COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

PETER DAGENAIS,
Appellant

v.

CASE NO: D1-11-227

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant: Jamie Kenny, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent: Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
133 William Street – Room 203
New Bedford, MA 02740

Commissioner: Paul M. Stein[1]

DECISION

The Appellant, Peter Dagenais, duly appealed to the Civil Service Commission (Commission), acting pursuant to G.L. c. 31, §43, from a decision of the City of New Bedford (New Bedford), the Appointing Authority, to terminate him on June 28, 2011 from the position of Heavy Motor Equipment Operator for the Department of Public Facilities (DPF) for violation of New Bedford's sexual harassment policy. A full hearing was held by the Commission at the University of Massachusetts School of Law at Dartmouth, on December 9, 2011 and April 6, 2012. As no written notice was received from either party, the hearing was declared private. New Bedford called three witnesses and the Appellant testified on his own behalf. Witnesses were sequestered. The hearing was digitally recorded. Both parties subsequently submitted proposed decisions.

[1] The Commission acknowledges the assistance of Law Clerk Amanda Belanger in the drafting of this decision.

FINDINGS OF FACT:

Eighteen (18) exhibits were entered into evidence at the hearing. Based on the documents, Exhibits 1 through 18, and the testimony of the Appellant, Roxanne Simoes, Adam Hart, Richard Correira, Lawrence Worden, and Ms. A, the complaining female employee, I find the following:

1. The Appellant, Peter Dagenais, was hired by the City of New Bedford as a Heavy Motor Equipment Operator on October 4, 1999. *(Exhibit A.A.-1)*

2. The Appellant was placed on a 30 day suspension on April 30, 2001 for violating the City's sexual harassment policy. The Appellant signed an agreement stating, "I understand this is my final warning. Any further warnings will result in discipline in accordance with Massachusetts General Laws, Chapter 31, and the Union Contract." *(Exhibit A.A-.9 and Exhibit A.A.-10)*

3. The City has a Sexual Harassment Policy, which the Appellant signed and acknowledged on September 27, 1999. *(Exhibit A.A.-2 and Exhibit A.A.-4)*

4. The Appellant signed and acknowledged New Bedford's Anti-Discriminatory Harassment Policy, which includes sexual harassment. The Appellant last received and read the Anti-Discriminatory Harassment Policy on January 12, 2011. *(Exhibit A.A.-3, Exhibit A.A.-5, and Exhibit A.A.-6)*

6. The Appellant met Ms. A at the Harbor Development Commission ("HDC") in May 2011, where Ms. A is employed and where the Appellant is assigned to pick up recyclable materials from the HDC. *(Testimony of Ms. A)*

7. During the Appellant's first meeting with Ms. A at the HDC, he came to pick up the recyclables and Ms. A went outside to bring out her recyclable materials from her office. As she

was walking back in, the Appellant asked her, "What would you say if I said you had a nice body?" Ms. A then replied "thank you". The Appellant responded, "That would be the correct answer". *(Testimony of Ms. A)*

8. Following this first meeting, Ms. A was in her car leaving work shortly after 4:00 P.M., when the Appellant was next to her car in his truck. She rolled down her window. The Appellant told her he had the day off work tomorrow and that he would bring her a coffee. She told him "no thank you". The Appellant was persistent and she told him she did not drink coffee, but he could bring her tea. *(Testimony of Ms. A)*

9. After this interaction, Ms. A called Ms. Roxanne Simoes, who also worked for the Harbor Development Commission at a different office. Ms. A called Ms. Simoes to ask if she would come to her office the next morning so that she would not be alone in her office when the Appellant came to bring her the tea. *(Testimony of Ms. A)*

10. That next morning, the Appellant delivered Ms. A a tea at her office at HDC and spoke with both Ms. A and Ms. Simoes for approximately 45 minutes. This was the first time Ms. Simoes met the Appellant. (*Testimony of Ms. A and Roxanne Simoes)*

11. During this meeting, Ms. A mentioned she was married and had children. The Appellant also told her he was married with children. During this same conversation, Ms. Simoes stated that her father worked for the same department as the Appellant. As the Appellant was leaving, he told Ms. Simoes, "make sure you tell your father I didn't touch you". Both Ms. A and Ms. Simoes thought the statement was odd and inappropriate. *(Testimony of Ms. A and Roxanne Simoes)*

12. The Appellant, Ms. A, and Ms. Simoes described the conversation as friendly and cordial up until the odd and inappropriate comment made by the Appellant. *(Testimony of Ms. A, Roxanne Simoes and Peter Dagenais)*

13. The Appellant came to Ms. A's office on a few other occasions. On one particular occasion, Ms. A asked him to bring another recycling container to her office. *(Testimony of Ms. A)*

14. On a separate occasion, the Appellant came into Ms. A's office and told her he was going away on vacation. He gave Ms. A his phone number and suggested that they go out for coffee. *(Testimony of Ms. A)*

16. The Appellant called the HDC office to talk to Ms. A about five times. Ms. A asked her co-worker, Mr. Adam Hart, to answer the phones so that she would not have to speak with the Appellant. *(Testimony of Adam Hart and Ms. A)*

17. On one occasion, the Appellant called the office to speak with Ms. A and she returned his phone call and left him a message stating that she was returning his call. The Appellant then called Ms. A back and asked her why she did not call him while he was away on vacation. Ms. A responded that she was very busy and did not have any time. The Appellant told Ms. A to give him a call back and that they could get together after work hours. Ms. A responded, "Yeah. Okay", so that she could hang up the phone and get back to work. *(Testimony of Ms. A)*

18. Ms. A saw the Appellant after this phone call when he would come into her office with the recycling bins. The Appellant referred to Ms. A as his "girlfriend" when he was in the office in front of other people and on the telephone when he called Ms. A's office to talk to her. This made Ms. A feel uncomfortable. *(Testimony of Ms. A, Roxanne Simoes and Adam Hart)*

19. On one occasion when the Appellant came to Ms. A's office, Mr. Hart overheard the Appellant make a comment to Ms. A about her getting up on stage and dancing. On one or two occasions, when Ms. A knew the Appellant was coming to the office, she left early or went to the Visitor's Center where the Appellant would not see her. *(Testimony of Adam Hart)*

20. Ms. Simoes testified that she saw the Appellant a second time when he came into the HDC office, where Ms. A worked. The Appellant loudly asked where his "girlfriend" was. When he saw Ms. Simoes, he stated to her, "You're finally doing something." Ms. Simoes felt insulted and she told him that she was not a lazy person. *(Testimony of Roxanne Simoes)*

21. On one particular occasion in Ms. A's office, the Appellant came up behind her and put his hands on her shoulders and she walked away from him. *(Testimony of Ms. A)*

22. The Appellant was the only person that Ms. A has come into contact with at her office at HDC that has made her feel uncomfortable. *(Testimony of Ms. A)*

23. Ms. A testified that she saw the Appellant coming to set up a band shell for a clambake. She left when she saw him come in because she did not want to see him. *(Testimony of Ms. A)*

24. Ms. A testified that she did not see the Appellant coming to pick up the band shell. He went and sat down in Ms. A's office and stated to her, "I thought maybe you'd get up on stage and dance for me." She replied to him, "No. Those days are over." The Appellant then told her, "I could spray you down with a hose and we could have a wet t-shirt contest." Ms. A responded, "No. I don't think so." Ms. A never explicitly stated to the Appellant that he was offending her, making her feel uncomfortable, or that his statements were inappropriate. *(Testimony of Ms. A)*

25. After this interaction, Ms. A asked Victor Fonseca, the Assistant Harbor Master, to contact Mr. Richard Correira at the City Yard and request that the Appellant not be sent to the HDC office anymore. *(Testimony of Ms. A and Richard Correira)*

26. Mr. Correira told Ms. A that she should report the incidents to her superior. Ms. A testified that the Appellant made her feel uncomfortable and did not report the incidents right away because she did not want to cause any trouble, but wanted the Appellant to leave her alone. *(Testimony of Ms. A and Richard Correira)*

27. After Mr. Correira spoke with Ms. A, he alerted the Appellant to stop going to the HDC office and told his supervisor, Kenneth Blanchard, the Superintendent of Parks and Public Places, of the matter. *(Testimony of Richard Correira)*

28. The Appellant was placed on administrative leave effective June 17, 2011 by Mr. Blanchard. *(Exhibit A.A.-12)*

29. When Lawrence Worden, the DPF Commissioner, returned from vacation, he reviewed the complaint and report, and notified the Appellant that he was contemplating his termination and suspending him immediately due to a violation of the sexual harassment policy. *(Exhibit A.A.-16)*

30. Mr. Worden met with the Appellant and a Union representative to interview the Appellant in order to find out what happened on the alleged incidents. *(Testimony of Lawrence Worden)*

31. Mr. Worden asked the Appellant for the facts about his visits to the HDC office. The Appellant told Mr. Worden that he went to the HDC office to collect the recyclables and the first time he went there, he met Ms. A. The Appellant asked Ms. A if he could bring her coffee and she responded that she did not drink coffee, but drank tea. He was on vacation and went to Ms. A's office the next day to bring her the tea. The Appellant also told Mr. Worden that that he tried calling Ms. A at her office several times and left messages. Ms. A only returned his call once

and left him a message that she was returning his call. The Appellant denied making any statements about the "wet t-shirt". *(Testimony of Lawrence Worden)*

32. Mr. Worden advised the Appellant that he would schedule a hearing due to the serious allegations. The Appellant told Mr. Worden that he did go to the HDC office and did state, "Where's my girlfriend?" on a few occasions. He also told Mr. Worden during their meeting that he did not know Ms. A was married and that he was surprised that she allowed him to give her a kiss on the cheek. *(Testimony of Lawrence Worden)*

33. Mr. Worden decided to terminate the Appellant due to his violation of the sexual harassment policy. He noted that the Appellant's went to the HDC office on his vacation and after work hours and that the Appellant admitted to him that he gave Ms. A a peck on the cheek, called Ms. A his "girlfriend" and "honey" at the office in front of other people. He also added that he terminated the Appellant's employment based on his previous sexual harassment violation that put him on a 30-day suspension in 2001. *(Exhibit A.A.-9, Exhibit A.A.-10, Exhibit A.A.-11 and Testimony of Lawrence Worden)*

34. The Appellant testified that the first time he met Ms. A, he claimed that Ms. Simoes was not present in the office, but did see Ms. Simoes on another occasion. The Appellant admitted that he stated to Ms. Simoes, "make sure you tell your father I didn't touch you". *(Testimony of Peter Dagenais)*

35. 36. One the day that the Appellant delivered the band shell for the clambake, he saw Ms. A's car and therefore decided to go in the HDC office and speak with her. He denied making the "wet t-shirt" comment or the statement about Ms. A getting up and dancing on stage, but rather, said when he was speaking with Ms. A in the HDC office, someone walked in behind him and said something that pertained to the "wet t-shirt contest and dancing on stage".

However, he could not identify who the person was and claimed he did not see the person. *(Testimony of Peter Dagenais)*

37. The Appellant admitted that he may have made a comment about Ms. A's body the first time he met her because he might have been making a joke. The Appellant waited for Ms. A after work because he was on his own time. *(Testimony of Peter Dagenais)*

38. During the hearing, the Appellant testified that did not know why Ms. Simoes would lie about being present the morning he brought Ms. A the tea. He also did not know why he told Ms. Simoes to tell her father that he didn't touch her or why Mr. Hart would lie about overhearing the Appellant make a statement to Ms. A about dancing on stage. He was unable to state why he called Ms. A his girlfriend when he went into the HDC office. *(Testimony of Peter Dagenais)*

CONCLUSION

Under G.L.c.31,§43, 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. The Commission has the duty to determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102, (1983). In performing its function:

> "[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [in] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely. . .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 decision rejecting evidence of appellant's failed polygraph test and 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 insufficient to hold justification unreasonable)

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" and 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 only "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

> The term 'just cause' must be construed in light of the purpose of the civil service legislation in which it appears. The purpose is to 'free public servants from political pressure and arbitrary separation. . . but not to prevent removal of those who have proved to be incompetent or unworthy to continue in the public service. [citation] '[I]n order to carry out the legislative purpose, the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.' [citations]

School Comm. of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486,488, rev.den. 426 Mass.1104 (1997). See also Murray v. Second Dist. Ct., 389 Mass. 508,514(1983)

An appointing authority's burden of proof by a preponderance of 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). An action is justified if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).The Commission 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). The Commission is entitled to "due weight for its experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

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)

G.L.c.31,§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., Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited; 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)

Applying these principles to the present case, the Respondent, the City of New Bedford, has shown by the preponderance of the evidence that it had just cause to terminate the Appellant, from employment as a Heavy Motor Equipment Operator.

New Bedford has a clear written Sexual Harassment Policy, which the Appellant received on September 27, 1999 and an Anti-Discriminatory Harassment Policy, which includes sexual harassment, and was given to the Appellant on January 12, 2011. *(Exhibit A.A.-2, Exhibit A.A.-3 and Exhibit A.A-4)* The Sexual Harassment policy states that sexual harassment includes, "unwelcome sexual advances – whether they involve physical touching or not…comments on an individual's body" and "suggestive comments". New Bedford's Anti-Discriminatory

Harassment Policy's purpose is to "promote a workplace free of discriminatory harassment, including sexual harassment". It also states that sexual harassment is defined as "conduct that has the effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment." The Appellant had full knowledge of the City's sexual harassment policy and the Anti-Discriminatory Harassment Policy. He willfully violated the policies by continuing to go to Ms. A's office during and after work hours without reason or justification. Furthermore, his repeated phone calls and constant inappropriate comments to Ms. A interfered with the employees' work at the HDC office.

Although Ms. A never explicitly expressed to the Appellant that his visits and comments were unwelcomed, she was clearly affected negatively at her job and offended by his persistence and repeated advances. The Appellant's actions were clearly unwanted and offensive as demonstrated through Ms. A's own testimony and other witness testimony.

During the hearing, the Appellant admitted to going to the HDC office to wait for Ms. A after work hours and on his vacation. He admitted he may have made a comment about Ms. A's body during their first meeting, however denied the fact that he made any other suggestive comments. The Appellant's repeated visits and calls to Ms. A's office, and offensive comments and statements heard by three of the witnesses demonstrate the Appellant's inappropriate and harassing behavior. These repeated visits and phone calls interfered with Ms. A's work, as well Mr. Hart's and Ms. Simoes' work, creating an uncomfortable situation in the workplace. Furthermore, during the hearing, the Appellant was unable to convey any reason or explanation as to why he was visiting Ms. A in her office during and after work hours and calling her at her office repeatedly.

The Appellant's testimony was not credible; he changed his testimony during the hearing when asked about how many times he interacted with Ms. A. He also told Mr. Worden during his meeting that Ms. A gave him a peck on the cheek, and during the hearing he stated that Ms. A never kissed him on the cheek, but had hugged him on two separate occasions, one of which the Appellant was unable to describe clearly. He also claimed that it was another person in the HDC office who made the suggestive comments about a "wet t-shirt contest" and "dancing on stage", however was unable to identify who the person was, and I do not find his explanation credible.

New Bedford has met its burden and proven by a preponderance of the evidence that the Appellant failed to comport himself with the City's policy prohibiting unwelcome sexual harassment and was unworthy to continue in the public service, demonstrating just cause to terminate him under G.L.c.31,§43. During his tenure, the Appellant was disciplined and suspended for 30 days on April 30, 2001 for violating the City's sexual harassment policy. After this incidence, the Appellant signed an agreement stating, "I understand this is my final warning. Any further warnings will result in discipline in accordance with Massachusetts General Laws, Chapter 31, and the Union Contract." *(Exhibit A.A-.9 and Exhibit A.A.-10)* Although this past offense occurred some time ago, it remains a factor on which New Bedford could justifiably rely. Moreover, I find that there is no evidence of disparate treatment, inappropriate motivations or objectives, or other factors that would warrant the Commission modifying the discipline imposed upon him.

For all of the above reasons, the Appellant's appeal filed under Docket No. D1-11-227 is hereby ***dismissed***.

Civil Service Commission

_____
Paul M. Stein, Commissioner

By a vote of the Civil Service Commission: to dismiss the appeal (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on May 30, 2013.

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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:
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