

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DINO DEMAURO,
Appellant,

CASE NO. D-09-386

v.

WORCESTER PUBLIC SCHOOLS,
Respondent

Appellant's Representative:

Salvatore Romano
Tim Mahoney
Massachusetts Laborer's Dist. Council
7 Laborers Way
Hopkinton, MA 01748

Respondent's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Dino DeMauro, acting pursuant to G.L. c. 31§ 43, duly appealed to the Civil Service Commission (Commission) from a decision of the Worcester Public Schools (WPS), his Appointing Authority, suspending him for ten (10) days for taking vacation days without approval and for failing to work collaboratively with other custodians and staff in his building. A full hearing was held by the Commission on January 6, 2010, and March 8, 2010 at 20 Irving Street, Worcester, MA. The hearing was declared private as neither party requested a public hearing. WPS called four (4) witnesses and Mr. DeMauro testified on his own behalf. Twenty-six (26) exhibits were received in evidence. The hearing was digitally recorded. Post hearing submissions were received by the Commission in August 2010.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses (the Appellant, Dino DeMauro; WPS Superintendent Dr. Melinda Boone; WPS Principal of Norrback Avenue School, Dr. Karrie Allen; WPS Director of Instructional Support Personnel Anthony Ingrisano; and WPS Coordinator of Maintenance and Custodial Services Jack Navin) and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Dino DeMauro, was a tenured WPS civil service employee holding the position of custodian. At the time of his suspension, WPS had employed him for approximately sixteen (16) years and he was currently assigned to the Norrback School. Mr. DeMauro's direct supervisor is Shawn Finnegan, Senior Custodian. (*Exhibit 1*)

2. Mr. DeMauro's prior discipline includes a one (1) day suspension, a two (2) day suspension (a ten (10) day suspension with only two (2) days served) and a five (5) day suspension. (*Exhibit 23; Testimony of Ingrisano*)

3. Mr. DeMauro was counseled by Norrback School Principal Dr. Karrie Allen in December 2008 concerning his inappropriate interaction with others in the school building. He also received counseling from WPS Maintenance Coordinator, Jack Navin (*Exhibit 14, Testimony of Allen & Navin*)

4. Despite this counseling, Mr. DeMauro engaged in conduct that demonstrated his failure to work collaboratively with other custodians and staff in his building. He complained about his performance reviews with co-workers; he refused to complete assigned tasks because of his dissatisfaction with his evaluations; he intentionally dirtied glass in an area assigned to another custodian and raised his voice in the presence of children and the other staff in the school. Mr.

DeMauro also informed a teacher that he would not complete his assigned tasks because of his evaluations. (*Exhibits 15, 16, 18 and 24; Testimony of Ingrisano, Allen and Navin*)

5. Mr. DeMauro confirmed that he spoke to others in his building concerning his dissatisfaction with his evaluations. Fellow custodians confirmed that he dirtied the window for which another custodian was responsible. (*Exhibit 15, Testimony of Appellant, Allen, Ingrisano, & Navin*)

6. The request and use of vacation days by WPS custodians is governed by the collective bargaining agreement (CBA) between the Worcester School Committee and Mass Laboror's District Council Local 176, as well as various WPS Human Resources bulletins and regulations. These rules provide that vacation days are to be requested in writing and approval is subject to the discretion of the school principal, subject to certain minimum system-wide staffing requirements. (*Exhibits 2,12,20, 21; Testimony of Navin*)

7. Effective July 1, 2009, WPS implemented an online attendance program known as AESOP. Each employee was issued an ID number and PIN number to use to access the system, report their absences and request vacation days. Mr. Finnegan issued these numbers to the Mr. DeMauro. In addition to the online submission of vacation requests, employees were required to continue to complete a form requesting vacation and return it to their supervisor. (*Exhibits 8 & 9; Testimony of Appellant,Navin & Igrisano*)

8. Dr. Allen was responsible for approving summer vacation requests submitted by the custodial staff at Norrback School. Among those she approved for Mr. DeMauro were requests made prior to the summer for the week of August 10, 2009 through August 14, 2009. (*Exhibit 5; Testimony of Appellant & Allen*)

9. On August 10, 2009, the Appellant made a written request for August 14, 2009, August 21, 2009 and August 28, 2009 as vacation days. He filled out a vacation day request and turned it in to Mr. Finnegan. (*Exhibit 7; Testimony of Appellant*)

10. Mr. Finnegan never informed Mr. DeMauro that his written vacation requests had been approved or denied. (*Testimony of Appellant*)

11. On August 12, 2009, the Appellant also requested August 14, 2009, August 21, 2009 and August 28, 2009 as vacation days through the AESOP system. He received a confirmation number for each of his requests. (*Exhibits 10 & 22; Testimony of Appellant*)

12. Mr. DeMauro did not take the week of August 10, 2009 off. Despite his further request for the use of August 14, 2009 as a vacation day, Mr. DeMauro worked his regular shift that day and so indicated on his time sheet. His timesheet was signed by Mr. Finnegan indicating Mr. DeMauro worked that week. (*Exhibit 6 & 6A; Testimony of the Appellant*)

13. Mr. DeMauro took vacation days on August 21, 2009 and August 28, 2009. He indicated on his timesheets, which were signed by Mr. Finnegan, that he took these days as vacation. (*Exhibit 6; Testimony of the Appellant*)

14. On or about August 12, 2009, Mr. DeMauro also submitted a request to Mr. Finnegan for August 17, 2009 as a vacation day, and did also take that day off, as reflected on his timesheet. There does not appear to be any AESOP online form corresponding to this request. WPS has not disciplined Mr. DeMauro for taking this vacation day. (*Exhibits 6 & 25-ID; Testimony of Appellant*)

15. In fact, Dr. Allen had not signed off her approval of Mr. DeMauro's August 10, 2008 (Written Form) or August 12, 2009(AESOP) vacation day requests. (*Exhibits 7, Testimony of Allen & Navin*)

16. On August 11, 2009, Mr. Finnegan, Mr. DeMauro's direct supervisor, submitted a request for vacation for August 12, 2009 and August 13, 2009. There is no evidence that Mr. Finnegan submitted an AESOP online requests or that Dr. Allen, the school principal, approved this request. (*Exhibit 26*)

17. Mr. Finnegan took vacation days on August 12, 2009 and August 13, 2009. He noted his status on his signed timesheet. (*Exhibits 11 & 11A*)

18. On September 1, 2009, Dr. Allen requested proof of Mr. DeMauro's permission to take a sick day on that date as well as authority for his August 28, 2009 and August 31, 2009 vacation days. (*Exhibit 17; Testimony of Appellant & Allen*)

19. On September 4, 2009, having not received any documentation from Mr. DeMauro, Dr. Allen wrote a letter to Mr. DeMauro citing his violation of vacation request procedures, as well as her concerns about his "unwillingness to work collaboratively with others" based on reports of certain incidents concerning him. (*Exhibit 18; Testimony of Allen*)

20. On September 23, 2009, WPS notified Mr. DeMauro of a hearing to be held on October 2, 2009 to consider possible disciplinary action for taking unauthorized vacation, failing to use the AESOP system, and failing to work collaboratively with other custodians and staff. (*Exhibit 3*)

21. At the October 2, 2009 hearing, Mr. Ingrisano was designated as the Hearing Officer. At the conclusion of the hearing, Mr. Ingrisano made findings of fact and recommended Mr. Demauro serve a ten (10) day suspension without pay. (*Exhibit 2; Testimony of Ingrisano*)

22. Superintendent Dr. Melinda Boone adopted Mr. Ingrisano's findings and imposed a ten (10) day suspension on the Appellant. (*Exhibit 4; Testimony of Dr. Boone*)

23. This appeal duly ensured. (*Exhibit 1*)

CONCLUSION

Summary

The preponderance of the evidence does not support the WPS's decision to suspend the Appellant for ten (10) days without pay. WPS did not show that Mr. DeMauro failed to comply with the necessary rules regarding prior notice and approval for taking time off. WPS did, however demonstrate just cause for disciplining Mr. DeMauro pursuant to the second set of charges involving his failure to work collaboratively with other custodians and school personnel..

Applicable Legal Standard

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 must 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., Falmouth v. Civil Serv. 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 Serv. Comm'n, 38 Mass App.Ct.473,477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). It is a basic tenet of the "merit principle" of 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.

An action is "justified" if "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 Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. 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). An appointing authority's burden of proof 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 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing)

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] 'a hearing de novo upon all material evidence and . . . not merely for a review of the

previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . . For the commission, the question is . . . 'whether, *on the facts found by the commission*, there was reasonable justification for the action taken by the appointing authority *in the circumstances found by the commission to have existed* when the appointing authority made its decision.' ” Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997); Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by “disinterested” Commissioner in context of procedural due process)

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

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

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

In deciding whether to exercise discretion to modify a penalty, the Commission's task "is not to be accomplished on a wholly blank slate". Unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the Commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." E.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). cf. School Comm. v. Civil Serv. Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Serv. Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Serv. Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld)

Applying these principles to this appeal, I conclude that WPS did not meet its burden to establish "just cause" for the 10-day suspension imposed on Mr. DeMauro. WPS did not prove by a preponderance of the credible evidence that Mr. DeMauro failed to comply with the rules regarding approval prior to taking time off that warranted such a severe sanction as a suspension.

I reach this conclusion for several reasons. First, Mr. DeMauro argues that he requested the vacation days at issue in the manner utilized prior to the implementation of the AESOP system, by delivering a written request to his supervisor. The supervisor never informed him that his request was denied. Mr. DeMauro renewed his request using the AESOP system, received a confirmation number for each requested day off, and legitimately believed that his request had been approved. He stated that he received no training in the system. He assumed that those

responsible for reviewing the requests had done so, and that the requests had been approved. Given the recent implementation of the new AESOP system only that summer, and the lack of clear instructions and training, I find it likely that Mr. DeMauro honestly was confused about the proper way of using the new system, and what constituted an acceptance of his vacation request.

I am also concerned about the disparity of treatment between Mr. DeMauro and other members of the custodial staff. WPS is within its rights to enact the rules and regulations concerning the allowance of vacation time as it sees fit, as long as those rules are applied equally to everyone. Mr. DeMauro allegedly engaged in misconduct by failing to comply with WPS's rules regarding approval prior to taking time off but his immediate supervisor, Mr. Finnegan also did the very same thing. Mr. DeMauro alleges, and evidence shows, that Mr. Finnegan took several days of vacation with similar short notice and covering the same allegedly critical weeks before school opening, and submitted his request in the same manner as Mr. DeMauro, with no record that any of his vacation days were approved in writing by his building principal. If such partial compliance with the rules and required notice were sufficient for the Senior Custodian, it should be sufficient for Mr. DeMauro as well. I find that Mr. DeMauro did provide sufficient notice of his intention to take the vacation days in question to constitute substantial compliance with the procedures as he understood them.

I have taken into account, in this regard, that Mr. DeMauro had been disciplined for attendance issues in the past, but WPS last disciplined Mr. DeMauro based on his attendance approximately ten (10) years prior to the present incident, once in 1997 and another time in 1998. Since that time, there have been no other attendance-based lapses until August 2009. I also note that the WPS procedures, especially the on-line procedures had been subject to recent changes and that Mr. DeMauro's technical non-compliance was attributable, in part, to a reasonable

misunderstanding of the new rules. Since I find there was no reason to discipline for what is a unique, first time reporting snafu, there is no reason to consider WPS's argument of progressive discipline based on stale and non-comparable prior attendance issues.

The second set of charges must be looked at in a different manner. Mr. DeMauro is charged with several episodes of misconduct ranging from complaining about evaluations to outright insubordination. While WPS provided evidence of this misconduct largely through documentary reports from third party sources, Mr. DeMauro did not credibly dispute them. Further, although Mr. DeMauro's 2009 evaluation rated him as "Good" for being cooperative with staff, his past work history does contain relatively recent prior discipline for other poor performance issues, including verbal counseling, a two (2) day suspension and the denial of his bidding rights due to a poor evaluations and a formal reprimand in 2003 for failing to clean his area. I conclude that WPS has met its burden of proof for these charges of misconduct and that appropriate discipline was warranted for this conduct.

In sum, I conclude that the Commission is justified to exercise its authority to modify Mr. DeMauro's discipline. I base this on the fact that WPS did not prove the vacation attendance violation, that Mr. DeMauro's most recent formal discipline was a two (2) day suspension in 2001, and that his 2009 evaluation indicates that, until the present incidents, he had made some progress since then with his interpersonal issues. Nevertheless, his relapse in this area must be treated seriously. The Commission exercises its discretion to modify the discipline imposed on the Appellant from a ten (10) day suspension to a five (5) day suspension as the appropriate remedial action necessary in the circumstances. The Worcester Public Schools will return to the Appellant all other compensation and other rights to which he is entitled pursuant to this decision.

For these reasons, the appeal of the Appellant, Dino DeMauro, filed under Docket No. D-09-386 is hereby *allowed in part*.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein, Commissioners [Marquis – Absent]) on February 24, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

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