

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

Vincent Cogliani,
Appellant

v.

D-04-539

City of Boston,
Respondent

Appellant's Attorney:

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Boston, MA 02108

Respondent's Attorney:

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Commissioner:

Daniel M. Henderson, Esq.

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Vincent Cogliani, (herein after referred to as "Appellant" or "Cogliani") is appealing the action of the Respondent, City of Boston, as the City of Boston Public Works Department, (herein after referred to as "The City"), in suspending him for a period of five (5) days without pay from the position of Supervisor. The Appellant claims that this action was taken against him without just cause. The appeal was timely filed. A full hearing was held on July 19, 2007 at the offices of the Civil Service Commission. As no notice was received from either

party, the hearing was declared private. One (1) tape was made of the proceedings. Both parties submitted post-hearing briefs.

FINDINGS OF FACT

Based upon the documents entered into evidence (Exhibits 1-2), the testimony of Kathleen Kelley, Personnel Director for the Boston Department of Public Works, John J. (“Joe”) Banks, Program Manager-Associate Electrical Engineer of the Street Lighting Division of DPW, and the Appellant Vincent Cogliani, I make the following findings of fact:

1. The Appellant has been employed by the City for approximately 35 years, transferring to the Street Lighting Division of the Department of Public Works in 1975. He thereafter was promoted up the ladder to his present position of Supervisor on July 1, 2004. (Testimony).
2. The Appellant did not receive any formal training for the position of Supervisor, other than “on the job” training by experience. There is not a training manual which could be used for guidance for the position of Supervisor. (Testimony)
3. The Appellant received the discipline of a five (5) day suspension, for his failure to properly supervise two employees, in Truck B, on November 4, 2004 from approximately 11:50 AM to the time he received a telephone call from Mr. Joe Banks, that day at approximately 2:00 PM. (Exhibits 1, 2 and testimony)

4. The two employees in Truck B, who the Appellant is charged with failure to properly supervise, also received discipline of a five (5) day suspension each for their dereliction on that day, (from 11:50AM to 2:20 PM). They each received the suspension discipline for: Absent without leave from assigned work assignment and Abandoning and double parking a City vehicle on a public way while obstructing an intersection. (Exhibit 1 and testimony)
5. The Appellant as a Supervisor had two 2-man crews under his supervision on the day of disciplinary event, November 4, 2004. Two men were each assigned to Truck A and Truck B that day. Truck B towed a tag-a-long compressor behind it. The Appellant was driving another vehicle, a pick-up truck. All five men worked together that day from the beginning of the shift, at 7:00 AM. The 3 trucks with the five men left the DPW yard at Forest Hills for their assignment at approximately 8:30 AM.(Testimony)
6. The five men and three trucks worked together that morning in the Neponset section of Dorchester. They found that their assigned work orders had been previously completed or otherwise could not be worked on. However, the five man crew under the supervision of the Appellant did find several other sites that needed work and they completed that work. This work was completed by 11:45 AM.(Testimony)
7. Upon completion of the work at approximately 11:50 AM, the Appellant as Supervisor then ordered the four men, two in each truck to “gas up the trucks at Frontage Road, get lunch (30 minutes allowed) and meet back at the [Forest

Hills] yard.” No priority or sequence order was given the men regarding lunch and gassing up the trucks (Testimony)

8. The Appellant drove his pick-up to Frontage Road and had his truck radio repaired. It took him about 10 minutes to drive to Frontage Road from the work site. He saw Truck A at Frontage Road. He then went to lunch and thereafter drove back to the Forest Hills yard. He arrived at the yard between 12:45 and 1:00 PM. When he arrived at the yard he found Truck A already there. He did not ask the two men in Truck A whether they had seen Truck B. (Testimony)
9. At approximately 1:30 PM the Appellant tried to reach Truck B by radio but did not receive any response. The radio in Truck B is fixed in the dashboard. The men in Truck B did not have cellular phones, hand held radios or other means by which they might be reached. Truck B did not have a GPS or other means of being located.(Testimony)
10. The Appellant, after he returned to the Forest Hills yard that afternoon, ordered the two men who returned to the yard in Truck A to clean out Truck A. That assignment would have taken the two men until the end of the shift, at 3:30 PM to complete. While the two men cleaned out the truck the Appellant busied himself with routine paperwork. (Testimony)
11. At Approximately 1:45 PM, the Street Lighting Division Manager, Associate Electrical Engineer Joe Banks received a telephone call from an angry resident stating that a Public Works Department-Street Lighting truck was double parked on the corner of Old Harbor street and Thomas park in South

Boston. The resident said that the truck (Truck B) had been parked there for hours and it was not the first time it had happened. Mr. Banks then drove to the location, arriving about 2:00 PM. He found the truck double parked as described by the resident. The truck was empty so he felt the engine manifold both on the truck and the tag-a-long compressor and found both manifolds to be cold. He then called the Forest Hills yard and spoke with the Appellant. The Appellant identified the two men assigned to the truck (Truck B). At approximately 2:20 PM one of the men returned to Truck B and Banks ordered him to return Truck B to the Forest Hills yard and that he was also “immediately suspended.” Mr. Banks then called Kathleen Kelley, Chief Personnel Officer for the DPW, and informed her of the situation and the action he had taken. (Exhibit 1 and testimony)

12. The Appellant testified at this hearing that at the time he received the call from Mr. Banks, he was planning on “knocking the two men in Truck B, off the Clock”. He would have ‘knocked them off the clock,’ in another 15 minutes if Mr. Banks had not telephoned him. He also testified that he did not know what else he could have done, other than ‘knocking them off the clock’ (removal from payroll).(Testimony)
13. Mr. Banks did memorialize the circumstances and events of that day by reducing them to a written memorandum, dated November 4, 2004, to Joseph E. Casazza, Commissioner of Public Works. The memorandum did recommend discipline for the two employees in Truck B and, indeed, he did suspend them that day. Eventually the two did receive suspensions of five (5)

days each. However, Mr. Banks did not recommend any discipline for the Appellant. (Exhibits 1, 2 and testimony)

14. Joseph E. Casazza, Commissioner of Public Works, sent a disciplinary letter to the Appellant, dated November 10, 2004. Casazza stated in that letter “...after listening to the testimony and reviewing the evidence” produced at the Appointing Authority’s disciplinary hearing, held on November 9, 2004, “... it is my decision to suspend you for a period of five (5) working days” Casazza did give the Appellant a five (5) day suspension. The Appellant did testify at the Appointing Authority disciplinary hearing. The Appellant did appeal that five (5) day suspension to the Civil Service Commission, resulting in this hearing. (Exhibit 2 and testimony)

15. Commissioner Casazza stated in that disciplinary letter, “... *I find you guilty of not properly supervising these employees on that date, from the time you last saw them at 11:50 AM until you were contacted by Mr. Banks later that afternoon[2:00 PM]. The employees admitted that they had both gone home. You admitted that you knew they had not returned to the yard as you had instructed them to, yet you made no attempt to find out where they were.*”

(Exhibit 2)

16. The Appellant, however, did make an attempt to find out where they were. He did make one attempt to contact Truck B, on the day of the incident, by radio at approximately 1:30 PM but was unsuccessful. This testimony was not rebutted in any way by the City.(Testimony)

17. No evidence was presented to show what alternatives might have been available to the Appellant in an attempt to locate Truck B and the two men in it. Truck B could have been determined late that day for its arrival back at the Forest Hills yard any time from 2:45 PM onward. However that does not mean the Appellant should have reacted immediately. There could have been a reasonable explanation for their late arrival and the Appellant could have waited a reasonable amount of time for the truck's arrival and that possible explanation. He waited for approximately 45 minutes while he did routine paperwork then he tried to reach Truck B by radio at approximately 1:30 PM. The Appellant was next contacted by Mr. Banks at 2:00 PM and after that telephone call, he knew the whereabouts of Truck B, the two men in it and that they were being suspended. The Appellant testified here that at the time of Mr. Banks' telephone call he was planning to wait another 15 minutes before he 'knocked them off the clock.' It is assumed that the Appellant could have 'knocked them off the clock' for any number of hours for that day after 12:45 PM. (Testimony)
18. The Appellant does not have any prior discipline while being employed by the City of Boston Public Works Department for 35 years. (Testimony)
19. I find that all three witnesses who testified at this hearing are credible. They were all straight forward, calm and unembellished. I found no hesitation or inconsistency in their testimony. Their demeanor was appropriate. (Testimony and demeanor)

CONCLUSION

The Appellant waited approximately 45 minutes after Truck B was due to arrive back at the Forest Hills yard before he tried to locate Truck B by radio. At 1:30 PM he tried to reach Truck B by radio but received no answer. This seems not to be an excessive amount of time to wait before trying to reach Truck B under the circumstances here. The Appellant busied himself during that time by doing routine paperwork.

The role of the Civil Service 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.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). The issue to determine in this case therefore is whether the Respondent, at the time of the Section 41 hearing, had reasonable justification for suspending the Appellant for a period of five (5) days. Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). The proper inquiry for determining if an action was justified is, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997).

The Appellant initially waited only 45 minutes from the time that Truck B was due back at the Forest Hills yard before he tried to reach Truck B by radio and then only

30 minutes elapsed from that radio attempt before Mr. Banks telephoned him at 2:00 PM with the information about Truck B and that the two employees had been found in South Boston, blocking an intersection. Waiting for these two periods of time, 45 minutes and then 30 minutes, taken either individually or in total, is not substantial misconduct under the facts and circumstances found here. There is no other suggested course of action which the Appellant could have reasonably pursued. He received no training for and no instruction material to guide him in this situation. He was following the only course of action which he believed he had available to him and that was to ‘knock them off the clock’ or off the payroll for the time they were missing. He was about to do that when he received the telephone call from Mr. Banks.

The Commission must affirm the decision of the appointing authority if the appointing authority can demonstrate just cause by a preponderance of the evidence. M.G.L. c. 31, §43. A party’s contention satisfies the preponderance standard “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, 39 (1956), quoting Sergeant v. Mass. Accident Co., 307 Mass. 246, 250 (1940). Whoever shoulders the burden of proof must convince the trier of fact that a proposition is more than simply possible, but that it is more likely to be true. See Sergeant, 307 Mass at 251. Continental Assurance Co. v. Diorio-Volungis, 51 Mass. App. Ct. 403, 408 (2001). The burden of proof may be satisfied “either by direct evidence or rational inference of probabilities from established facts.” Zeuski v. Jenny Manufacturing Co., 363 Mass. 324, 329 (1973), quoting Bigwood v. Boston & No. St. Ry. Co., 209 Mass. 345, 348 (1911).

The Appellant here contends that the City has failed to demonstrate the charge contained in the letter of discipline; that he was guilty “*of not properly supervising these employees on that date, from the time you last saw them at 11:50 AM until you were contacted by Mr. Banks later that afternoon[2:00 PM].*” The Appellant did show that the two employees were accounted for up until 12:45 PM. He could not know that Truck B and the two employees were not following his instructions until at least that time or shortly thereafter. He then reacted to their tardiness by trying to reach them by radio, the only means available to him.

The City has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant did fail to properly supervise the two employees in Truck B that day during the time period as charged. No evidence was presented to show what other alternatives might have been available to the Appellant in an attempt to locate Truck B and the two men in it. Truck B could have been determined late that day for its arrival back at the Forest Hills yard any time from 12:45 PM onward. However, that does not mean the Appellant should have reacted immediately.

There could have been a reasonable explanation for their late arrival and the Appellant could have waited a reasonable amount of time after 12:45 PM for the truck’s arrival and that possible explanation. He waited for approximately 45 minutes while he did routine paperwork. Then he tried to reach Truck B by radio at approximately 1:30 PM. The Appellant was next contacted by Mr. Banks at 2:00 PM and after that telephone call he knew the whereabouts of Truck B, the two men in it and that they were being suspended. The Appellant testified here that at the time of Mr. Banks’ telephone call that

he was planning to wait another 15 minutes before he ‘knocked them off the clock.’ It is assumed that the Appellant could have ‘knocked them off the clock’ (removed them from the payroll) any time that day after 12:45 PM.

Commissioner Casazza stated clearly in his disciplinary letter to the Appellant “... yet you made no attempt to find out where they were” when the Appellant had actually tried to contact them by radio. Mr. Banks, who was the overall manager of the Street Lighting Division and had first hand knowledge of the day’s events, did not recommend discipline for the Appellant. Mr. Banks had the advantage of having received a telephone call from a resident, informing him of the location of the missing Truck B.

For all of the above stated reasons, it is determined that The City has failed to demonstrate by a preponderance of the credible evidence in the record that the Appellant failed to properly supervise the two employees from 11:50 AM to 2:00 PM, as charged by the City, on November 4, 2004.

Therefore the City was not justified in suspending him for a period of five (5) days. The appeal on Docket No. D-04-539 is hereby ***allowed***. The City shall return the Appellant to his position, without any loss of compensation or other benefits.

Civil Service Commission

Daniel M. Henderson, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman; Chairman, Guerin, Henderson, Marquis and Taylor; Commissioners) on August 9, 2007.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL ch. 30A sec. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL ch. 31 sec. 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under MGL ch. 30A sec. 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:

Joseph L. DeLorey, Esq.
Samantha Doeppen, Esq.