant*)

12. Ms. O'Sullivan testified that she had been informed that Ms. Smith had to leave work early one day because she met with Mr. Clark and Ms. Walsh, her leasing officer, at Chauncy Street. Ms. O'Sullivan testified that BHD never has an inspector have a meeting with a Section 8 tenant for nonpayment of rent. Ms. O'Sullivan contacted Ms. Walsh and asked her if she had a

meeting with Ms. Smith, which she denied. Ms. Walsh said Ms. Smith was in default because Ms. Smith failed to show up at two appointments to recertify her Section 8 voucher. Although I find Ms. O'Sullivan's testimony generally credible, I do not credit the hearsay statements attributed to Ms. Smith, unless otherwise corroborated, as I do not find reason to believe statements attributable to Ms. Smith are sufficiently reliable to warrant accepting them for the truth.. (*Testimony of O'Sullivan; Testimony of Walsh*)

13 The telephone records of Mr. Clark's BHD Nextel cellular phone show he had three conversations with Ms. Smith on February 6, 2007 (one conversation was nine minutes long), one conversation on February 7, 2007, and one on February 13, 2007. (*Exhibit 12*)

14 In a letter dated February 15, 2007, Ms. Smith wrote to the hearing officer, Mr. Fredler Breneville, "[I] am just dropping off the info you asked for. I also spoke to inspector Clark and he said if need be he will speak on my behalf." Ms. Smith attached records that included communications between the BHA and Ms. Smith's Section 8 landlord that Ms. O'Sullivan testified would not normally have been in the possession of a Section 8 tenant. She also attached a form from the Leased Housing Division of the BHA, which stated that payment has been stopped on her Centre Street apartment because of Ms. Smith's failure to repair. Another letter was attached stating payment had been resumed because all corrective work was completed. (*Exhibit No. 11; Testimony of Barrett; Testimony of O'Sullivan*)

15. Ms. O'Sullivan testified that the records marked as Exhibit 11 were located in Ms. Smith's participant file which tenants do not have access to. Ms. O'Sullivan stated that she researched if the Leased Housing department at the BHA's main office had any record of a document request by Ms. Smith for her participant records and that no record was found. Mr. Barrett and Ms. O'Sullivan testified that while most of the documentation in February 2007 could have come

from the Landlord, the fact that certain documents have a "File Copy" designation means they had to come from BHA's files. (*Exhibit No. 11; Testimony of Barrett; Testimony of O'Sullivan*)

B. Events of October 2007

16. Ms. Walsh, who was Ms. Smith's leasing officer for the BHA, became aware of Ms. Smith almost losing her Magazine Street apartment when she got a fax from management on May 8, 2007. Ms. Smith was \$2,535.00 in arrears. Ms. Walsh spoke to Ms. Smith about the fact that she was upset she might lose her subsidy. Usually when someone hasn't paid their rent and the landlord notifies the BHA, the person is taken to court and a document is drawn up for monies owed. If they evict the person, then they are later terminated by the BHA. Ms. Walsh testified that it was the leased housing officer (not an inspector) who was the main contact assigned to monitor Ms. Smith's BHA relationship and who Ms. Smith would be expected to call if she had any problems with the BHA. (*Testimony of Walsh; Exhibit 21*)

17. Mr. Clark first testified it is a "possibility we spoke after February 2007." Mr. Clark later testified that actually Ms. Smith did contact him again in or about September or October 2007 about a problem she was having with her Section 8 voucher. Mr. Clark assumed the problem of February 2007 had not been resolved. Mr. Clark also testified it is a "possibility he received messages, spoke to Ms. Smith and/or returned her call on October 2, 2007." (*Testimony of Clark*)

18. Mr. Clark's Nextel telephone records showed several telephone calls on September 28, 2007, between Mr. Clark and Ms. Smith. The first call was at 10:46a.m. from 617-635-2795, which was identified as Ms. Smith's direct line in the City's Human Resources Department. On October 1, 2007, Ms. Smith called Mr. Clark again at 9:01a.m. On October 2, 2007, there were six telephone calls between Ms. Smith and Mr. Clark. (*Exhibit 12; Testimony of O'Sullivan*)

19. On October 2, 2007, the BHA Inspection Department Fax log shows that four faxes were sent from the BHA's Inspection Department Fax dated October 2, 2007 at 5:32p.m. to City Hall's fax machines at 617-635-2950 and 617-635-3119.¹ Mr. Barrett testified that the date and time stamp were off by exactly one hour due to an error in resetting the fax machine's clock to account for daylight savings. (*Exhibit 9*)

20. On or about October 2, 2007, Ms. Smith provided her employer with three documents to support her claim that she left work to go to meetings with the BHA. One document was dated August 13, 2007; the other two were dated October 1, 2007, which were a Notice of Termination of Ms. Smith's participation in the Section 8 program. The reason for termination was alleged to be Ms. Smith's failure to allow Mr. Velasquez (a Section 8 inspector) access to her unit for inspection. (*Exhibits 5, 6*)

21. Ms. Smith handed to the City documents marked as Exhibits 5B and 5C. The City realized the documents were forged as they were typed and not filled in by hand, which is the usual way inspectors fill in a Proposed Termination form. Additionally, there was only one date listed in Exhibit 5B where Ms. Smith had allegedly failed to provide access. The form required the inspector to fill in two dates on which the participant had denied access. Further, Exhibit 5C was a termination memo from Mr. Velasquez to Ms. Smith to propose termination of her section 8 assistance which is not facially valid because Ms. Smith cannot terminate herself. The evidence disclosed that the documents marked as Exhibit 5B & 5C were internal documents, which should not be copied to the tenant. (*Testimony of Barrett; Testimony of O'Sullivan; Exhibits 5B, 5C*)

22. In the beginning of October 2007, Ms. Glazier was told to investigate Ms. Smith by the Director of the Office of Human Resources and Ms. Smith's direct supervisor. The City of

¹ The 635 exchange is known to BHA personnel as a City number thereby facilitating the search for telephone and fax records involving communications to and from the City. Additionally, Ms. Glazier had provided Mr. Barrett with the fax numbers of the machines at City Hall's Human Resources Department.

Boston gave Ms. Glazier documents and informed her that they had questions about the authenticity of the documents. Ms. Glazier started a preliminary internal investigation through Ms. Smith's personnel record and a review of her computer. As part of that review, it became apparent to Ms. Glazier that another employee was assisting Ms. Smith with a variety of issues. Ms. Glazier did not see the documents marked as Exhibit 5 (A-C) on Ms. Smith's computer but found them on another employee's computer who worked in the MIS department along with two additional blank versions of Exhibit 5 (B & C) with a fax header running across the sheets.

(Testimony of Glazier; Exhibits 5, 6, 18, 19)

23. Ms. Glazier went to Mr. Barrett's office and asked him whether the documents in Exhibit 5 (A-C) were authentic. Mr. Barrett said they were not. The BHA continued its investigation into how these internal documents came into Ms. Smith's possession. Mr. Barrett began an independent investigation by looking at fax records and Nextel records to see if those documents were sent out of the BHD. All of the inspectors have Nextel cell phones and bills are sent monthly. Mr. Barrett gathered as many inspectors' bills as he could find and examined the phone numbers. Mr. Barrett knew to look for City Hall numbers from Ms. Glazier, which began with the numbers (617-635-xxxx). *(Testimony of Glazier; Testimony of Barrett)*

24. Mr. Barrett testified that a few days after the documents were released, he had a conversation with Ms. Glazier where she said that Mr. Clark had a meeting with Ms. Smith. Thereafter, Mr. Barrett saw the telephone calls on Mr. Clark's phone bill with Ms. Smith. Mr. Barrett testified he had a fine relationship with Mr. Clark and there was no major discipline issued to Mr. Clark before this incident occurred. *(Testimony of Glazier; Testimony of Barrett)*

25. Mr. Barrett relayed the findings of his investigation to his supervisor, Wendell Philips.

That was the extent of Mr. Barrett's investigation. The investigation was then passed to Ms. O'Sullivan who was thereafter in charge of the investigation. (*Testimony of Barrett*)

26. In early October 2007, Ms. O'Sullivan was told that the City received certain internal documents from an employee of the City who was a Section 8 participant that were not usually in the hands of those participants. Ms. O'Sullivan began her own investigation into the matter and testified that in researching independently the phone and fax records it did not mean much but when she put the two together she saw a link between Ms. Smith and Mr. Clark. (*Testimony of O'Sullivan*)

27. Ms. O'Sullivan scheduled a meeting with Mr. Clark for February 1, 2008 and had Mr. Clark's supervisor give him a memo. Ms. O'Sullivan was told that Mr. Clark wouldn't attend the meeting unless he got a full agenda and Union representation. A new meeting was scheduled for February 7, 2008 but right before the meeting Ms. O'Sullivan received a letter saying Mr. Clark wasn't attending the meeting. A third Meeting was scheduled at Ms. O'Sullivan's office on February 15, 2008. Mr. Clark appeared with his union representative, John Murphy, and his immediate supervisor Mr. Barrett. At the meeting, Mr. Clark said he may have met Ms. Smith but wouldn't recognize her if he passed her on the street. He said "If the phone records say I had those conversations with her, then I did." (*Testimony of O'Sullivan; Testimony of Appellant*)

28. During the February 15, 2008 meeting, Mr. Clark had a tape recording device in front of him. Ms. O'Sullivan noticed the device and notified counsel. The BHA asked Mr. Clark if he taped the proceedings and he said yes. (*Testimony of Ms. O'Sullivan*)

29. The time sheets for the week of September 30, 2007 show Mr. Clark worked from 8 a.m. to 5 p.m., which is handwritten and signed by Mr. Clark. The time sheets for the week of October 7, 2007 and October 14, 2007, similarly shows Mr. Clark worked from 9 a.m. to 5

p.m.,and are also handwritten and signed by Mr. Clark. The BHA expected employees to work a 35 hour work week Monday through Friday. (*Testimony of Appellant; Exhibits 15, 16, 17*)

30. Mr. Clark testified that he worked approximately from 9am – 3:30p.m. doing inspections in the field, sometimes returning to the office in the afternoon. Mr. Clark stated that he was usually not in the office after 3:30p.m. as it was optional to work. He testified that at 4:15p.m., he picked up his twelve-year old son at the school bus stop and would take him home or go on errands. Occasionally, he returned to work with his son. Mr. Clark testified that even though he wrote down on his timesheet that he finished at 5:00p.m. he actually stopped work each day at 3:30p.m. Mr. Clark testified he does not recall if he returned to work after 3:30p.m. on October 2, 2007. (*Testimony of Appellant*)

31. Mr. Barrett testified that all Inspectors worked from 9:00a.m. to 5:00p.m. and that no part of the workday was ever considered optional. (*Testimony of Barrett*)

32. On March 7, 2008, a letter was sent to Mr. Clark notifying him that a hearing was scheduled for March 13, 2008 where the BHA was contemplating terminating him from his position as Housing Inspector in the Leased Housing Division. Mr. Clark never attended this meeting (*Exhibit 2*)

33. On March 14, 2008, a second notice of a hearing was sent to Mr. Clark to be held on March 20, 2008. (*Exhibit 3*)

34. On March 26, 2008, the BHA rendered a decision based on the March 20, 2008 hearing whereby the BHA recommended that the Administrator approve the Authority's requested termination of Mr. Clark's employment as the Authority demonstrated that there is just cause for the termination of Mr. Clark as he acted in a manner prejudicial to the Authority. (*Exhibit 2*)

CONCLUSION

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.

Under Section 43, the role of the Commission is to determine, under a “preponderance of the evidence” test, “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 (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).

In performing its appellate function, “the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] ‘a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer’ . . . For the commission, the question is . . . ‘whether, on the facts found by the commission, 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.’ ”

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission’s decision to reject appointing authority’s evidence of appellant’s failed polygraph test and prior domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority’s justification unreasonable) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

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, 43 Mass. App. Ct. at 304; 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 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.’” ”

Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the “merit principle” which governs Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31,§1.

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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing) The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006)

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

“It is well to remember that the power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.”

Id., 39 Mass.App.Ct. at 600 (*emphasis added*). See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

In deciding whether to exercise discretion to modify a penalty, however, the commission’s task “is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.” ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983). “The ‘power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.” Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996).

Thus, when it comes to its review of the penalty, unless the Commission's findings of fact differ materially and significantly from those of 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."). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified); cf. School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to suspension upheld)

Applying the applicable standards to the facts of this appeal, the BHA has shown by a preponderance of the credible and reliable evidence that it had just cause to terminate Mr. Clark for misconduct which materially affects the public interest.

As to the February 2007 documentation, it appears what Mr. Smith provided was relatively benign and only showed that Ms. Smith was in a dispute with her landlord over violation of the housing code for failing to provide heat to her apartment. (I credit Mr. Barrett and Ms. O'Sullivan that, while most of this documentation could have come from the landlord, the fact that certain documents have a "File Copy" designation, means they had to come from BHA's

files). Even though the material was relatively benign, BHA policies clearly prohibit an inspector from accessing a tenant's files without prior authorization from his or her supervisor as shown in the evidence and testimony. Ms. O'Sullivan testified that the records marked as Exhibit 11 were located in Ms. Smith's participant file which tenants do not have access to. Ms. O'Sullivan stated that she researched if the Leased Housing department at the BHA's main office had any record of a document request by Ms. Smith for her participant records and that no record was found.

The telephone records of Mr. Clark's BHD Nextel cellular phone show he had three conversations with Ms. Smith on February 6, 2007 (one conversation was nine minutes long), one conversation on February 7, 2007, and one on February 13, 2007. (*Exhibit 12*) Additionally, Mr. Clark testified as to his conversation with Ms. Smith regarding being asked to help her with her hearing in potentially losing her Section 9 voucher. Further, Mr. Barrett testified he was informed by Ms. O'Sullivan that Ms. Smith left work early one day to have a meeting with Mr. Clark. As indicated above, I am unable to credit any of the statements attributed to Ms. Smith that are not otherwise corroborated by admissions from Mr. Clark although here Ms. O'Sullivan can testify as to what Ms. Smith told her. However,, Ms. Smith attached records in a letter to her hearing officer that would not normally be in the possession of a Section 8 tenant. The letter specifically stated that Mr. Clark spoke with Ms. Smith who would speak on her behalf. Thus, the evidence shows that Mr. Clark is more likely than anyone else at the BHA the one who provided the documentation to assist Ms. Smith in February 2007.

As to the October 2007 documentation, the strong circumstantial evidence consisting of the Nextel phone records and BHA Inspection Department fax records clearly infer that Mr. Clark had frequent contact with former Boston employee Ms. Smith during late September through

early October 2007. Ms. O'Sullivan and Mr. Barrett began a search into Ms. Smith's records and through the fax and telephone transmissions found a link to Mr. Smith. When these BHA personnel launched their investigation shortly after October 2, 2007, they had no premonition that the evidence would eventually focus on Mr. Clark. Ms. O'Sullivan was a particularly impressive witness who described her own meticulous efforts to get to the truth. This included directing that Nextel provide a report that matched all of the phone numbers the BHA had for Ms. Smith with the Nextel phone records of ALL BHA Leased Housing personnel who had Nextel phones (herself included), which turned up that only Mr. Clark's Nextel had such matching phone numbers.

Ms. O'Sullivan began her own investigation into the matter and testified that in researching independently the phone and fax records they did not mean much but when she put the two together she saw a link between Ms. Smith and Mr. Clark. In fact, an exchange of six calls occurred on October 2, 2007 on Mr. Clark's work cell phone.

I also make the reasonable inference that documents (specifically blank BHA internal forms used to initiate tenant subsidy termination proceedings) were faxed from BHA Inspectional Department to Ms. Smith's workplace about 4:30 p.m. on October 2, 2007. I credit Mr. Barrett's testimony that the fax time stamp was off by one hour for daylight savings time. I find that those faxed documents were used by Ms. Smith to perpetrate a fraud on the City by giving her an excuse for her absences from work.

I do not read the file room policy to cover blank internal forms. However, I do infer that no inspector could reasonably believe that it was in the interest of the BHA for a tenant to be provided blank forms by an inspector (without informing a supervisor) that are only supposed to be used by authorized BHA personnel. In this regard, I credit the testimony of the BHA

witnesses, particularly, Maureen Walsh, who was Ms. Smith's leased housing officer, and who testified that it was the leased housing officer (not any inspector) who was the "main contact" assigned to monitor Ms. Smith's BHA relationship and who Ms. Smith would be expected to call if she had a problem of the sort that Ms. Smith was allegedly having with the BHA. In fact, Ms. Walsh had made several appointments with Ms. Smith (to arrange for her annual subsidy review) for which Ms. Smith failed to show. I infer that, once it was discovered that Mr. Clark may have been the source of the blank forms given to Ms. Smith, he probably realized that he had been negligent and began to prevaricate to try to cover his tracks.

Mr. Clark's testimony is not credible that he had only a limited memory of having any such contacts with Ms. Smith in October 2007 (the most he would say was that it was a "possibility" even after being shown the phone records) although he did acknowledge speaking to her in the February 2007 timeframe when she was going through a prior adversary proceeding. This was his position at the pre-termination meetings and hearing at BHA (in February and March 2007) and he persisted in taking the same tack at the Commission hearing. Mr. Clark testified it is a "possibility he received messages, spoke to Ms. Smith and/or returned her call on October 2, 2007." Mr. Clark later testified that actually Ms. Smith did contact him again in or about September or October 2007 about a problem she was having with her Section 8 voucher. This aspect of his testimony was not the only indication of mendacity. I also do not find credible the testimony that he originally did not even claim to recognize the blank forms in question, when the record indicates that they are very commonly used forms in the BHA Inspectional Department.

I also do not credit Mr. Clark's testimony about his work hours (he claimed he generally worked 9 to 3:30 and "never" used the fax machine at the BHA Inspectional Dept. office. His

testimony in this regard vacillated between saying he “never” did certain things (i.e. return to the office after 3:30) and later making statements that it was a “possibility” that he did so (i.e., to pick up his inspection work for the next day). Mr. Barrett, on rebuttal credibly refuted Mr. Clark’s testimony about his work routine, including his hours, and the presence of Mr. Clark and his son at the BHA Inspectional Department Office. The evidence showed that Mr. Clark’s timesheets for the three-week period beginning with September 30, 2007 and ending with October 14, 2007 all had the day beginning at 9:00a.m. (and on a few occasions 8:00a.m.) and ending at 5:00p.m. The time sheets were all handwritten and signed by Mr. Clark. I do credit Mr. Clark’s testimony that he would routinely pick up his son (then 12) at the school bus stop between 4 and 4:15 each day, but that does not make any of his alleged conduct on Oct. 2 any less likely.

I do believe that Mr. Clark was probably truthful to state that he did not act in “cahoots” with Ms. Smith or knowingly believed he was helping her perpetrate a fraud on the City of Boston. While I do find that Mr. Clark provided documentation to Ms. Smith to assist her in February 2007 and probably did provide the documentation in Oct. 2007, he did not know the purposes to which those documents were going to be used. As a former resident of the “projects” himself (Orchard Park), his testimony indicated that he would be receptive to a BHA tenant who asked for his help.. As to the October documentation he may well have believed that he was simply providing routine forms as information to show how important it was for her to meet her inspector or she could face termination of her subsidy.

I do not believe Mr. Clark was “uncooperative” in the investigation process as the BHA pre-termination hearing officer and Mr. O’Sullivan implied as Mr. Clark cancelled and failed to show up for two meetings. On the contrary, the evidence established to my satisfaction that Mr.

Clark's actions are reasonably inferred to be the result of his legitimate requests for union representation at such meetings and/or a failure of his union representative to communicate effectively with Mr. Clark. I attribute no ill-will on Mr. Clark's part due to any of these delays. I do not attribute any unfair animus toward him from his BHA superiors due to these circumstances.

I agree with Mr. Clark that he did not secretly record the BHA hearing on March 20, 2008 in violation of the wiretap law, G.L. c. 272 § 99, as the recorder was placed in the middle of the table in plain view and was initially noticed at the outset of the meeting by Ms. O'Sullivan. While secretly taping speech is a violation of the wiretap law, the recording here was in plain view and therefore does not violate the law. See *Commonwealth v. Jackson*, 370 Mass. 502, 507 (1976) (no "interception" when defendant was aware his voice was being recorded).

The actual motive behind Mr. Clark's actions, however, does not alter the conclusion that his actions were inappropriate. The evidence shows that BHA policies clearly prohibit an inspector from accessing a tenant's files without prior authorization from his or her supervisor. Mr. Clark may well have violated this policy when he provided documentation to Ms. Smith in February 2007. However, even assuming he did so, I would not find that action to rise to the level requiring significant discipline. For one thing, the policy was last circulated in 2004 and it does not specifically require "written" authority from the supervisor or documentation of such authority (it even refers to requesting records by "radio"). Second, given the passage of time here, I do not infer that Mr. Clark failed to inform his supervisor before releasing these records. I find that the Feb 2007 purported violation, alone, does not justify termination.

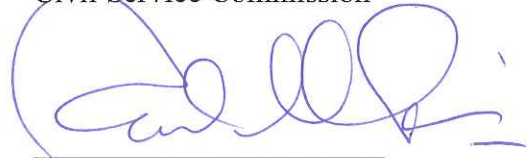
Even if Mr. Clark was not in "cahoots" with Ms. Smith at the outset, once he came to learn that he may have (whether intentionally or unwittingly) facilitated her misconduct, rather than

come clean, he fabricated a lack of knowledge of his involvement, which, then, led to his being required to fabricate further untruths, such as only working until 3:30, never using the fax, etc. At bottom, this untruthfulness, coupled with his misconduct (negligently or intentionally) in being persuaded by Ms. Smith to provide her the blank forms in question, clearly represents misconduct that BHA was justified to consider to adversely affect his work in the public service and established just cause for his termination.

Finally, while the Commission has discretion to modify a penalty, the Commission finds the facts do not warrant the exercise of such discretion in this case. The preponderance of the evidence being the phone records, fax records, and testimonies establishes to my satisfaction that Mr. Clark, as opposed to any other person, was more likely than not the person who sent those faxes, and BHA is warranted to have made that inference.

For all of the reasons stated herein, the Respondent has established by a preponderance of the evidence that it had just cause under G.L.c.31, §43 to terminate Mr. Clark on or about March 26, 2008. Therefore, Mr. Clark's appeal under Docket No. D1-10-73 is hereby *dismissed*.

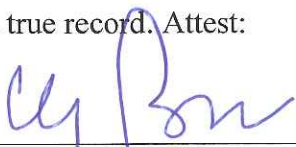
Civil Service Commission



Paul M. Stein, Commissioner

By 3-1 vote of the Civil Service Commission (Bowman Chairman [Not Participating], Henderson [No], Marquis [Aye], McDowell [Aye] & Stein [Aye], Commissioners) on April 21, 2011

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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Neil Osborne, Esq. (for Appellant)

Jay S. Koplove, Esq. (for Appointing Authority)