

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

CHRISTOPHER COSTA,

Appellant

v.

D-03-388

CITY OF NEW BEDFORD,

Respondent

Appellant's Attorney:

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Commissioners:

Christopher C. Bowman

DECISION

The Appellant, Christopher Costa (hereafter "Costa" or "Appellant"), pursuant to G.L. c. 31, § 43, filed an appeal with the Commission on May 9, 2003 claiming that the

City of New Bedford (hereafter “City” or “Appointing Authority”) did not have just cause to suspend him for thirty (30) days for failing to report to work on April 26, 2003.

The appeal was timely filed. A hearing was held on January 26, 2007 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. The witnesses were not sequestered. One tape was made of the hearing.

FINDINGS OF FACT:

28 exhibits were entered into evidence by the Appointing Authority without objection and 6 exhibits were entered into evidence by the Appellant without objection. Based upon the documents entered into evidence and the testimony of:

For the City of New Bedford:

- Lawrence D. Worden, then Commissioner of Public Works, City of New Bedford;

For the Appellant:

- Christopher Costa, Appellant;

I make the following findings of fact:

1. The Appellant, Christopher Costa, was a tenured civil service employee of the City of New Bedford in the position of Laborer within the Department of Public Works. He had been employed by the City for approximately 16 years prior to his suspension on May 5, 2003. (Testimony of Appellant)
2. Subsequent to the suspension in question, the trash pick-up services previously performed by the Appellant were privatized by the City of New Bedford and the

Appellant's position, along with dozens of others, was abolished. (Testimony of Appellant)

3. Prior to the incident in question, the Appellant had an extensive history of prior discipline ultimately leading to the execution of a last chance agreement between the Appellant and the City which was executed approximately two months prior to the incident which is the subject of the instant appeal. (Appointing Authority Exhibit 23C)
4. The above-referenced last chance agreement, signed by the Appellant on February 12, 2003 states in part, "I understand this is my final warning. Any further discipline may result in my termination." (Appointing Authority Exhibit 23C)
5. The laundry list of offenses for which the Appellant was disciplined during his 16-year tenure included, but is not limited to: several incidents of sick time abuse, including more than three occasions in which the Appellant forged a doctor's note; at least five incidents in which the Appellant failed to show for work without calling; two incidents in which the Appellant hit a parked vehicle; and one incident of yelling and cursing at the public. (Appointing Authority Exhibits 2 -19)
6. On November 19, 2002, the DPW Commissioner issued a memo to Solid Waste employees, including the Appellant, advising them that their employment with the department was "essential". (Appointing Authority Exhibit 20)
7. On December 17, 2002, the DPW Commissioner issued another memo to Solid Waste employees, including the Appellant, reminding employees that their employment with the department had been deemed essential. (Appointing Authority Exhibit 21)

8. On those weeks in which a holiday occurs, Saturday trash collection is necessary in order to accommodate the five-day pick-up schedule. (Testimony of Worden)
9. Prior to the onset of budget constraints, the DPW Commissioner had typically been able to rely on the use of volunteers to cover the above-referenced Saturday shifts when a holiday occurred during the week. (Testimony of Worden)
10. The Appellant had previously volunteered for certain available Saturday shifts and opted not to volunteer for others. (Testimony of Appellant)
11. Beginning in 2002, as a result of a reduced workforce caused by budget constraints, there weren't always enough volunteers to cover the Saturday shifts in question. The problem related to the lack of volunteers persisted into 2003. (Testimony of Worden)
12. On Thursday, April 24, 2003, the week of the Patriots Day holiday in Massachusetts, the DPW Commissioner issued a memorandum to all Solid Waste employees including the Appellant. The memorandum stated in relevant part, "Please be advised that your employment with this department is 'essential'. As you know the collection of trash and recycling is an essential service to the residents of New Bedford and since trash and recycling collection has fallen behind due to the Patriots Day holiday it is '**mandatory**' that all employees work on Saturday, April 26, 2003 until all routes have been completed." (emphasis in original) (Appointing Authority Exhibit 26A)
13. On Saturday, April 26, 2003, several Sanitation Department employees, including the Appellant, failed to show for work as instructed. (Testimony of Worden)
14. In addition to failing to show for work on April 26, 2003, the Appellant failed to call, marking at least the sixth time in his tenure that he was a "no show / no call" employee. (Testimony of Appellant; Appointing Authority Exhibits 2 -19)

15. During direct testimony, the Appellant offered various reasons for not showing up for work on the Saturday in question, first stating that he didn't believe it was a state of emergency, then stating his body couldn't take it because of his diabetes and hypertension. (Testimony of Appellant)
16. When asked directly by this Commissioner why he didn't show up for work on April 26, 2003, the Appellant stated, "I just stood out; I didn't call in". (Testimony of Appellant)
17. After considering the individual prior discipline records of each employee who failed to appear for work on the day in question, the City imposed suspensions of up to 30 days. (Testimony of Worden)
18. Despite being subject to a last chance agreement, signed only two months prior, which explicitly stated that any further discipline could result in the Appellant's termination, the City only suspended the Appellant for thirty days for his "no show / no call" on Saturday, April 26, 2003. (Testimony of Worden; Appointing Authority Exhibit 26C)

CONCLUSION

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). See 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). An action is

“justified” when 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.” Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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.” 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 Appointing Authority’s burden of proof is one of a preponderance of the evidence which is established “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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the commission is "not whether it would have acted as the appointing authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See*

Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The City has proven, by a preponderance of the evidence, that it had just cause to suspend the Appellant for thirty days for failing to appear for work on April 26, 2003. The Appellant had a breathtakingly-long record of prior discipline before this incident, ultimately leading to a last chance agreement in which the Appellant agreed that any further discipline could result in his termination.

Despite the existence of the above-referenced last-chance agreement, signed only two months prior to the incident which is the subject of this appeal, the Appellant refused the written directive of the DPW Commissioner to appear for work on Saturday, April 26, 2003, stating during his testimony before the Commission, “I just stood out; I didn’t call in.”

Given that the City subsequently chose to privatize the trash pick-up services for City residents, ultimately costing the Appellant his job, this Commissioner will avoid the temptation to pile-on and question the City’s wisdom of tolerating such behavior for so long.

For all the above reasons, the Appellant’s appeal under Case No. D-03-388 is hereby ***dismissed.***

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman, Bowman, Marquis and Guerin, Commissioners [Taylor – Absent]) on February 8, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party 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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Jane Medeiros Friedman, Esq.

Michael Maccaro, Esq.