COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

MICHAEL CONNOLLY
Appellant

v.

CITY OF QUINCY,
Respondent

Case No.: D1-11-287

Appellant's Representative:

Salvatore Romano
Coordinator, New England Laborer's Labor Management Cooperation Trust
226 South Main Street
Providence, RI 02903

Respondent's Attorney:

Deirdre Jacobs Hall, Assistant City Solicitor
1305 Hancock Street
Quincy, MA

Commissioner:

Cynthia Ittleman[1,2]

DECISION

The Appellant, Michael Connolly (hereafter "Appellant"), pursuant to G.L. c. 31, § 43, duly appealed to the Civil Service Commission (hereafter "Commission") on September 27, 2011, opposing the decision of Mayor Thomas P. Koch, Mayor of the City of Quincy and Appointing

[1] This case was heard by Commissioner Daniel Henderson, whose term expired before drafting a decision Pursuant to 801 CMR 1.00(11)(e), this case was reassigned to Commissioner Cynthia Ittleman, who reviewed the CD, notes, and exhibits, and drafted a decision

[2] The Commission recognizes the assistance of Law Clerk Hunter Holman in writing this decision.

Authority, terminating his employment with the Department of Public Works (hereafter "DPW") for the City of Quincy ("City"). A prehearing conference was held on November 15, 2011, and a full hearing was held on January 9, 2012. The witnesses were sequestered during the full hearing, with the exception of the Appellant. The parties submitted proposed decisions. The full hearing was recorded and a copy of the recording was sent to each of the parties and was made part of the record. For the reasons stated herein, the appeal is denied.

Findings of fact

Based on the sixteen (16) exhibits entered into evidence and the testimony of:

For the Appointing Authority:

- Lawrence Prendeville, Superintendent, Quincy Department of Public Works;
- Joseph Newton, Operations Manager, Quincy Department of Public Works;
- Joseph Pepjonovich, Information Technology Specialist, Quincy Police Department;
- Daniel Raymondi, Commissioner, Quincy Department of Public Works;

For the Appellant:

- Joseph McArdle, Business Agent, Local 1139 of the Laborers International Union of America;
- Michael Connolly, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, a preponderance of the evidence establishes the following findings of fact:

1. Prior to his termination at the Quincy DPW, the Appellant was a tenured laborer there. (Connolly Testimony ("Test."))
2. The Appellant was employed at the DPW for approximately ten (10) years at the time of his termination. (Connolly Test.)
3. The Appellant was a member of the Laborers International Union of North America, Local 1139 (hereafter "Local 1139") for approximately nine and a half (9.5) years. (Connolly Test.)
4. Prior to the incident that led to the Appellant's termination of employment, the Appellant had been disciplined by the Appointing Authority on four (4) separate occasions:
    a) On September 3, 2004, the Appellant was reprimanded after being seen at his home while he was supposed to be at work. The Appellant was warned that any future failure to perform his duties as assigned or required would result in progressive discipline. (Ex. 14)
    b) On February 10, 2005, the Appellant was suspended for one (1) day without pay for his "lack of attention and poor job performance associated with carrying out explicit instructions on an assigned duty." (Ex. 13) The duty assigned to the Appellant was "to remove trash and debris from [the] sidewalks and gutter lines [in the Quincy Center Business District]." (Ex. 13)
    c) On March 4, 2005, the Appellant was suspended for three (3) days without pay because he left a job site before completing the assigned task. The Appellant was directed to assist the Quincy Public School Department staff with snow removal efforts on a narrow section of sidewalk that posed a serious safety concern. The

Appellant left the work site minutes after arriving, forcing a supervisor to contact the Appellant to tell him to return to the work site. (Ex. 12)

d) On April 7, 2009, the Appellant was suspended for three (3) days without pay because he performed personal errands on City time. (Ex. 11)

5. Sometime during the first week of August, 2011, the Appellant was cleaning a lunch area after lunch around 12:30 P.M. in a building called the "tin shed." (Connolly Test.)
6. The tin shed is a large metal structure on the back of the DPW yard and is approximately 100 feet by 100 feet. (Prendeville Test.) This shed is used to store trucks, tools, and other equipment the DPW uses. (Prendeville Test.)
7. Inside the tin shed there is a secure room that is used as an office and storage space for valuable DPW equipment. (Prendeville Test.) There is also a bathroom inside the secure room. (Prendeville Test.) This room is typically locked and only a few employees have keys to access this room. (Prendeville Test.)
8. The Appellant did not have a key to access the secure room during his employment at the DPW. (Connolly Test.)
9. The tin shed also contains an area with secure lockers that are assigned to employees. (Prendeville Test.) The Appellant was assigned one of these lockers. (Prendeville Test.)
10. While the Appellant was cleaning the lunch area in the first week of August, 2011, he walked into the secure room located in the tin shed, which was unlocked at the time, and he took a stainless steel brine pump inside a cardboard box out of the secure room. (Connolly Test.)
11. It is unknown who left the door unlocked and there was no evidence in that regard. (Prendeville Test.)

12. The stainless steel pump is "approximately sixteen inches round and eighteen inches tall." (Ex. 1)
13. The pump is typically stored in a closet within the secure room and is used by the DPW in conjunction with other pieces of equipment that collectively make up a "brine system." (Prendeville Test.) The brine system is used to make and distribute brine by mixing salt and water together in a large tank to create brine, which is then pumped out of the tank via the pump, and sprayed onto the street to assist with snow removal efforts. (Prendeville Test.)
14. The pump is typically fixed to a truck while in use. (Prendeville Test.) However, because the pump can operate independently of the brine system, the pump could be used for purposes other than pumping brine out of a tank. (Prendeville Test.) For example, the pump could be used to pump water out of a basement. (Prendeville Test.)
15. The DPW originally bought a brine system for $8,900, which included a plastic pump. (Ex. 8) The City eventually upgraded from the plastic pump that was included in the brine system to a stainless steel pump that cost an additional $502.34. (Ex. 9)
16. The Appellant removed the upgraded stainless steel pump from the secure room in the tin shed. (Connolly Test.) The approximate true value of this pump is $1,295.[3] (Ex. 10)
17. After the Appellant took the stainless steel pump from the secure room, he hid it for a period of time in an area near the lockers. (Connolly Test.) While the exact location that the Appellant hid the pump was not identified, others could have stumbled upon the pump while it was hidden because the hidden location was not secure. (Connolly Test.) After "a period

[3] The approximate value is based on the quoted price for a replacement stainless steel pump that the DPW received on August 30, 2011. (Ex. 10) The DPW never purchased a replacement pump. (Prendeville Test.) The replacement pump would have cost $792.66 more than the pump purchased as an upgrade because the City received a discount for purchasing the pump as an upgrade, and the replacement pump would not have qualified for this discount. (Prendeville Test.)

of time," the Appellant took the pump from the hidden location and placed it in his locker, where it stayed for two to three weeks. (Connolly Test.)

18. Throughout, approximately, the second and third weeks of August, 2011, Laurence Prendeville, the DPW Superintendent, was told by multiple employees with access to the secure room that the stainless steel pump was missing. (Prendeville Test.) These employees—who were not called to testify before the Commission—also informed Mr. Prendeville that they thought the pump was in one of the lockers in the tin shed. (Prendeville and Raymondi Test.)
19. Mr. Prendeville did not immediately inform Mr. Daniel Raymondi, Commissioner of the Quincy DPW since July 5, 2011, that the pump was missing. (Prendeville Test.) Instead, Mr. Prendeville attempted to informally locate the pump by letting other DPW employees know that the pump was missing, asking the employees if they knew anything about the pump and telling the DPW employees to keep an eye out for it. (Prendeville Test.)
20. While Mr. Prendeville was attempting to informally locate the pump, he did not ask the Appellant if he knew the location of the pump. (Prendeville Test.)
21. At or about the time of these events, Hurricane Irene was bearing down on the City of Quincy, and the DPW began gathering the pumps that they owned and renting even more pumps, filling sandbags, and performing other tasks to prepare for the potential flooding. (Raymondi Test.) During this time, the DPW employees were working overtime. (Raymondi Test.)
22. On August 27, 2011, Mr. Prendeville informed Mr. Raymondi that the pump was missing and that the employees who informed Mr. Prendeville that the pump was missing thought that the pump was being kept in a locker in the tin shed. (Prendeville and Raymondi Test.)

23. Mr. Raymondi began investigating the matter immediately, as this was, in Mr. Raymondi's words, "a top priority" because the City was expecting to encounter flooding as a result of Hurricane Irene, and the City needed every pump they had. (Raymondi Test.)
24. After Mr. Prendeville spoke to Mr. Raymondi on August 27, 2011, Mr. Raymondi attended an emergency meeting called by Mayor Koch with all of the City department heads to discuss the City's plan to respond to Hurricane Irene. (Raymondi Test.)
25. At this meeting Mr. Raymondi asked the Police Chief if the police could install a surveillance camera in the locker area of the tin shed. (Raymondi Test.)
26. The Police Chief instructed Officer Pepjonovich, Director of Information Technology at the Quincy Police Department, to get in touch with Mr. Raymondi to receive more information about where and when to install a surveillance camera at the DPW. (Pepjonovich Test.)
27. When Officer Pepjonovich contacted Mr. Raymondi, Mr. Raymondi told him that there was some suspicious activity in one of the Quincy DPW buildings, and that Officer Pepjonovich should meet Joseph Newton, the Operations Manager for the DPW, who would let Officer Pepjonovich into the tin shed so he could install a surveillance camera. (Pepjonovich and Raymondi Test.)
28. Mr. Raymondi gave directions to Mr. Newton, who subsequently gave directions to Officer Pepjonovich, to position the camera in the secure locker area so that as many of the lockers as possible would be captured on video. (Raymondi Test.) This area included approximately 5 lockers as well as the doors leading to and from the locker area. (Pepjonovich Test.) Mr. Raymondi gave instructions for the camera to be installed in that particular location because, "he had to start [the investigation] somewhere" and because the only lead he had to find the person who took the pump was "unsubstantiated information" suggesting that the pump was

in one of the lockers in the tin shed. (Raymondi Test.) The unsubstantiated information came from the conversation between Mr. Raymondi and Mr. Prendeville, wherein Mr. Prendeville informed Mr. Raymondi that the employees who informed Mr. Prendeville that the pump was missing believed that the pump was in a locker in the tin shed. (Prendeville and Raymondi Test.)

29. The next day, August 28, 2011, Mr. Raymondi interviewed eight (8) employees individually in his office while they were each on overtime, asking the employees what they knew about the missing pump. (Raymondi Test.) This group of employees included the Appellant and other employees who had access to the locker area in the tin shed. (Raymondi Test.)
30. Mr. Raymondi had not directly confronted the Appellant before August 28, 2011 about the location of the pump because he felt that the unsubstantiated information, suggesting that the pump was in a particular locker, was too attenuated, and that accusing someone without proof would be a serious matter. (Raymondi Test.)
31. The day before the interviews were conducted, August 27, 2011, Joseph McArdle, the Business Manager for the Local 1139, called Commissioner Raymondi around noon and asked if he needed to be present to provide union representation. (McArdle Test.) Commissioner Raymondi told Mr. McArdle that his presence was not necessary because Mr. Mooney was going to be present, and, as the Vice President of Local 1139, Mr. Mooney's presence ensured union representation as may be necessary. [4] (McArdle and Raymondi Test.)

[4] Daniel Mooney was originally on the witness list for the Appellant's full hearing before the Commission, and he currently has an appeal pending at the Commission. (Docket # D-12-135) In his appeal, Mr. Mooney claims that he was not paid for his time spent at the Commission waiting to be called to testify. Mr. Mooney was ultimately not called to testify at the Appellant's full hearing before the Commission. (Administrative Notice)

32. During the interview, Mr. Raymondi brought the eight employees into his office one at a time, with Mr. Mooney present, and informed them that the pump was missing, and that he was investigating the matter. (Raymondi Test.) Mr. Raymondi also asked each employee "what, if anything they knew about the pump." (Raymondi Test.)

33. After Mr. Raymondi received each employee's answer, he presented each employee with a prewritten statement, drafted by Mr. Raymondi, which stated:

> Recently, I became aware that the Department of Public Work's new stainless steel pump which is approximately sixteen inches round and eighteen inches tall was missing. I last saw the pump in the green tin shed in the office/storage room.
>
> I have no knowledge as to what happened to the pump or where it is presently located. If any information comes to my attention regarding this missing pump, and in particular if any information comes to my attention as to where the pump is presently located, I will report that information forthwith to the Commissioner of Public Works.[5]

(Ex. 1)

34. If the eight employees did not agree with something in the prewritten statement, they had the opportunity to cross out sections and rewrite a more accurate representation of their individual knowledge of the pump. (Raymondi Test.) All of the employees voluntarily signed the statement.[6] (Raymondi Test.)

35. Five (5) of the employees interviewed, including the Appellant, crossed out the second sentence, which states: "I last saw the pump in the green tin shed in the office/storage room." (Ex. 1) Only the Appellant, however, added a sentence to the statement. The Appellant added: "I have never seen the pump." (Ex. 1)

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[5] Corrado Solimini, one of the employees interviewed by Mr. Raymondi, signed a different statement that only contained the first sentence of the statement that the other employees signed. (Ex. 1) The reason for this was not explained in the testimony.

[6] The suspension letter written by Mr. Raymondi and the findings of the Appointing Authority's hearing officer both state that the Appellant misrepresented facts to his employer under oath. (Ex. 2 and 4) The statement the Appellant signed did not include an oath. (Ex. 1) Attached to the statement, however, is a document in which Mr. Raymondi notarizes the Appellant's statement as "truthful and accurate to the best of his knowledge and belief." (Ex. 1)

36. Mr. Prendeville and Mr. Mooney were both present during each employee's interview and they signed as witnesses each employee's statement. (Ex. 1 and Raymondi Test.) The process of interviewing all of the employees took no more than an hour to complete. (Prendeville Test.)
37. After each employee was interviewed, he left Mr. Raymondi's office without reentering the conference room where the other employees were waiting to be interviewed. (Connolly Test.)
38. On August 29, 2011, the Commissioner sent a communication to the Quincy Human Resources Division ("Quincy HRD"), including copies of the employees' signed statements taken during the interviews on August 28, 2011. (Raymondi Test.)
39. After the Appellant left Mr. Raymondi's office on August 28, 2011, he went to his locker in the tin shed. (Connolly Test.) Another employee, Ms. Picard, was in the locker area at the same time as the Appellant. (Connolly Test.)
40. The Appellant asked Ms. Picard if she had a pair of socks that he could use and Ms. Picard left the locker area to retrieve a pair of socks for the Appellant. (Ex. 6 and Connolly Test.) The Appellant admitted that he asked Ms. Picard to get him a pair of socks because he wanted her to leave the locker area so that he could remove the pump from his locker. (Connolly Test.) Once Ms. Picard had left the locker area, the Appellant removed the pump from his locker, placed it behind the lockers, and covered the pump with a metal shelf so that he could remove any connection between himself and the pump, but still allow himself easy access to the pump so he could put the pump back in the secure room at some point. (Connolly Test.)

41. Late in the evening after the interviews on August 28, 2011, Officer Pepjonovich came back to the tin shed and met with Mr. Newton to remove the camera from the locker area. (Pepjonovich Test.)

42. A few days after the interviews, Officer Pepjonovich showed the video footage from the surveillance camera to Mr. Raymondi. (Raymondi and Pepjonovich Test.)

43. The video shows the Appellant and Ms. Picard in the locker area of the tin shed. (Raymondi Test.) Ms. Picard left the frame of the camera, at which time the Appellant removed a box—later found to contain the pump—from his locker, and placed the box off-camera. (Raymondi Test.) The Appellant admits to being the person on the video who moves the box. (Connolly Test.)

44. After watching the video, Mr. Raymondi told Mr. Newton to go to the location where the box was placed. (Raymondi Test.) At that location, Mr. Newton found the pump box with the pump inside it, concealed underneath a metal shelf. (Newton Test.) After retrieving the pump, Mr. Newton brought the pump, still inside the box, to Mr. Raymondi's office. (Newton Test.)

45. On August 30, 2011, Mr. Raymondi showed Ms. Picard the surveillance video footage and subsequently asked her about her activities on August 28, 2011 in the locker area of the tin shed. (Raymondi Test.) Ms. Picard said that she was at work filling sandbags in preparation for Hurricane Irene and that she just happened to be near the locker area the same time as the Appellant. (Raymondi Test. and Ex. 6)

46. Ms. Picard said that she went off-camera because the Appellant had asked her to retrieve a pair of socks for him and she complied. (Ex. 6) The video shows Ms. Picard handing the

Appellant socks once back on-camera and after the Appellant had moved the pump from his locker to the off-camera location. (Raymondi Test.)

47. During her conversation with Mr. Raymondi, Ms. Picard reviewed and signed an affidavit confirming that she and the Appellant were the two people in the video, that she retrieved socks for, and at the request of the Appellant, and that she had no knowledge of the pump's location. (Ex. 6)

48. On August 30, 2011, Mr. Raymondi wrote a letter to Mayor Koch recommending a five-day suspension without pay for the Appellant, and requested that the Mayor convene a hearing to discuss further disciplinary action. (Ex. 2)

49. On August 30, 2011, the Appellant was called into Mr. Raymondi's office. (Connolly and Raymondi Test.)

50. While the Appellant was in Mr. Raymondi's office, Mr. Raymondi gave the Appellant a letter of suspension written by Mr. Raymondi, informing the Appellant that he had been suspended for five (5) days without pay. (Raymondi Test.)

51. Mr. Raymondi's letter states:

> "Please be advised that you are hereby suspended, without pay, for a period of five (5) days, commencing Wednesday, August 31, 2011. I am also recommending to Mayor Koch, the appointing authority, that he convene a hearing to determine whether further disciplinary action – up to and including termination – is appropriate, given the following facts.
>
> On August 28, 2011, I met with you and some of your fellow employees regarding a missing stainless steel pump that was the property of the City of Quincy. Following our meeting, you voluntarily signed a statement that you were aware that a stainless steel pump belonging to the Department of Public Works was missing, and asserted that you had never seen the pump. I have since determined that the pump was in your locker and that you removed it from your locker shortly after our discussion. I regard your actions in converting, receiving, and/or concealing the pump, and then denying any knowledge of its whereabouts, to constitute terminable offences because:
>
> 1) you knowingly impeded an investigation;

2) you intentionally misrepresented facts to your supervisor, and did so under oath; and
3) you were in actual possession of the stolen property, which fact you then attempted to conceal.

With this letter, you have been provided a copy of Massachusetts General Laws Chapter 31, Sections 41-45, which outline your rights. You have a right to appeal, provided you do so within 48 hours of your receipt of this notice, by filing a written request for a hearing before Mayor Thomas P. Koch or his designee."

(Ex. 2)

52. The Appellant admits to misrepresenting facts to his superiors, and taking, possessing, and attempting to conceal the pump, but alleges that he did not steal the pump. (Connolly Test.)

53. The letter of suspension also informed the Appellant that Mr. Raymondi was recommending to Mayor Koch that a hearing be convened to determine whether or not any further disciplinary action, including termination, was appropriate under the circumstances. (Ex. 2)

54. The Appellant did not appeal the five-day suspension to Quincy authorities. (Raymondi Test.)

55. After the Appellant read the suspension letter, Mr. Raymondi asked him if he had any knowledge of the missing pump and also if the Appellant had "removed the box [containing the pump] within 15-20 minutes from talking to the Commissioner on Sunday." (Raymondi Test.) The Appellant replied "no" to both questions. (Raymondi Test.)

56. Mr. Raymondi based his conclusion that the Appellant stole the pump on the combination "…of the concealing, the hiding, the attempt to further conceal after being pressed on it, misrepresenting or lying to a department head twice during an investigation…" while a hurricane was approaching Quincy, and the fact that he took resources away from the public mission [while Mr. Raymondi was trying to] get to the bottom of it." (Raymondi Test.)

57. The "City of Quincy has an expectation of its employees that…individually they would not inappropriately conceal, hide, or steal public property, assets, especially ones that are sensitive to a public mission whether it be snow removal, and or flood." (Raymondi Test.) Also the department heads have an expectation that their employees will not "…lie, misrepresent, or conceal a material fact that would prolong or impede an investigation to the detriment of the tax payer." (Raymondi Test.)
58. After the Appellant left Mr. Raymondi's office on August 30, 2011, he was escorted by the police and Mr. Newton to retrieve his lunch pail, which was in the break room in the administrative building, and to his locker, which he was told to clear out. (Raymondi and Newton Test.) The Appellant said that he did not need anything from his locker and that he did not have a key to access it. (Newton Test.)
59. However, Mr. Newton was told to make sure that the Appellant's locker was cleared out and to perform an inventory of its contents. (Raymondi and Newton Test.) After Mr. Newton tried and failed to find a key to the Appellant's locker, Mr. Newton broke the lock off of the Appellant's locker and performed an inventory while an unspecified union representative was present. (Newton Test.)
60. Mr. Newton performed an inventory of the contents of the Appellant's locker. (Newton Test.) Among the contents of the Appellant's locker were several pairs of socks. (Newton Test.)
61. After the Appellant's locker was inventoried, he was escorted off the premises by the police and Mr. Newton. (Newton, Raymondi, and Connolly Test)
62. Within a day or two after August 30, 2011, the Appellant was forwarded his paycheck, a copy of the inventory list from his locker, and told that he could pick up his personal

belongings at any time by contacting Mr. Newton. Mr. Mooney ultimately delivered the Appellant's personal items to the Appellant's house. (Raymondi Test.)

63. On September 1, 2011, the Appellant received a letter informing him that a hearing was to be held on September 8, 2011 to determine if further disciplinary action should be taken against him as a result of the incidents described in the suspension letter that Mr. Raymondi had given the Appellant on August 30, 2011 and stating, " … A copy of G.L. Chap. 31 s.41-45 has been sent to you." (Ex. 3; Raymondi Test.)

64. The Appointing Authority's hearing took place over two days, September 8, 2011 and September 19, 2011. (Ex. 4)[7]

65. Mr. Prendeville and Mr. Raymondi testified at the Appointing Authority hearing. (Ex. 4) The Appellant did not testify on his own behalf, nor did any other witness testify on his behalf. (Ex. 4)

66. On September 21, 2011, the hearing officer, Stephen J. McGrath the Director of Quincy HRD, wrote a letter to the Appointing Authority which contained his findings and recommendations. (Ex. 4)

67. Mr. McGrath's letter to the Appointing Authority contained the following:

> The facts alleged against Mr. Connolly are outlined in correspondence from Mr. Raymondi to Mr. Connolly dated August 30, 2011…relating to converting, receiving and or concealing the pump and then denying any knowledge of its whereabouts. At the hearing the facts…[presented by the City]…were uncontroverted by Mr. Connolly as he did not testify. Commissioner Raymondi and Superintendent Larry Prendeville testified under direct and cross examination.
>
> The evidence presented to me at the hearing warrants a finding that Mr. Connolly did convert, receive and conceal the pump and then denied any knowledge of its whereabouts, and I do so find. The evidence presented to me at the hearing warrants a finding that Mr. Connolly knowingly impeded an investigation, intentionally misrepresented facts to his supervisor, did so under oath, and was in

[7] The Appellant was represented at the Appointing Authority hearing by a union representative. (Ex. 5, which includes a copy of Ex. 4)

> actual possession of the stolen property, which fact he then attempted to conceal, and I do so find.
>
> I note also a three day suspension given to Mr. Connolly on April 14, 2009, for doing personal errands on City time.
>
> In light of the above, I recommend that Mr. Connolly be terminated from his employment with the City of Quincy effective immediately.

(Ex. 4)

68. After the Appointing Authority's hearing, the Appellant received a letter from Mayor Koch, dated September 22, 2011, which notified the Appellant that the Mayor was adopting the hearing officer's findings and recommendations, and that, effective immediately, the Appellant's employment was terminated. (Ex. 5)

69. No criminal charges were filed against the Appellant with regard to the pump. (Connolly Test.)

70. The Appellant filed the instant appeal at the Commission on September 27, 2011. (Administrative Notice)

Applicable Administrative Law

Under G.L. c. 31, § 43, a permanent civil service employee may appeal a disciplinary decision made pursuant to G.L. c. 31, § 41 by an Appointing Authority. G.L. c. 31, §43 requires "…the [C]omission to find whether, on the basis of the evidence before it, the appointing authority has…" proven by a preponderance of the evidence "…that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Com'n, 43 Mass. App. Ct. 300, 303, (1997). Reasonable justification exists when "…the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Justices of Second Dist. Court of Eastern Middlesex, 389 Mass. 508, 514 (1983). See School Committee of Brockton v.

Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). An Appointing Authority has satisfied the preponderance of the evidence standard with regard to an allegation "…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." Sargent v. Massachusetts Assoc. Co., 307 Mass. 246, 250, (1940). See Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

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). 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. See Cullen v. Mayor of City of Newton, 308 Mass. 578, 581 (1941); Murray, 389 Mass. at 514.

In performing its 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 . . . 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."

City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 727 (2003) quoting Sullivan v. Municipal Ct. of Roxbury Dist., 322 Mass. 566, 572 (1948). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

It is within the purview of the hearing officer to determine the 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." 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).

Summary

The Appellant acknowledges in his testimony before the Commission that he moved and concealed the pump and that he lied to his supervisors regarding his knowledge of the pump's location. But the Appellant alleges that his termination was too severe because he did not steal the pump and because his conduct otherwise does not warrant termination. The City argues that the Appellant's conduct warrants termination regardless of whether the Appellant stole the pump because the Appellant did remove and conceal the pump, which impaired the DPW's ability to respond and because he lied about it, which impeded the investigation. As indicated below, although the Appellant did not steal the pump, his conduct warrants termination.

Analysis

Mr. Raymondi testified credibly regarding his investigation of the missing pump because he recalled the details of the events quickly and confidently. Also, since it was Mr. Raymondi's first and only investigation up to that point in time as the Commissioner of the DPW it was likely a memorable occasion. Further, Mr. Raymondi's recounting of the investigation was corroborated by the Appellant's admissions and other testimony. The testimony of Officer Pepjonovich, Mr. Prendeville, and Mr. Newton, as a whole, was credible where it was consistent with that of Mr. Raymondi and because they were each forthright and detailed in their statements, which remained unchanged under examination.

The only portions of the testimony of Mr. Raymondi, Mr. Newton, and Mr. Prendeville that was not consistent relates to who had keys to the secure room. Their accounts of the key distribution varied. This discrepancy is given limited weight because it has been established that the door to the secure room was left open and the discrepancy does not seriously affect the witnesses' credibility regarding the Appellant's conduct that led to this appeal.

The Appellant did not testify at the local hearing, from which the City could draw a negative inference. At the Commission hearing, however, the Appellant, to his credit, admitted that he removed the pump from the secure room in the tin shed in approximately the first week of August, 2011 and that he kept it in his locker for the majority of the time that he had it, which was almost a month. The Appellant also admitted that when he was called into Mr. Raymondi's office for his interview in this regard, he lied, in writing, about his knowledge of the location of the pump while the DPW was preparing for the potential effects of Hurricane Irene in late August, 2011. Also, the Appellant admitted that, subsequent to his interview, he attempted to avoid responsibility for having taken the pump by removing the pump from his locker while he waited for an opportunity to put the pump back into the secure room. This is confirmed by the surveillance video that recorded the Appellant—who admitted to being the individual captured on the video—taking the pump out of his locker and hiding it where it was later discovered by Mr. Newton under a metal shelf and by Mr. Raymondi's testimony. The Appellant's admissions made him credible in these regards. However, his testimony regarding the reasons for his actions was unsupported and not credible. See discussion infra.

Based on all of these facts, the Appointing Authority concluded that the Appellant stole the pump and that he intentionally misrepresented facts to his supervisor which impeded an investigation during the preparation for a hurricane. The Appointing Authority concluded that

the Appellant's actions collectively warranted termination. The Appellant maintains that while he did engage in some of the conduct described above, he did not intend to steal the pump. If the Appellant stole the pump, it may be grounds for termination. See Hagen v. City of Peabody, 17 MCSR 35, 36 (2004) (upholding termination stating that "[c]omplying with simple directives and refraining from theft of others' personal items are bare minimum attributes that any Appointing Authority should be able to reasonably expect from its employees."); Peltier v. New Bedford Public Schools, (2004) (upholding termination concluding that if an employee was found to have stolen, the breach of trust that the employee committed would cause the Appointing Authority to doubt whether or not the employee could ever be trusted again); DeSouza v. Fairhaven Public Schools, 8 MCSR 114, 115 (1995) (terminating a laborer after he was caught stealing electronic equipment); Beebe v. City of Northampton, 6 MCSR 111, 114 (1993) (terminating the employee for stealing even though she had an excellent service record prior to the incident). See also Myers v. Mass. Civil Serv. Comm., Sup. Ct. Mass. (2006) WL4114271; Spicer v. City of Newburyport, MCSC (1998)

Allegation of Theft

Both the suspension letter written by Mr. Raymondi and the finding of the Appointing Authority's hearing officer, Stephen J. McGrath, which was attached to the Appointing Authority's letter of termination as just cause for terminating the Appellant, accuse the Appellant of "converting" the pump and also of possessing the "stolen" property. Later on in the letter of suspension and in the letter of termination the Appellant is said to have been in "possession of the stolen property." Also, Mr. Raymondi testified before the Commission that the Appellant "stole" the pump and the Appellant denied "stealing" the pump in his testimony before the Commission. These allegations against the Appellant indicate that Mr. Raymondi and the Appointing Authority's hearing officer concluded that the Appellant engaged in criminal larceny.

Criminal larceny, or stealing, is defined by M.G.L. c. 277 § 39 as "[t]he criminal taking, obtaining or converting of personal property, **with intent to**…**deprive the owner permanently** of the use of it…". M.G.L. c. 277 § 39 (emphasis added).

At the full hearing before the Commission, Mr. Raymondi testified that he concluded that the Appellant stole the pump because: 1) the Appellant entered a secure room without authorization, took the pump from the room, concealed the pump, and lied to his superiors twice about his knowledge of the pump's location; 2) the Appellant's conduct cost the City valuable resources during the preparations for Hurricane Irene; 3) and the Appellant's conduct undermined the City's and the supervisors' expectation that their employees would not "conceal, hide, or steal public property, or impede an investigation.[8] (Raymondi Test). Based on the testimony of Mr. Raymondi and Mr. Prendeville at the Appointing Authority's hearing, the hearing officer concluded that the Appellant stole the pump. While the Appellant did not testify at the Appointing Authority's hearing, he did testify at the full hearing before the Commission.

At the Commission's full hearing, the Appellant contends that he took the pump not to steal it, but to play a "practical joke" on his "nemesis," a co-worker named Corrado Solimini. (Connolly Test.) These two employees did not get along, according to the Appellant, because Solimini would intentionally spill food and drinks, which the Appellant would then have to clean up. The Appellant also claimed that he was storing an electric scooter in the secure room in the tin shed and that this scooter was taken by Solimini. (Connolly Test.) Although the Appellant got the scooter back within a few hours from the time it was removed, the Appellant testified that he wanted to get "a little retribution" for Solimini's acts. The Appellant decided to move the

[8] Mr. Raymondi also testified that he heard the Appellant admit to stealing the pump at an unemployment compensation hearing. However, there is no further evidence in this regard. In addition, we do not know if the unemployment hearing was held before or after the Appointing Authority's hearing. Therefore, this decision does not rely on this allegation.

pump because it is a piece of equipment that the Appellant thought Solimini used at work and would worry about if it was lost, like the Appellant had worried when his scooter was taken from the tin shed. The Appellant alleged that he could not resolve his grievances with Solimini through the normal channels because Solimini was "taken care of," suggesting that he was favored in some way by their employer. (Connolly Test.) There is no supporting evidence in this regard. Although the Appellant called his attempted retribution a "joke," he did not tell anyone about his plans for retribution, as one might expect when someone plays a practical joke. Also, his testimony indicates that the Appellant knew from the start that his conduct was wrong and likely to result in disciplinary action if he was caught. The Appellant's actions were not a joke and his unsupported attempt to minimize his actions fail in view of the established facts. However, his actions do not indicate an intent to steal the pump.

In addition to the Appellant's explanation for taking the pump, he also testified that he never intended to steal the pump because he thought the pump could only be used in conjunction with the brine system, and as such, he had no use for it. While the Appellant's alleged ignorance of the pump's uses does not excuse his conduct, the fact that the Appellant did not remove the pump from DPW property indicates that he did not intend to steal the pump. The surveillance video shows the Appellant removing the pump from his locker after his interview with Mr. Raymondi. This indicates that the Appellant left the pump in his locker for almost the entire time it was missing, which was almost a month. There is no evidence that the Appellant attempted to remove the pump from the DPW but was unsuccessful and it is not likely that an employee who intends to steal equipment of this kind from their employer would keep the stolen equipment in their work locker for almost a month. For these reasons, the City has not shown by

a preponderance of the evidence that the Appellant's possession of the pump proves his intent to permanently dispossess the City of it, thereby stealing the pump.

Mr. Raymondi also testified that the Appellant's intent to steal the pump was evident when he lied about it to his supervisors multiple times. The Appellant contends that he lied during the interview not to cover up his intent to steal, but because he felt scared and panicked as a result of having been interviewed by multiple supervisors. The Appellant claimed that he thought that if he told Mr. Raymondi that he moved the pump as a joke he would be accused of stealing. Being scared and panicked does not diminish the Appellant's responsibility for his actions. However, neither does it show that the Appellant intended to permanently deprive the DPW of the pump. By lying to Mr. Raymondi, the Appellant impeded and prolonged an investigation and also continued to prevent the City from using a valuable piece of equipment in the City's efforts to protect the public from the effects of a hurricane. This behavior constitutes substantial misconduct but it does not indicate that the Appellant stole the pump. In fact, the Appellant was never charged with any crime as a result of his conduct here.

The Appointing Authority also found that the Appellant "converted" the pump. The civil tort of conversion exists, " ….[when] one person exercise[s] dominion over the personal property of another, without right, and thereby deprives[s] the rightful owner of its use and enjoyment." In Re Hilson, 448 Mass. 603, 611 (2007). See Jackpot Provision Co., Inc. v. Lamb, 69 Mass.App.Ct. 1113 (2007). "There is no requirement [for the tort of conversion] that the [individual] converting property be show to have had the intent to deprive permanently the rightful owner of its use and enjoyment, as in stealing." In Re Hilson, 448 Mass. at 611. Since the tort of conversion does not require proof of intent to permanently deprive an owner of his property, there can be no question that by hiding the pump for weeks the Appellant exercised

dominion over the property of the DPW, without right, depriving the DPW of its use of the pump.

Impeding the Public Service

The Appellant knew that the City was preparing for Hurricane Irene and the substantial flooding that could result. Nonetheless, he did not return one of the most valuable pieces of equipment the City had to protect the citizens of Quincy from possible flooding: the pump. Mr. Raymondi testified that the DPW was impeded during its preparations for Hurricane Irene by having to conduct an investigation to find the missing pump and also because the DPW was not able to use the pump when it was needed. The fact that the DPW was renting pumps to prepare for the storm suggests that they were short of pumps and that the City needed every pump it could muster. When the Appellant moved the pump in the first week of August, 2011, the hurricane was not yet upon the City and arguably was not even foreseeable. However, when the City discovered that the hurricane would hit Quincy on or around August 28, 2011, the Appellant, along with the other DPW employees, began working overtime to prepare Quincy for the hurricane by preparing sand bags to help control the flooding, locating as many pumps as they could find, as well as performing other tasks to help minimize the flooding. Under these circumstances, withholding the location of important equipment used to protect the public impeded the DPW's essential function.

The Appellant stated in his testimony that he did not know the pump would be helpful in preventing and alleviating any flooding caused by Hurricane Irene because he thought that the pump could only be used in conjunction with the brine system to assist in snow removal. The Appellant's testimony in this regard is not credible. The Appellant worked at the DPW for ten years. In addition, most prudent people with the Appellant's knowledge and experience at the

DPW would know that a pump could be used to help alleviate the flooding, for example, that is sustained during a hurricane. Even if the Appellant did not know of any other uses for the pump, his ignorance is no excuse for continuing to withhold DPW equipment knowing that Mr. Solimini and/or others in the DPW would need to use the pump. For this and the foregoing reasons, the Appointing Authority has demonstrated that there was reasonable justification to discipline the Appellant.

Discipline

The City argues that the Appellant should be terminated regardless of whether the Appellant stole the pump because his actions constitute substantial misconduct that adversely affected the public interest, including impeding the public service. The Appellant argues that because he did not steal the pump and because the City of Quincy punished two other City employees who engaged in similar conduct in a less severe manner than the Appellant, his termination was too severe. The Appellant also alleges that his disciplinary record at the DPW was expunged pursuant to the rules of the applicable collective bargaining agreement and, therefore, termination is not appropriate pursuant to the principles of progressive discipline. (Connolly Test.; Exhibit 7 (Article XXVIII)) However, there is no other credible evidence that supports the assertion that the Appellant's disciplinary record was expunged. Moreover, it is not for the Commission to interpret the collective bargaining agreement.[9]

[9] The Appellant suggests that he was without appropriate union representation during his interview with Mr. Raymondi on August 28, 2011. (Connolly Test.) This assertion lacks merit as Mr. Mooney, Vice President of Local 1139, was present during all of the interviews conducted on August 28, 2011, as shown by his witness signature on the statements signed by the Appellant and all of the other employees interviewed that day. (Raymondi Test. and Ex. 1) The Appellant also alleges that he took the pump impulsively as a result of his ADHD symptoms. (Connolly Test.) The Appellant provided no credible evidence supporting this allegation and/or that he was being medicated therefor, and that the illness and/or any treatment may have caused his conduct during August, 2011. Therefor the Appellant's assertions in this regard are baseless.

The Appointing Authority's hearing officer concluded that the Appellant committed larceny when he took the pump, that he received, concealed, and possessed the pump, that he denied any knowledge of its location, and also that the Appellant intentionally misrepresented facts to his supervisors which impeded an investigation while the DPW prepared for Hurricane Irene. The only one of these conclusions not shown by a preponderance before the Commission is that the Appellant stole the pump, intending to permanently deprive the DPW of it. However, the Appellant's conduct, especially at the height of the City's response to the hurricane, is substantial misconduct warranting appropriate discipline.

The Appellant suggests that the City engaged in disparate treatment by assigning less severe punishment to two other City employees who intended to steal public property and who interfered with a City investigation. The facts surrounding the case involving the two other City employees have limited application here. The two other City employees were seen putting metal signs that belonged to the City of Quincy in the bed of a truck owned by one of the employees. The employees were instructed to dispose of the signs by taking the signs to the DPW's recycling dumpster. At the Appointing Authority's hearing, the hearing officer found that the two employees intended to steal the signs and that the employees interfered with an investigation by not being forthcoming with information, and recommended only that their five (5) day suspension be upheld. It is true that the metal signs being thrown out had little to no value, whereas the value of the pump that the Appellant moved was estimated at $1295. This alone is not determinative. However, unlike the pump, the signs the two other City employees intended to steal were not needed to respond to a natural disaster as was the case here. Further, we do not know if the two other employees had been disciplined previously but we know that the Appellant

was disciplined previously. Therefore, the Commission finds that the Appellant was not subject to disparate treatment.

Conclusion

According to the law, the facts, and the reasoning herein, the Appellant's appeal is ***denied***.

CIVIL SERVICE COMMISSION

_____
Commissioner Cynthia Ittleman

By a vote of the Civil Service Commission (Bowman, Chairman, Ittleman, Marquis, and McDowell [Stein – absent], Commissioners) on August 9, 2012.

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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case 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:
Salvatore Romano (for Appellant)
Deirdre Jacobs Hall, Esq. (for Appointing Authority)