

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DINO DEMAURO,
Appellant

Case No. D-10-68

v.

WORCESTER PUBLIC SCHOOLS,
Appointing Authority

Appellant's Representative:

Salvatore Romano
Massachusetts Laborers Dist. Council
7 Laborers Way
Hopkinton, MA 01748

Respondent's Attorney:

Sean P. Sweeney, Esq.
Law Offices of Sean P. Sweeney, P.C.
311 Village Green North, suite A4
Plymouth, MA 02360

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43¹, the Appellant, Dino DeMauro (hereinafter "DeMauro" or "Appellant") appealed the decision of the Worcester Public Schools (hereinafter "Worcester" or "Appointing Authority") to suspend him for ten (10) days without pay from his position as a custodian. The appeal was timely filed. A full hearing was held on June 16, 2010 at 20 Irving Avenue, Worcester, Massachusetts. The witnesses were sequestered and the hearing

¹ Appellant waived the G.L. c. 31 § 42 portion of his appeal at the pre-hearing conference held on April 27, 2010.

was digitally recorded. As no notice was received from either party, the hearing was declared private.

FINDINGS OF FACT:

Based on the eight (8) documents entered into evidence and the testimony of the following witnesses:

For the Appointing Authority:

- Mr. Anthony Ingrisano, Director, Instructional Support Personnel, Worcester Public Schools;
- Ms. Kimberley Trombley, Instructional Assistant, Worcester Public Schools; and
- Mr. Sergio Bacelis, Instructional Assistant, Worcester Public Schools.

For the Appellant:

- None.

I make the following findings of fact:

1. The Appellant has been employed by the Worcester Public Schools as a junior custodian since February 24, 1993 and presently assigned to the Norrback Avenue Public School. (Stipulated Fact)
2. There have been four instances where the Appointing Authority has disciplined the Appellant. He was suspended for one (1) day in August, 1997; five (5) days in August, 1998; two (2) days in June, 2001; and ten (10) days in October, 2009. (Stipulated Fact; Testimony of Ingrisano)
3. The Appellant also filed an appeal to the Commission regarding the October, 2009 suspension. That appeal is pending with the Commission. (Stipulated Fact; Testimony of Ingrisano)

4. There are rules and regulations that govern employee conduct at Norrback Avenue Public School. Some of these regulations are published in the form of bulletins. The Office of the Superintendent publishes annual bulletins that are directed to All Personnel and disseminated by each school's principal. In August, 2009 a bulletin was issued regarding "Appropriate Interpersonal Communications" ("Bulletin #11"). Bulletin #11 states in its entirety that "The Worcester Public Schools employs over 4,000 individuals, each with unique perspectives and values. Unfortunately, disputes between co-workers are inevitable in an organization of our size. It is my expectation that such disputes will be handled professionally and without raised voices, profanity and/or physical contact. If you are involved in a dispute with a co-worker please contact your Principal and/or Supervisor for assistance to help to resolve it." Bulletin #11 was posted at the Norrback Avenue Public School. (Exhibit 8; Testimony of Ingrisano).
5. On January 25, 2010, from approximately 11:30 to 11:45 a.m., approximately one hundred second grade students and a handful of staff were gathered in the cafeteria for lunch. Mr. Sergio Bacelis ("Bacelis") is an Instructional Assistant who was scheduled to monitor the children in the cafeteria. Also present were Ms. Kimberly Trombley ("Trombley") and Ms. Takouhie Taoukdjian ("Taoukdjian"), both Instructional Assistants who were seated with their respective groups of students. (Testimony of Bacelis; Testimony of Trombley)
6. The Appellant was also present in the cafeteria on January 25th between 11:30 A.M. and 11:45 A.M. (Exhibits 1, 2 & 7; Testimony of Bacelis; Testimony of Trombley)
7. At approximately 11:45 a.m. lunch period was concluding and students were exiting the cafeteria. Ms. Trombley and Ms. Taoukdjian were positioned between the Appellant and Mr. Bacelis. Ms. Trombley heard a voice from behind her. The voice was loud and caught Ms.

Trombley's attention. Ms. Trombley turned around in her chair and observed the Appellant yelling across the room. Ms. Trombley followed the Appellant's line of sight and observed that the Appellant was yelling at Mr. Bacelis. (Testimony of Trombley)

8. Ms. Trombley heard the Appellant make loud statements to the effect of "You'll find out you're on your own here" or "you'll realize that you're on your own here." Ms. Trombley could not remember the Appellant's words verbatim. However, Ms. Trombley clearly understood that the Appellant's outburst was a warning directed at Mr. Bacelis. (Exhibit 1; Testimony of Trombley)
9. Mr. Bacelis was standing near the cafeteria exit and monitoring the students as they ate. Mr. Bacelis noticed that the Appellant was speaking to him, but could not hear his words. (Testimony of Bacelis)
10. The Appellant followed up his statement with a hand gesture. The gesture was made in an aggressive manner and directed at Mr. Bacelis. The gesture involved the flicking of the fingers of the hand off the bottom of the chin in an outward motion. Both Ms. Trombley and Mr. Bacelis understood this gesture to be the equivalent of displaying one's middle finger or "flipping the bird." (Testimony of Bacelis; Testimony of Trombley)
11. The Appellant's statement was overheard and the gesture was observed by the students. At least one student made eye contact with Ms. Trombley and expressed a look of shock. Ms. Trombley recognized his eye contact and facial expressions to be that of disbelief and disapproval at the Appellant's use of the gesture. Ms. Trombley was equally appalled but did not address the student or draw added attention to the scene. (Testimony of Trombley)
12. Ms. Taoukdjian observed the gesture but did not immediately understand its' significance. However, Ms. Taoukdjian did see the reaction on one student's face and later questioned Ms.

Trombley as to why the student was shocked. (Testimony of Ingrisano; Testimony of Trombley)

13. Mr. Bacelis observed the Appellant make the gesture toward him. Mr. Bacelis did not respond to the Appellant. Rather, he exited the cafeteria and avoided a possible confrontation. (Testimony of Bacelis)
14. Ms. Trombley and Ms. Taoukdjian ushered the students back to their respective classrooms at the end of the lunch period. (Testimony of Bacelis; Testimony of Trombley)
15. During her personal lunch break, Ms. Trombley reported the incident to Dr. Karrie Allen, the school principal. (Testimony of Trombley)
16. Dr. Allen requested that Ms. Trombley, Ms. Taoukdjian and Mr. Bacelis write statements regarding the incident. Dr. Allen then contacted Anthony Ingrisano, Director of Instructional Support Personnel, and requested that he conduct an investigation. Mr. Ingrisano is the civil service administrator for the Appointing Authority and acts as the primary hearing officer for all civil service matters. (Testimony of Ingrisano)
17. Mr. Ingrisano reviewed the written statements and interviewed the witnesses. (Testimony of Ingrisano)
18. Mr. Ingrisano learned that prior to serving the October, 2009 suspension, the Appellant had contacted Mr. Bacelis to voice his disapproval of Dr. Allen. The Appellant had informed Mr. Bacelis that the Appellant was going to take some form of action against Dr. Allen and wanted to know whether Mr. Bacelis was “with me or against me.” Mr. Bacelis had informed the Appellant that he would not take sides and was neither for nor against the Appellant. It appeared that outburst and gesture made on the Appellant’s first day back from suspension was related to the feelings harbored by Appellant that were previously expressed.

(Testimony of Bacelis; Testimony of Ingrisano)

19. On February 3, 2010 the Appellant was notified by letter that a hearing was scheduled on February 12, 2010 to review the incident. That hearing was subsequently rescheduled to February 16, 2010 and the Appellant was provided notice of same. (Exhibits 3 & 4)

20. On February 16, 2010 Mr. Ingrisano conducted a hearing. The Appellant was present and represented by his union. At that hearing the Appellant testified and denied that the incident occurred. Based on his credibility as exhibited during the hearing, Mr. Ingrisano discredited the Appellant's version of events and concluded that the alleged outburst and gesture did occur. (Exhibit 5; Testimony of Ingrisano)

21. Mr. Ingrisano also found that the Appellant's conduct violated Bulletin # 11, regarding interpersonal disputes. However, Mr. Ingrisano did not rely exclusively on the violation of this policy as the predicate for the discipline imposed. (Testimony of Ingrisano)

22. Based on witness statements, Appellant's testimony, his lengthy disciplinary history and the severity of this incident, Mr. Ingrisano concluded that the Appointing Authority had just cause to suspend the Appellant for ten (10) days. On March 23, 2010, Mr. Ingrisano issued his findings and recommendation to Superintendent Melinda Boone, Ed.D., who adopted the recommendation and issued notice to the Appellant of his suspension. (Exhibits 5 & 6; Testimony of Ingrisano)

23. On April 2, 2010, the Appellant appealed the Appointing Authority's decision.

24. The Appellant declined to testify before the Commission at the hearing regarding his appeal.

I drew an adverse inference against him for his failure to testify. See Falmouth v. Civil Service Comm'n, 447 Mass. 814 (2006)

25. When testifying before the Commission, Ms. Trombley presented herself as a truthful and credible witness. She has no significant relationship with the Appellant and she did not appear to harbor any animosity against the Appellant. It is clear that Ms. Trombley's motivation for reporting the Appellant's conduct was not for personal bias or political motivations, but rather that she was concerned because the Appellant's conduct had occurred in front of students. (Testimony of Trombley)
26. When testifying before the Commission, Mr. Bacelis presented himself as a truthful and credible witness who harbors no animosity toward the Appellant. Rather, it appeared that Mr. Bacelis had originally tried to avoid confrontations by informing the Appellant that he would remain neutral in any actions the Appellant takes against the principal, Dr. Allen. When confronted by the Appellant in the school cafeteria, Mr. Bacelis did not respond or antagonize the Appellant but rather exited the cafeteria and dismissed the incident. Mr. Bacelis did not report the incident to the principal because he did not hear the Appellant or observe the students' reactions to the outburst. However, he was very cooperative with Mr. Ingrisano once an investigation commenced and he testified truthfully and credibly before the Commission. (Testimony of Bacelis)
27. When testifying before the Commission, Mr. Ingrisano presented himself as a neutral, truthful and credible witness. His interests in this incident were to collect information, interview witnesses, conduct a fair hearing, and report his findings and recommendation to the superintendent. Mr. Ingrisano's investigation was thoroughly conducted and the hearing fairly administered. The Commission credits his diligent investigation and truthful testimony on this matter. (Testimony of Ingrisano)

CONCLUSION

G.L c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

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, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). 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 Service Comm’n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the 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, 133 N.E.2d 489 (1956).

“The commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the 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." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

There was just cause for the Appellant’s suspension in accordance with the standards articulated above given his record of past discipline and the serious misconduct in which he engaged, namely, shouting and making a commonly known inappropriate gesture with his hands

toward Mr. Bacelis in full view of the second grade students on January 25, 2010. The Appellant's conduct as described herein amounts to substantial misconduct which adversely affected the public interest by impairing the efficiency of public service, especially when one considers that it occurred in the presence of numerous young children. The Appellant's prior record reflects a pattern of extensive, progressive discipline which has failed to correct misconduct including four previous incidents that all resulted in suspensions. The Appellant has misconstrued his role as a junior custodian. Rather than focusing on the important task of ensuring a clean, safe environment for students, the Appellant has chosen to spend his time taking names of those who are "with him" or "against him" regarding his grievances against the school's principal. Given the Appellant's troubling disciplinary history, he would be well-advised to reevaluate his priorities.

The most recent incident occurred on the Appellant's first day back to work after serving a ten-day suspension for a previous incident. The Appellant's conduct violated the Appointing Authority's rules and regulations, including Bulletin #11 that instructed employees to direct their interpersonal disputes to the school principal or supervisor rather than using raised voices or profanity around students. The Appellant's use of a commonly-known obscene gesture in front of students is offensive, irresponsible, and the Appellant should know that such conduct is inappropriate regardless of any specific notice.

At the hearing conducted by the Appointing Authority, the Appellant denied having made any statement or gesture. It is the function of the hearing officer to determine the credibility of the testimony presented before him. 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); (In

cases where live witnesses giving different versions do testify 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); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility). The Appellant's flat-out denial that the incident occurred was wholly unbelievable to the Appointing Authority. Rather, the witnesses who observed the Appellant's conduct were credible and corroborated by one-another. The Commission credits the witness observations as truthful and not motivated by personal or political biases.

The Appellant declined to testify at the hearing before the Commission. While the Appellant had the bravado to shout warnings across a student-filled cafeteria, he apparently lacked the fortitude to testify under oath before the Commission. I credit the testimony of Mr. Bacelis and Ms. Trombley who witnessed the Appellant's outburst. The Commission also credits Mr. Ingrisano for conducting an impartial hearing and testifying truthfully before the Commission. Based on the evidence and testimony presented, it is clear that the Appellant's outburst was inappropriate and that he had prior notice that such conduct is not acceptable. Considering the progressive discipline utilized in the Appellant's previous disciplinary actions and the severity of this misconduct, the Appointing Authority had just cause to suspend the Appellant for ten (10) days.

For all the above reasons, the appeal under Docket No. D-10-68 is hereby *dismissed*.

Civil Service Commission

Christopher Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, and Marquis, Commissioners [Stein – not participating]) on September 23, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission decision. 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:

Sean P. Sweeney, Esq. (For the Appointing Authority)

Salvatore Romano (For the Appellant)