

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RICHARD DRAPER,
Appellant,

v.

D1-12-148

BROOKLINE SCHOOL DEPARTMENT,
Respondent

Appearance for Appellant:

Robert F. Houlihan, Esq.
229 Harvard Street
Brookline, MA 02445

Appearance for Respondent:

Brian Magner, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

On April 9, 2012, the Appellant, Richard Draper (“Mr. Draper”), pursuant to G.L. c. 31, §§ 42, 43, filed this appeal with the Civil Service Commission (“Commission”) contesting the decision of Brookline Public Schools (“BPS”) to terminate him from his position of custodian. A pre-hearing conference was held at the Commission on June 19, 2012, where Draper withdrew his § 42 appeal, and a full hearing was held at the same location on September 20, 2012. Neither party requested a public hearing so the hearing was deemed private. The witnesses were sequestered. The hearing was digitally recorded and the parties were provided with a CD of the hearing. The parties submitted proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Kari-Ann E. Greene in preparing this decision.

FINDINGS OF FACT

Twenty-two (22) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by BPS:

- Peter Rowe, Deputy Superintendent for Administration and Finance, Brookline Public Schools;
- Jay Pagliarulo, Manager of School Building Service, Brookline Public Schools;
- Keith Owen Lacy, Detective, Brookline Police Department;
- James Gillis, Junior Custodian, Brookline Public Schools;

Called by Mr. Draper:

- Richard Draper, Appellant;
- Paul Epstein, Social Worker, Brookline Public Schools;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. On September 5, 2000, Mr. Draper was appointed as a provisional school custodian by BPS.

This appointment was subject to a satisfactory CORI report. (Exhibit 20; Testimony of Draper)

2. On October 24, 2000, BPS received Mr. Draper's CORI report. The CORI report specifically noted that Mr. Draper had been convicted of the following:

- a. 1984 - Breaking and entering;
- b. 1985 - Armed robbery;²
- c. 1986 - Robbery;
- d. 1987 - Assault with a deadly weapon;
- e. 1987 – Shoplifting;

² It is noted in handwriting on the CORI report that this charge was reduced to "larceny from a person."

- f. 1989 – Shoplifting;
 - g. 1989 – Violation of a town bylaw; and
 - h. 1989 – Operating under the influence of liquor. (Testimony of Mr. Draper)
- 3. Based on this CORI report, BPS scheduled a full disciplinary hearing to determine whether Mr. Draper should be allowed to continue his employment with BPS. Peter Rowe (“Mr. Rowe”), Deputy Assistant Superintendent of Administration and Finance, was designated the Hearing Officer for BPS. (Testimony of Mr. Rowe)
- 4. At the hearing, Mr. Draper stated that he was an alcoholic from 1984 to 1989, but that, starting in 1989, he stopped drinking and did not engage in any further criminal activity. (Exhibit 20; Testimony of Mr. Draper)
- 5. Mr. Rowe recommended that Mr. Draper be allowed to continue his provisional employment with BPS provided that he agree that his probationary period be extended from the statutory period of six (6) months for a period of two (2) years, such that the probationary period would expire on September 5, 2002. Furthermore, Mr. Rowe recommended that this should be conditioned on Mr. Draper not receiving any discipline and on his CORI record remaining clear during this two (2) year probationary period. In January 2001, BPS and Mr. Draper entered into a settlement agreement consistent with Mr. Rowe’s recommendation. (Exhibit 20; Testimony of Mr. Rowe and Mr. Draper)
- 6. Mr. Draper remained a provisional employee of BPS until 2006, when he became a permanent tenured civil service employee. (Exhibit 10)
- 7. In 2004 and 2005, Mr. Draper engaged in a pattern of absenteeism, including ten (10) sick days and two (2) “emergency” administrative days, for which he received a written warning. Additionally, in 2007, Mr. Draper engaged in a pattern of sick leave abuse, amounting to

eight (8) sick days, and received another written warning. Furthermore, on December 8, 2011, Mr. Draper left his shift with no notice to his supervisor at 10:10 PM, when his shift did not end until 11:30 PM. This resulted in Mr. Draper losing pay for four (4) hours and being given notice of a disciplinary hearing. The hearing officer concluded that the four (4) hours of docked pay was sufficient punishment and that no further discipline was necessary. (Testimonies of Mr. Draper, Mr. Pagliarulo, and Mr. Rowe; Exhibits 7 and 8)

8. Mr. Draper injured his back while at work in June 2005. As a result of this injury, Mr. Draper was unable to work and he received worker's compensation for several years in addition to attending rehabilitation for his back injury in May 2010. A doctor prescribed the painkiller Oxycodone to Mr. Draper. Mr. Draper's last refill for Oxycodone was on December 8, 2011. (Testimony of Mr. Draper, Mr. Pagliarulo, and Mr. Rowe)
9. At some point after Mr. Draper's back injury for which he had been prescribed Oxycodone by his doctor, Mr. Draper began to illegally purchase Oxycodone from a drug dealer, Ms. A³. (Testimony of Mr. Draper)
10. In 2011, Mr. Draper returned to work. From 2011 to 2012, Mr. Draper was placed on restricted duty due to his back injury. On February 20, 2012, Mr. Draper returned to full duty. (Testimony of Mr. Draper)
11. In March 2012, Mr. Draper was assigned to work at Brookline High School ("BHS") on Tappen St. as a custodian, where he shared a shift with fellow custodian, James Gillis ("Mr. Gillis"). (Testimony of Mr. Draper, Mr. Gillis, and Mr. Pagliarulo)

³ Ms. A is a pseudonym for the drug dealer from whom Mr. Draper purchased illicit drugs and from whom he attempted to do so on March 6, 2012.

12. While he worked at BHS, Mr. Draper acted as a mentor for certain students, sometimes at the request of Paul Epstein, a social worker for BPS and on occasion on his own initiative.
(Testimonies of Mr. Epstein and Draper)
13. During his work shift on March 6, 2012, Mr. Draper made phone calls to Ms. A for the purpose of buying Oxycodone illegally. Mr. Gillis also called and texted Ms. A about the purchase of Oxycodone during this shift. Mr. Draper and Mr. Gillis met outside of the Tappen Street building, which is a part of BHS, around 11:20 PM to discuss the purchase. Their shift did not end until 11:30 PM. (Testimony of Mr. Draper and Mr. Gillis; Exhibit 15)
14. Unbeknownst to Mr. Draper and Mr. Gillis, they were under surveillance by the Brookline police around the time following the theft of computers from BHS. The police accessed their phone records and conducted routine surveillance of the pair toward the end of their shifts.
(Exhibit 11; Testimony of Detective Lacy)
15. Consequently, beginning around 11:20 PM on March 6, 2012, the police followed Mr. Draper and Mr. Gillis to Ms. A's apartment in Norwood, where the pair intended to buy Oxycodone and drove back to Brookline. However, after arriving outside her apartment, Mr. Draper and Mr. Gillis decided to not buy Oxycodone. Upon reentering Brookline, the police pulled their car over and conducted a traffic stop. During the traffic stop, the police asked Mr. Draper to exit the vehicle and frisked him. During the frisk, the police discovered a small cylinder case in Mr. Draper's front pocket that contained Suboxone, for which Mr. Draper did not have a prescription, and marijuana. (Exhibit 11; Testimony of Detective Lacy)
16. The police arrested Mr. Draper for Conspiracy to Violate the Controlled Substances Act for conspiring to purchase Oxycodone, Possession of a Class E Drug (regarding the Suboxone),

and issued Mr. Draper a civil citation for possession of limited amount of marijuana.⁴

(Exhibit 11; Testimony of Mr. Draper and Detective Lacy)

17. The police arrested Mr. Gillis for Conspiracy to Violate the Controlled Substances Act for conspiring to purchase Oxycodone. (Testimony of Mr. Draper and Detective Lacy)

18. On March 7, 2012, the day after his arrest, Mr. Draper called Jay Pagliarulo (“Mr. Pagliarulo”), Manager of School Building Service at BPS, and informed him of his arrest. Mr. Pagliarulo placed him on paid administrative leave pending a disciplinary hearing.

(Exhibit 13; Testimony of Mr. Pagliarulo)

19. On March 9, 2012, Mr. Pagliarulo sent Mr. Draper a hearing notice, which included G.L. c. 31, §§ 41-45, informing him that his misconduct, taken together with his prior misconduct, which included abuse of sick time and unauthorized absences, constituted just cause for discipline up to and including discharge. (Exhibits 1 and 2)

20. On March 14, 2012 BPS held a disciplinary hearing wherein Mr. Draper testified. (Exhibit 3; Testimony of Mr. Draper)

21. Mr. Rowe, the hearing officer, recommended that Mr. Draper be discharged in light of his arrest and prior discipline. (Exhibit 3; Testimony of Mr. Rowe)

22. On April 2, 2012, as a result of the hearing and following Mr. Rowe’s recommendation, BPS issued Mr. Draper a termination letter, noting that Mr. Draper had been arrested for conspiring to purchase Oxycodone and possession of Suboxone and marijuana, combined with his prior disciplinary record, were the reasons for his termination. (Exhibit 5)

23. Mr. Gillis was disciplined with a ten (10) day suspension from work. Mr. Gillis had no prior disciplinary record. (Exhibit 6)

⁴ At the time of the hearing on September 20, 2012, Mr. Draper had been ordered to pretrial probation for these two (2) charges.

24. Mr. Draper filed this appeal at the Commission on April 9, 2012. (Stipulated Fact)

DISCUSSION

Applicable Law

The role of the Civil Service 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 Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). Reasonable justification is established when such an action is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law.” Comm’rs of Civil Serv. v. Mun. Ct., 359 Mass. 211, 214 (1971) (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 485 (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.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); Sch. Comm. of Brockton v. Civil Serv. Comm’n, 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 its review, the commission is to find the facts afresh, and in doing so, the commission is not limited to examining the evidence that was before the appointing authority.” Id. at 187 (quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev. den., 440

Mass. 1108 (2003)). “The commission’s task, however, is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). Further, “[t]he 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.” Id. at 824 (quoting Watertown, at 334).

In deciding an appeal, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was reasonable justification” shown. City of Beverly v. Civil Serv. Comm’n, 78 Mass. App. Ct. 182, 188 (2010). 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 at 332; Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28 (2003).

There must exist the necessary work-related nexus, which constitutes “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, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). Establishing a nexus between off-duty conduct and responsibilities as a public employee is an essential element that must be proved to show just cause for termination under basic merit principles of civil service law. See id.

The Parties' Positions

BPS argues that it had just cause to terminate Mr. Draper. BPS is responsible for maintaining the efficient operation of the city's school buildings and the wellbeing of the student body. Mr. Draper engaged in substantial misconduct, which adversely affected the public interest by impairing the efficiency of the public service to which he was charged. Mr. Draper conspired with Mr. Gillis during his shift at BHS to purchase Oxycodone. He made calls to Ms. A before his shift ended to arrange the purchase of Oxycodone. Mr. Draper left his shift before it ended to go purchase the Oxycodone. Therefore, BPS avers, based on BPS's policies regarding misconduct of a school employee, it was justified in terminating Mr. Draper.

Mr. Draper argues that he should not have been terminated from his position with BPS. Mr. Draper argues that the incident causing his termination was totally unrelated to his position as a custodian. He contends that he should not have been terminated because there is an insufficient "nexus" between his misconduct that occurred while he was off duty and off school property and the performance of his duties as a custodian in the school. Moreover, he contends his termination constitutes disparate treatment. Whereas Mr. Draper was terminated for his misconduct, Mr. Gillis, a fellow custodian, only received a ten (10) day suspension. Furthermore, Mr. Draper argues that he was terminated to avoid payment for a disability retirement related to his back injury.

Analysis

Mr. Draper's argument that he should not have been terminated because his arrest was totally unrelated to his position as custodian fails. A sufficient nexus exists between Mr. Draper's off duty misconduct and his position as a school custodian. While on duty, Mr. Draper discussed with Mr. Gillis the idea of purchasing Oxycodone. Mr. Draper made phone calls to a drug

dealer, Ms. A, in the pursuit of purchasing the substance while still on duty. He left his shift to purchase Oxycodone before it ended. BPS has an interest in maintaining a safe, drug-free space in its schools. To further this goal, BPS cannot allow employees who conspire to purchase drugs and are in possession of drugs, in addition to having a disciplinary history like Mr. Draper's, to remain employed in its schools. Moreover, as Mr. Draper was in BHS at the same time as students and even acted as a mentor for some students, it would be unconscionable for BPS to allow him to remain employed by them when he has taken part in such misconduct. Due to all of these facts, it is evident that Mr. Draper's misconduct concerning the conspiracy to purchase Oxycodone occurred while he was on duty. Consequently, there is a sufficient nexus between Mr. Draper's alleged "off duty" misconduct and his employment as a custodian.

While at face value it might appear that Mr. Draper and Mr. Gillis received disparate treatment in their respective disciplines, this is not true. Mr. Gillis was only charged with Conspiracy to Violate the Controlled Substances Act while Mr. Draper was not only charged with the same violation but also was charged with Possession of a Class E Drug Suboxone and issued a civil citation for possession of marijuana. Moreover, Mr. Gillis has no prior disciplinary history, whereas Mr. Draper has a disciplinary history that includes his unauthorized absenteeism and abuse of sick days, both of which resulted in written warnings, and, on another occasion, he left work eighty (80) minutes early without giving any notice for which the Respondent docked him four (4) hours of pay after a disciplinary hearing.

Furthermore, Mr. Draper's argument that he was discharged because of his back injury and a potential disability retirement claim is unsupported. There is no credible evidence that this was a part of BPS's consideration of whether to terminate Mr. Draper. He was back to work full-time

as a custodian by the time he was terminated and thus there would be no reason for BPS to fire him for the alleged reason.

CONCLUSION

For the reasons stated herein, BPS had just cause to terminate Mr. Draper. Therefore, Mr. Draper's appeal filed under Docket No. D1-12-148 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on July 11, 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 this order or 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 this Commission order or decision.

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

Notice:

Robert F. Houlihan, Jr., Esq. (for Appellant)
Brian Magner, Esq. (for Respondent)