Decision mailed: 12/11/09
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DANIEL DEXTER,
Appellant

v.

D-09-276

TOWN OF WEST SPRINGFIELD,
Respondent

Appellant's Attorney:

Joseph L. DeLorey, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Respondent's Attorney:

James T. Donahue, Esq.
P.O. Box 465
1252 Elm Street: Suite 6
West Springfield, MA 01090

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Danny Dexter (hereinafter "Dexter" or "Appellant"), pursuant to G.L. c. 31, § 43[1], is appealing the decision of the Town of West Springfield (hereinafter "Town" or "Appointing Authority") to suspend him for one (1) day for leaving a work site without permission.

[1] The Appellant waived his concurrent appeal under G.L. c. 31, § 42 at the pre-hearing conference on August 12, 2009.

The Appellant filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on June 12, 2009. A pre-hearing conference was conducted on August 12, 2009 and a full hearing was conducted on September 23, 2009 at the Springfield State Building in Springfield, MA. The hearing was declared private and was digitally recorded. The parties submitted post-hearing briefs on October 26, 2009.

FINDINGS OF FACT:

Three (3) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- William Manley, Foreman, West Springfield DPW;
- Vincent DeSantis, Deputy Director, West Springfield DPW;
- Jack Dowd, Director, West Springfield DPW;

For the Appellant:

- Daniel Dexter, Appellant;
- Jason Croteau; local Union President;

I make the following findings of fact:

1. The Appellant, Daniel Dexter, is a tenured civil service employee in the Town of West Springfield's DPW in the position of working foreman. He has been employed as a working foreman for five (5) years and was originally hired by the Town on May 19, 1998. (Stipulated Facts and Testimony of Appellant)

2. In regard to prior discipline, the Appellant received a written warning in 2006 and a verbal warning in 2007. (Stipulated Fact)
3. On May 15, 2009, the Appellant, a working foreman, was assigned by DPW Foreman William Manley to work with two other subordinate employees to trim trees on the Town Common in preparation for an upcoming "Taste of West Springfield" event to be held the following weekend. (Testimony of Manley, DeSantis and Appellant)
4. Mr. Manley and the Appellant are friends and see each other socially. (Testimony of Appellant and Manley) Given their friendship, I find that Mr. Manley had no ulterior motive for providing testimony that portrayed the Appellant in a negative light. Rather, Mr. Manley testified to his best recollection of events regarding what occurred on May 15, 2009. I credit his testimony. (Testimony, demeanor of Manley)
5. Messrs. Gromaski and Rufo were the two individuals who were assigned to work with the Appellant that morning. (Testimony of Manley and Appellant)
6. During the three workers' noontime lunch break, which occurs from 12:00 – 12:30 P.M., Mr. Gromaski advised Mr. Manley that he would like to be excused for sick leave at 1:30 P.M. Mr. Manley approved that request. (Testimony of Manley)
7. The Appellant has authority to close down a worksite if he determines that a safety issue exists. The Appellant does not have authority, however, to alter his work assignment and/or location without receiving authorization from his immediate supervisor. (Testimony of Manley and DeSantis)
8. At no point on May 15, 2009 did the Appellant ever notify Mr. Manley that he believed a safety issue existed as a result of Mr. Gromaski being allowed to go home,

resulting in only two workers to trim the trees at the Town Common. (Testimony of Appellant and Manley)

9. The Appellant testified before the Commission that he shut down the worksite at some point on May 15, 2009 because he believed a safety issue existed. As referenced above, he never notified Mr. Manley of this nor did he ask Mr. Manley about an alternate work assignment. (Testimony of Appellant and Manley)
10. There is a factual dispute regarding the exact time the Appellant shut down the worksite. Mr. Manley testified that he visited the worksite at approximately 12:50 P.M. and then again at 2:30 P.M. and the Appellant was not present either time. (Testimony of Manley)
11. While the Appellant testified that he was indeed present at 12:50 P.M., he acknowledged that he left the worksite as early as 1:30 P.M. without notifying Mr. Manley. (Testimony of Appellant)
12. While there was a problem with the radio in the truck assigned to the Appellant, he was less than one (1) mile from the DPW yard and could have easily notified Mr. Manley or someone else in authority that he had shut down the worksite for safety reasons. It is undisputed that he did not take this action.
13. Based on the Appellant's own testimony, he took a "break" from at least 1:30 P.M. to 2:15 P.M. after driving by the DPW yard without notifying anyone. (Testimony of Appellant)
14. Existing policy is for employees to notify their supervisor if they are unable to perform the work assignment for any reason. (Testimony of Manley, DeSantis and Dowd) While this is not a written policy, the Appellant testified that when similar

situations arose in the past, he knew to contact his supervisor for instructions about a new job assignment. (Testimony of Appellant)

15. Jason Croteau, the local union president, during his testimony at the local disciplinary aring, testified that the Appellant should have notified a supervisor when he left the work site. Mr. Croteau confirmed this during this testimony before the Commission. (Testimony of Croteau)

16. When Mr. Manley finally saw the Appellant back at the DPW yard shortly after 3:00 P.M, the Appellant was preparing to leave for the day. When Mr. Manley questioned the Appellant about not being present at the worksite that afternoon, the Appellant told Mr. Manley he had "taken it easy" that afternoon. (Testimony of Manley)

17. The Town suspended the Appellant for one (1) day for leaving the work site without permission. (Stipulated Fact)

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).

Based on the Appellant's own testimony and statements, he left a worksite without notifying his supervisor and decided to "take it easy". Even the Appellant acknowledges that he took an unauthorized 45-minute break that afternoon, but the credible testimony of Mr. Manley, the Appellant's supervisor, suggests that the afternoon sojourn was much longer than 45 minutes.

The Appellant argues that since there is no written policy requiring him to notify his supervisor that he is closing down a worksite, he did not engage in misconduct. He is mistaken. Public employees are expected to put in an honest day's work for an honest day's pay. When they don't, as is the case here, it only feeds into the sometimes negative perception of public employees.

Further, even the Appellant acknowledges that, in the past, he has always known to notify his supervisor when he is leaving a worksite under the circumstances that existed here. Hence, any argument that he was unaware of such an expectation rings hollow.

While the Appellant strikes me as someone who takes his job seriously, he erred and engaged in misconduct when he left the worksite and "took it easy" for a good part of the afternoon on May 15, 2009. By a preponderance of the evidence, the Town has shown that it had reasonable justification for disciplining the Appellant.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was a 1-day suspension.

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. *See* Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the

Commission's findings of fact differ significantly from those reported by 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., Town of Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006).

There is no evidence the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. Further, the Appellant's one-day suspension appears to be consistent with progressive discipline given that he has previously received a verbal and written warning.

For all of the above reasons, the Appellant's appeal under Docket No. D-09-276 is hereby ***dismissed***.

Civil Service Commission

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on December 10, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:
Joseph L. DeLorey, Esq. (for Appellant)
James T. Donahue, Esq. (for Appointing Authority)