COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

LEON DYKAS,
Appellant

v.

D1-09-382

CITY OF WORCESTER,
Respondent

Appellant's Attorney:

Kevin E. Buck, Esq.
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133 Merrimack Street
Lowell, MA 01852

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON APPELLANT'S MOTION FOR SUMMARY DECISION
AND CITY'S CROSS MOTION FOR SUMMARY DECISION

The Appellant, Leon Dykas (hereinafter "Dykas" or "Appellant"), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (hereinafter "Commission") on September 24, 2009 claiming that he was aggrieved by a decision of the City of Worcester (hereinafter "City" or "Appointing Authority") to terminate him from his position as a patrol police officer for failure to testify at a Chapter 31 § 41 hearing (hereinafter "Section 41 hearing").

A pre-hearing conference was conducted at the offices of the Commission on October 22, 2009 and a telephone status conference was held on December 15, 2009. The Appellant filed a Motion for Summary Decision (hereinafter "Appellant's Motion"), and the City filed a Cross Motion for Summary Decision (hereinafter "City's Motion"), on April 1, 2010. A hearing on the motions was held at the offices of the Commission on April 12, 2010. The motion hearing was digitally recorded. The Commission requested further submissions from the parties, received from the City on May 4, 2010 and from the Appellant on May 7, 2010.

The following facts appear to be undisputed:

1. Appellant was a tenured civil service employee employed as a patrol officer by the Worcester Police Department (hereinafter "Department"). (Appellant's Motion; City's Motion)
2. The Department has Rules and Regulations that apply to the Appellant and all other officers. (City's Motion).
3. The Department's Rules and Regulations include the following provisions related to an officer's obligation to cooperate with official investigations, hearings, trials or proceedings:

   1402.1 Truthfulness

   > An officer or employee of the Department shall truthfully state facts in all reports as well as when he appears before or participates in any judicial, Departmental or other official investigation, hearing, trial or proceeding. He shall fully cooperate in all phases of such investigations, hearings, trials and proceedings.

   (City's Motion)
4. The Rules and Regulations include the following provisions related to orders:

1201.12 City Manager Orders/Directives via Office of the Chief

All orders and directives to the Police Department emanating from the City Manager shall be directed through the office of the Chief of Police.

1301.1 Orders Generally

An order is a command or instruction written or oral, given by a Commanding Officer, a Superior Officer, or the Dispatcher. All lawful orders, written or oral, shall be carried out fully and in the prescribed manner. Officers shall not publicly criticize instructions or orders they have received: if an order is thought to be unlawful, unjust, improper or in conflict with a previous order, that fact shall be pointed out to the officer giving the order as discreetly as possible under the circumstances. It shall be no excuse or justification for anything an officer may do or omit to do contrary to any law or these Rules and Regulations, that the officer followed the advice, suggestion or instruction of any person, whether that person is connected with the Police Department or not, except when an officer of a higher rank takes upon himself the responsibility of issuing orders.

1306.1 Unlawful Orders

No officer shall knowingly issue an order in violation of any law, ordinance, these Rules and Regulations, or any guideline issued in pursuance thereof. Unlawful orders shall not be obeyed. The officer to whom the order is given shall notify the ordering officer of the illegality of his order. Responsibility for refusal to obey rests with the officer to whom the order was given. He shall be strictly required to justify his action.

1307.1 Unjust or Improper Orders

Lawful orders which appear to be unjust or improper shall be carried out. After carrying out the order, the officer to whom the order was given may file a written report to the Chief of Police via the chain of command indicating the circumstances and the reasons for questioning the order and requesting clarification of Department policy.

1515.1 Insubordination

Deliberately failing or refusing to obey a lawfully issued order.

(City's Motion)

5. The Department's Rules and Regulations include the following provisions related to an officer's obligation to know and abide by the Rules and Regulations:

1801.1 Knowledge of and Up-Keep of Rules and Regulations

> All officers and employees who are issued a copy of these Rules and Regulations are responsible for its maintenance. They shall be knowledgeable as to its contents and shall make appropriate changes or inserts as directed by the Chief of Police.

1802.1 General Obligation

> Officers and employees of the Police Department are expected to conform their behavior to the standard of conduct outlined in these Rules and Regulations and in the Departmental orders, directives and other guidelines issued in pursuance of these Rules and Regulations. Officers and employees of the Police Department are further expected to comply with the procedures and fulfill the duties and responsibilities outlined in these Rules and Regulations and in the Departmental orders, directives and other guidelines issued in pursuance thereof.

(City's Motion)

6. The Department's Rules and Regulations include the following provisions related to the consequences of an officer failing to comply with the Rules and Regulations:

1803.1 Violations

> Failure to comply with these Rules and Regulations and the official guidelines issued in pursuance thereof may subject the offending officer or employee to disciplinary action in accordance with the law.

1804.1 Types of Discipline

> A police officer or employee may be subject to discharge, suspension exceeding five days, transfer from his office or employment, reduction in grade or compensation, or abolition of his office, without his consent in writing, in accordance with the procedures provided in the General Laws, Chapter 31, Sections 43, 45, and 46A and other applicable laws.

(City's Motion)

7. The Appellant complied with an order to attend an investigatory interview at the Worcester Police Department Bureau of Professional Standards ("BOPS") on March 14, 2009.[1] BOPS was investigating allegations of misconduct by the Appellant. BOPS provided an investigatory report to the Worcester Police Chief, and included a transcript of the interview with Appellant. (City's Motion; Appellant's Motion)
8. On March 17, 2009, Worcester Police Chief Gary Gemme placed the Appellant on administrative leave with pay because of the pending investigation into whether he had engaged in misconduct. (City's Motion; Appellant's Motion)
9. On July 9, 2009, the Appellant was served with a Notice of Hearing and Contemplated Dismissal, dated July 2, 2009 from City Manager Michael V. O'Brien, the City's Appointing Authority for police officers. Paragraph 2 of the Notice read as follows:

> You are directed to attend and testify truthfully. If you fail to obey this directive in any respect, it could result in discipline, up to and including dismissal, separate and apart from any discipline imposed as a result of the substantiation of the underlying charge. A copy of sections 41-45 of Chapter 31 is attached.

(City's Motion; Appellant's Motion)

10. The disciplinary process for Worcester police officers typically begins with a Department investigation, which can include written reports and interviews of the officer and other witnesses. Unless the matter has criminal implications and the officer invokes his constitutional right against self-incrimination, the officer is obligated to cooperate fully. (City's Motion)
11. In matters where discipline of more than a five (5) day suspension without pay is contemplated, the Department investigation is followed by a hearing pursuant to G.L.

[1] The Appellant states in his Motion that the interview occurred on March 4, 2009.

c. 31, § 41. The Section 41 hearing is a formal proceeding, conducted by a city attorney as hearing officer. The City's labor counsel prosecutes the case and the officer is represented by counsel and/or the Union. (City's Motion)

12. According to the City, often, the witnesses at Section 41 hearings include employees of the City, such as police officers. The witnesses are required to testify under oath and they are subject to cross examination. Except where the matter involves criminal implications and the officer invokes a constitutional right against self-incrimination, the officer who is the subject of the allegations must testify under oath and is subject to cross-examination. Generally, a stenographic transcript of the Section 41 hearing is prepared. (City's Motion)
13. In some instances, as in the above matter, one of the charges at a Section 41 hearing is whether the officer, during the Department investigation, violated the Department Rules and Regulations, Policies and Procedures, including those requiring full and truthful cooperation with the investigation. (City's Motion)
14. Following the Section 41 hearing, the hearing officer prepares a report and a recommendation for the City Manager. The City Manager decides whether to adopt the report and recommendation and whether to impose or uphold discipline. (City's Motion)
15. The City contends that it uses the Section 41 hearing to bring light to information or testimony, in addition to that developed in prior investigation, to allow the City to make a fully informed decision, with the cooperation of all employees, as to whether the charges are supported by evidence and there is just cause to discipline an employee. (City's Motion)

16. The July 2, 2009 notice stated that the hearing was scheduled for July 21, 2009. Through counsel and NEPBA Local 911, the Appellant requested and was granted a postponement of the hearing. It was rescheduled for August 14, 2009. (City's Motion; Appellant's Motion)
17. Prior to the August 14, 2009 hearing, the Appellant's attorney, Kevin Buck, asked the City's attorney for certain documents and a list of witnesses that the City expected to call. On August 12, 2009, the City's attorney, Leo Peloquin, sent the documents and a letter that included the following statement, "I anticipate calling Gina Genatossio and Toby Lauder and, possibly, Sgt. Andrew Avedian as witnesses." (City's Motion; Appellant's Motion)
18. In the August 12, 2009 letter to Attorney Buck, Attorney Peloquin also wrote, "[p]lease advise of your list of witnesses." He received no response. (City's Motion; Appellant's Motion)
19. On August 14, 2009, the hearing on the charges set forth in the July 2, 2009 notice began before Attorney John O'Day, the hearing officer designated by the City Manager. At the conclusion of the testimony of Gina Genatossio, and by agreement of the parties and Hearing Officer O'Day, the hearing was adjourned at approximately the close of the business day. By agreement of the parties and the hearing officer, the second day of hearing was scheduled to continue at 9 a.m. on Thursday, August 20, 2009. (City's Motion; Appellant's Motion)
20. On August 20, 2009, the hearing resumed with the testimony of Toby Lauder. Attorney Buck was cross examining Lauder when, at about 11:15 a.m., Attorney Buck requested a break to determine whether he had any additional cross

examination. Hearing Officer O'Day granted the break and Attorney Buck, the Appellant, and Edward T. Saucier, President of NEPBA Local 911, left the hearing room. When Attorney Buck returned a few minutes later, the Appellant did not return with him. Attorney Buck announced that he had no additional cross examination for Lauder. (City's Motion; Appellant's Motion)

21. As Lauder was leaving the hearing room, Attorney Peloquin asked about the Appellant's whereabouts. Attorney Buck responded with words to the effect that the Appellant had left. Attorney Peloquin requested that the Appellant return to the hearing to testify. Attorney Buck responded that the Appellant would not be returning and he was not going to testify. Attorney Peloquin responded that, in the July 2, 2009 notice, the City Manager had directed him to attend and testify truthfully. Attorney Buck responded that the Appellant was not going to testify. (City's Motion; Appellant's Motion)
22. Hearing Officer O'Day learned what had occurred and offered to Attorney Buck that he would take a lunch break if it would facilitate the Appellant returning to the hearing and testifying. (City's Motion; Appellant's Motion)
23. Attorney Buck stated that the Appellant would not be returning and that he was not prepared to testify that day. He further stated that the Appellant might be prepared to testify on another date. Attorney Buck questioned the legality of the order by City Manager O'Brien to the Appellant in the July 2, 2009 notice directing him to attend the hearing and testify truthfully. Attorney Buck asserted, in part, that it conflicted with that portion of the civil service statute that gave the appellant the option of answering by counsel. He further asserted that Attorney Peloquin had failed to

include the Appellant in the list of witnesses provided to Attorney Buck. (City's Motion; Appellant's Motion)

24. Attorney Peloquin responded that the civil service statute did not preclude or override an order from the Appointing Authority that the Appellant attend and testify truthfully. Attorney Peloquin further asserted that he did not need to list the Appellant on his witness list because he already had been directed by the City Manager in the July 2, 2009 notice to attend and testify truthfully. (City's Motion; Appellant's Motion)
25. Hearing Officer O'Day resumed the hearing. He determined that the Appellant had been properly notified of the hearing and the continuation date. He stated that he would not decide the legality of the City Manager's order to the Appellant to attend and testify truthfully. However, he stated that, in deciding the charges in the July 2, 2009 notice, he would draw an adverse inference against the Appellant for his failure to testify. Hearing Officer O'Day then announced, at about noon, that the hearing was concluded. (City's Motion; Appellant's Motion)
26. In a letter dated August 24, 2009, Chief Gemme notified the Appellant in writing pursuant to G.L. c. 31, § 41 that he was suspended for five (5) tours of duty without pay for failing to obey the order to testify at the hearing. The reason given for the imposition of the suspension was that "[y]ou disobeyed the City Manager's written directive in a July 2, 2009 notice when you failed to remain at a disciplinary hearing to consider the charges against you and testify." (City's Motion; Appellant's Motion)
27. In correspondence also on August 24, 2009, City Manager Michael V. O'Brien notified the Appellant that a hearing pursuant to G.L. c. 31, § 41 would be taking

place on August 28, 2009 and that the "hearing could result in disciplinary action against you, up to and including dismissal." The City Manager's correspondence stated that, "[y]ou disobeyed my written directive in a July 2, 2009 notice when you failed to remain at a disciplinary hearing to consider the charges against you and testify." (City's Motion; Appellant's Motion)

28. Other than announcing through his counsel at the August 20, 2009 hearing that he would not obey the City Manager's order that he testify, the Appellant did not challenge the City Manager's order with the Police Department or the City Manager. (City's Motion)

29. The Appellant never claimed a right not to testify at the hearing on August 20, 2009 based on a privilege against self-incrimination. (City's Motion)

30. On August 28, 2009, there was a hearing pursuant to G.L. c. 31, § 41 on the Appellant's appeal of the five (5) day suspension for failing to obey the order to testify and to determine whether he should be dismissed for failing to obey the order to testify. The hearing officer was Attorney Karen Meyer, who was appointed by the City Manager. At the hearing, the parties reached an agreement on pertinent facts, which the hearing officer incorporated into her final reports. (City's Motion)

31. On September 18, 2009, Hearing Officer Meyer submitted a Hearing Officer Report and Recommended Disposition to the City Manager in which she found that there was just cause to uphold the five (5) day suspension and dismiss the Appellant for failing to obey the order to testify. On September 22, 2009, the City Manager issued a decision in which he adopted the hearing officer's report in its entirety, denied the

Appellant's appeal of the five (5) day suspension, and dismissed him. (City's Motion; Appellant's Motion)

32. The Appellant appealed the suspension and the dismissal to the Civil Service Commission.[2] (City's Motion; Appellant's Motion)

Appellant's Argument

The Appellant argues that the termination issued by the Appointing Authority for his failure to testify at his Section 41 hearing is simply without "just cause." He contends that this order was unlawful and counter to the legislative purpose and intent of G.L. c. 31, and conflicts with the clear language of G.L. c. 31, § 41. The Appellant frames the Section 41 hearing as his opportunity to present his side of the story, if he so chooses. The Appellant relies on Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) for the proposition that, in order to address the due process concerns of a public employee, a pre-termination hearing should provide the employee with (1) oral or written notice of the charges against him; (2) an explanation of the employer's evidence; and (3) an opportunity to present his side of the story. According to the Appellant, statutes that provide such a scheme, such as Chapter 31, are designed to protect the employee's due process right, and provide the first opportunity for the employee to answer the allegations set forth in the charges from the Appointing Authority, if the employee so desires. On the other hand, such statutory schemes are not designed to give the Appointing Authority the opportunity to continue its investigation into the underlying matter.

[2] The Appellant has a pending grievance before an arbitrator in connection with the discipline he received for the charge of misconduct, which was the subject of the August 20, 2009 hearing. The instant appeal before the Commission is only related to the suspension and dismissal for refusing to obey the City Manager's order to testify at the August 20, 2009 hearing.

The Appellant further argues that the specific language of Section 41 that provides a civil service employee the ability to answer the charges from the Appointing Authority "personally or by counsel," is directly relevant to the issue of this case. He argues that, in the civil service arena, this language means much more than simply allowing an employee to represent himself or be represented by counsel. Instead, the language means that an employee may opt not to take the stand and testify, and can simply argue the absence of just cause. Or, according to the statute, he may have a representative argue on his behalf.

The Appellant also contends that the City was not prejudiced by the Appellant's choice not to testify because the investigatory interview, conducted by BOPS, had been completed. The Appellant attended and answered questions at this investigatory interview, and a transcript of his testimony was available for the Appointing Authority to present at the Section 41 hearing, which it chose not to do.

Lastly, the Appellant cites Falmouth v. Civil Service Commission, 61 Mass.App.Ct. 796 (2004) for the proposition that the hearing officer is permitted to make an adverse inference in certain situations, which the Appointing Authority did here when it drew a negative inference from the Appellant's refusal to testify. According to the Appellant, Falmouth lends further support to the argument that the Section 41 hearing is for the benefit of the employee and, as such, it is his decision to determine whether he will answer the charges or risk the adverse inference.

City's Argument

The City argues that the Appellant was obligated to obey the City Manager's order to testify at the Section 41 hearing as the Department's Rules and Regulations require that

an officer or employee "shall truthfully state all facts" when he appears before any "Departmental or other official investigation, hearing, trial or proceeding" and "he shall fully cooperate in all phases of such investigations, hearings, trials and proceedings." The City argues that Section 41 cannot, and does not, override the Appellant's obligation to comply with these Rules and Regulations. The City does allow that in cases with criminal implications, the employee cannot be compelled to testify after invoking his constitutional right against self-incrimination. But it notes that this is not the case here as the Appellant did not attempt to invoke a claim of privilege.

As support for its position, the City relies on Boston Police Department v. Tolland, 2005 WL 1309076 (Mass.Super. 2005), aff.'d 67 Mass.App. 1107, 2006 WL 2772636 (Mass.App.Ct. 2006; Rule 1:28 Decision), rev.den., 447 Mass. 1115 (2006). In Tolland, the Court upheld a three (3) day suspension of an officer for failing to obey an order, pursuant to a department regulation, to appear at a hearing, even though the officer was told by a union official that the hearing would be postponed. The City also cites Massachusetts Parole Board v. Civil Service Comm'n, 47 Mass.App.Ct. 760, 766 (1999) for the proposition that an employee cannot refuse an employer's order to appear and answer questions at an investigatory interview. There is no basis for finding that a police officer's obligations to answer questions at an investigatory interview differ from his obligations to do the same at a Section 41 hearing, according to the City.

Regarding Tolland, the City contends that even though the facts differ in that the employee in Tolland did not refuse to testify, but rather did not appear at the hearing, there are substantial similarities that make it appropriate to extend the holding to the instant case. Such similarities include the fact that in Tolland, the employee was ordered

to appear at the hearing pursuant to a departmental regulation. Moreover, according to the City, the Appellant's behavior in the instant case was far worse because he continued to defy the order even after being suspended and threatened with dismissal.

The City rejects the Appellant's argument that because he testified at the BOPS interview, he had no further obligation to testify at the Section 41 hearing. Rather, it contends that the obligation of the Appellant to account for his actions includes testimony and cross-examination at a full due process hearing, not just answering an interviewer's questions. In addition, the Appointing Authority was investigating more than what BOPS had investigated; the issue of untruthfulness, including what was said by the Appellant at the BOPS interview, was a matter of the Section 41 hearing.

On the subject of the Section 41 hearing, the City argues that it is not the "Appellant's hearing," but rather the purpose is to bring to light information or testimony, in addition to that developed in the prior investigation, to make a fully informed decision as to whether the charges are supported by evidence and there is just cause to support the discipline. This requires the cooperation of all employees. As further support, it notes that Section 41 imposes an obligation on the Appointing Authority to hold the hearing, and does not even condition the obligation on the Appellant's request or assent to a hearing.

The City also rejects the Appellant's argument that the language of Section 41, which provides that "[t]he person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him" evidences that the employee is not required to testify, and may have his counsel testify on his behalf. Instead this language simply means the employee can choose between

professional representation or pro se advocacy as evidenced by a long line of cases. Therefore, in the City's opinion, this language of Section 41 should not nullify the Appellant's conditions of employment as a police officer that required him to obey the City Manager's order to testify at the hearing.

Conclusion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., "viewing the evidence in the light most favorable to the non-moving party", the movant has presented substantial and credible evidence that the opponent has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that the non-moving party has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

Based on the parties' motions, as well as the arguments presented at the motion hearing, it is evident that the parties are in agreement as to the facts of this case. They also agree that the issue to be decided is whether an Appointing Authority can order an employee to testify at his own Chapter 31, § 41 hearing, and discipline him if he refuses to do so, which is a question of law. Therefore, summary decision is an appropriate avenue for resolution.

G.L. c. 31, § 41 states in relevant part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed,

> suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority…
>
> A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension…Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension…
>
> Any hearing pursuant to this section shall be public if either party to the hearing files a written request that it be public. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him."
>
> 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 (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 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, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (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 (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 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (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 (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, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

The Appellant's argument that the Section 41 hearing is for the protection of the employee, and thus the employee cannot be required to testify, is compelling. As has long been recognized, it is the role of the Commission to protect the system in light of its fundamental purposes, which are "to guard against political considerations, favoritism, and bias in governmental employment decisions…and *to protect efficient public employees* from political control." Cambridge v. Civil Service Comm'n at 304 (*emphasis added)*. With this background in mind, it follows that the disciplinary hearing required by Chapter 31, i.e., the Section 41 hearing, is held for the protection of the employee and not the Appointing Authority.

The Commission must reject the Appointing Authority's argument that the Section 41 hearing is also an opportunity for the Appointing Authority to gather all the information it can in order to determine just cause. For that, the Appointing Authority may conduct its own internal investigation at which it can require the employee to testify. In this case, the

Appellant was interviewed by BOPS, and did provide testimony in that forum. If the Appointing Authority felt that it had more questions for the Appellant, it could have extended the BOPS investigation and required further testimony, or directed the Appellant to testify through another internal mechanism. But the Commission finds that Chapter 31 gives the Appointing Authority no right to order an employee to testify at a hearing that is being held to protect his rights, notwithstanding a contrary departmental rule or regulation.

The Appointing Authority contends that the fact that a Section 41 hearing is required in terminations or suspensions of longer than five (5) days, pursuant to the language of the statute, even without an employee's request or consent, is further evidence that it is a hearing for the benefit of both parties. In making this argument, the Appointing Authority is ignoring another paragraph of Section 41, which applies to suspensions of five (5) days or less. With shorter suspensions, Section 41 provides that a hearing is not required, but must be provided if the employee so requests. The logical interpretation of both paragraphs taken together is that a hearing is required, regardless of whether an employee requests it, in the cases of longer suspensions and terminations because there is more at stake for the employee. Thus, to best protect the employee who is facing a more serious discipline, the law demands a hearing, without requiring any action on the part of the employee, to ensure that the employee's rights are protected. Clearly, the employee's interests, and not those of the Appointing Authority, are being protected by Chapter 31, § 41.

The Appointing Authority's reliance on Tolland for the proposition that the Appellant was required to testify at the Section 41 hearing is also misplaced. In Tolland, Michael

Tolland, a sergeant for the Boston Police Department, was notified that there would be a full hearing on charges that were being brought against him by the department, and that he was to appear at the hearing. Prior to the hearing, Tolland's counsel advised him that it was unnecessary to attend the hearing. Neither Tolland nor his counsel attended. The Department suspended Tolland for three (3) days for his failure to attend. In its Motion, the City contends that Tolland failed to attend a Section 41 hearing. In its May 4, 2010 submission, the City admitted that the hearing was not, in fact, a Section 41 hearing, but "more analogous to such a hearing than an investigative interview." The Commission respectfully disagrees. There is nothing in Tolland that suggests that the hearing at issue was akin to a Section 41 hearing, i.e., there is nothing to indicate that this hearing was held in accordance with a statute that is in place to protect public employees, which is the crux of a Chapter 31, Section 41 hearing. Similarly, the facts in Parole Board involve an employee who failed to appear at an investigatory interview, and not a Section 41 hearing. Additionally, in both Tolland and Parole Board, the issue was not the refusal to testify at a hearing, but rather the fact that the employee in each case did not attend. Because neither decision addresses an employee's failure to testify at a Section 41 hearing, neither is controlling in the instant case.

Further, if the Commission were to adopt the City's reasoning, it could then follow that the Appointing Authority could order an employee to testify at his own full hearing brought before the Commission in accordance with Chapter 31, § 43, and terminate the employee if he refused such an order. In fact, at the motion hearing, the City argued that an employee could be ordered to do so pursuant to the Department Rules and Regulations, and could be terminated if he refused. Although this is not the issue in the

instant case, the Commission finds this proposition to further support that the City's argument is without merit. An Appointing Authority cannot have unlimited discretion to create rules and orders that affect an employee's rights provided by Chapter 31. Allowing an Appointing Authority to decide whether an employee would have to testify at his own Commission hearing would completely disregard the intent of Chapter 31, i.e., to protect public employees.

The Commission further agrees with the Appellant that the Appointing Authority was not prejudiced by the Appellant's refusal to testify at the Section 41 hearing. First, as mentioned above, the City had the option to continue its internal investigation if it felt that there were still unanswered questions, which it chose not to do. Second, the Appellant does not dispute that the City was permitted to make a negative inference from the fact that the Appellant did not testify, which the City did in making its decision. If the Appellant is willing to risk that such an inference will be made, which could lead to a negative outcome for himself, then he must be permitted to do so as the hearing is being held in order to protect his rights. The Appointing Authority was not left without any recourse from the Appellant not testifying, instead it was able to make a decision that took into account the refusal to testify.

With regard to the arguments concerning the language of Section 41, specifically that an employee may be allowed to answer the charges brought forth at the hearing "personally or by counsel," the Commission agrees with the Appointing Authority that this means the employee may choose to be represented by counsel or represent himself. The Commission declines to decide whether the language also means that the employee may testify through counsel, as this was not the situation in the instant case; the

Appellant's counsel only informed the hearing officer and the City that the Appellant would not testify. Thus, the Commission declines to decide whether an additional interpretation of this language is correct when it will have no bearing on the outcome of this case.

For all of the above reasons, the Commission holds that the City did not have just cause to suspend or terminate the Appellant for his failure to testify at his Section 41 hearing, and the Appellant's Motion for Summary Decision is allowed. The City will return Dykas to his position without any loss of pay or other benefits to which he is entitled consistent with this decision.

Civil Service Commission

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Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on September 23, 2010.

A true Copy. Attest:

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Commissioner
Civil Service Commission

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:
Kevin Buck, Esq. (for Appellant)
Leo Peloquin, Esq. (for Appointing Authority)