COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

EDWARD ECKERT,
Appellant

v. D-07-181

CITY OF HOLYOKE,
Respondent

Appellant's Attorney: Marshall T. Moriarty, Esq.
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Hearing Officer: John J. Guerin, Jr.[1]

DECISION

Pursuant to the provisions of G.L c. 31, § 43, the Appellant, Edward Eckert (hereafter "Appellant") is appealing the decision of the Respondent, City of Holyoke (hereafter "City") as Appointing Authority, to suspend him via written notice dated May 9, 2007 for three (3) working days, without pay, from his employment as a Heavy Motor Equipment Operator (hereafter "HMEO") in the City's Department of Public Works (hereafter "DPW"). The appeal was timely filed. A hearing was held on January 9, 2008 in the City Council Chamber of Holyoke City Hall. Two (2) tapes were made of the hearing. Witnesses providing sworn testimony were not sequestered. As no written notice was

[1] John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

received from either party, the hearing was declared to be private. Proposed Decisions were submitted by the parties thereafter, as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (11 Stipulations of Fact, Joint Exhibits (JE) 1 – 8 and Appointing Authority's Exhibits (AA) 1 and 2) and the testimony of the Appellant; William D. Fuqua, DPW General Superintendent ("Mr. Fuqua"); Russell McNiff, member and former President of the Saint Patrick's Committee of Holyoke, Inc. ("Mr. McNiff"); Michael Gallagher, Union President ("Mr. Gallagher"); and Kevin Lukasiewicz, Union Vice President ("Mr. Lukasiewicz), I make the following findings of fact:

1. The Appellant is a tenured civil service employee in the position of HMEO in the City's DPW**.** He possesses a CDL license for the operation of certain heavy motor equipment. He was first hired by the City's DPW in 1987 or 1988. (Testimony of Mr. Fuqua and Appellant and Stipulation of Parties)
2. On April 17, 1992, the Appellant signed an acknowledgement indicating that as a HMEO he would be required to work emergencies, particularly during inclement weather. (JE 7)
3. Article 9 of the Collective Bargaining Agreement (hereafter "CBA") states that "Except when an employee is unable to do so because of a reason deemed satisfactory to the Superintendent, an employee shall perform holiday work and reasonable overtime as directed". (JE 1)
4. Mr. Fuqua has held the position of DPW General Superintendent for approximately 20 years. Mr. Fuqua is the head of operations and lead manager of the City's DPW.

He is also the Appellant's Manager and Supervisor and was so at all times relevant to this matter. (Testimony of Mr. Fuqua)

5. During the weekend of March 17 and March 18 of 2007, the City of Holyoke's annual Saint Patrick's Parade and Road Race (hereafter "Parade Weekend") was held. The Parade Weekend is the largest annual cultural event for the City. The Parade Weekend annually draws hundreds of thousands of people to the City from the local region, the continental United States and from various countries as participants, award winners and spectators, which it did on March 17 and March 18, 2007. (Testimony of Mr. McNiff)
6. In the days leading up to the Parade Weekend, the weather forecast predicted that a significant snowstorm would blanket the City of Holyoke. Mr. Fuqua posted a snow plowing and removal schedule sometime early on Friday, March 16, 2007 as a result. The purpose of the posting was to give the City's DPW workers advance notice of their snow removal assignments and an opportunity for them to address any scheduling issues or concerns with Mr. Fuqua in advance of the need for increased staffing. Mr. Fuqua posted the workers' expected duty hours by the workers' time clock. (Testimony of Mr. Fuqua)
7. Mr. Fuqua credibly testified at the Commission hearing that dealing with a snowstorm at that time of year is a "nightmare" regardless of special events occurring in the City. Mr. Fuqua related that one of the main reasons that a late-season snowstorm is difficult to handle is because of the overall fatigue of DPW staff from fighting storms all winter. Mr. Fuqua credibly testified that he did not receive any

protests from any workers regarding the posting of the hours required for the plowing and removal operation. (Id.)

8. The Appellant was assigned to work three (3) shifts for snow removal. The first shift was his regular shift from 7 a.m. to 3 p.m. on Friday, March 16, 2007. The Appellant was then relieved from work for a period of 8 hours. The Appellant was then scheduled to return to work for snow plowing from 11 p.m. to 7 a.m. He was then scheduled to commence a shift at 7 a.m. on Saturday, March 17, 2007 for the purpose of removing snow with the DPW's snow blower. (Testimony of Mr. Fuqua and Appellant and JE 4)
9. On March 16, 2007, a snowstorm did hit the City of Holyoke and all the DPW workers commenced working their snow removal assignments, as posted earlier that day. (Testimony of Mr. Fuqua)
10. None of the equipment to which the Appellant was assigned required a CDL license to operate. The Appellant worked the first two snow removal shifts he was assigned to work as required. (Id.)
11. At the start of his third shift, at approximately 7 a.m. on March 17, 2007, there was an incident involving the Appellant. He was complaining to other DPW workers about having to work another shift and stated he was tired and going home instead. The Appellant was to be assigned to the DPW's snow blower unit for his third shift. Mr. Fuqua asked the Appellant to step into a private office with him and to speak with him regarding the matter. (Testimony of Mr. Fuqua and Mr. Likasiewicz).
12. When Mr. Fuqua questioned the Appellant about his wish to go home, the Appellant indicated only that he was tired. Mr. Fuqua responded that everyone was tired but

that the Appellant was required to work the assigned shift and that he would be disciplined if he did not. The Appellant stated, "do what you gotta do" and, when he left the office, continued to complain and act in a disrespectful manner toward Mr. Fuqua, thereby "making a scene" in front of staff. (Testimony of Mr. Fuqua)

13. I find that the Appellant was responsive in his testimony at the Commission hearing and that he did not embellish his answers under examination and cross-examination. He appeared sincere in his account of the subject episode. His testimony at the Commission hearing corroborated Mr. Fuqua's testimony regarding their meeting in the private office to discuss the Appellant's refusal to work his third snow removal shift. (Testimony of Appellant)
14. The Appellant testified at hearing that he had been diagnosed with Type 2 diabetes approximately four (4) years ago. He also testified that, not only did he believe he was too tired to drive, but that he was also concerned he would be in violation of the regulatory provisions of his CDL license. He stated that he believed at the time that the snow blower unit required a CDL license to operate. He stated that he "just didn't feel right that day" (March 17, 2007). He testified at hearing that, regardless of CDL restrictions, it is "common sense that if you don't think you should be driving, you shouldn't be driving." (Id.)
15. He credibly testified that he did not indicate any health or equipment licensure issues to Mr. Fuqua at any point that day. (Id.)
16. By all accounts, the Appellant is a good employee and rarely declines overtime opportunities. In fact, he is consistently among the top DPW overtime recipients. He testified that he was aware that the Parade Weekend is a "big affair" and he didn't

want to bow out of the operation but that he just did not "feel right." (Testimony of Appellant, Mr. Fuqua, and Mr. Gallagher)

17. I credit Mr. Fuqua's testimony at hearing that it was his belief that the emergency nature of the snow removal was heightened in light of the Parade Weekend and that the Appellant *only* claiming that he was tired was not a reasonable or satisfactory excuse for refusing the assignment given the circumstances. He believed that he had authority to make this determination under Article 9 of the CBA. (Testimony of Mr. Fuqua and JE 1)
18. Mr. Fuqua credibly testified that no other employee refused to work a shift during the Parade Weekend snow removal efforts. Other employees besides the Appellant were scheduled to work three (3) shifts in the 32-hour period in question. (Testimony of Mr. Fuqua)
19. Mr. Gallagher had been employed by the City's DPW for approximately 8½ years and served as president of the Holyoke Employee Association (hereafter "Union") at the time of the subject of this appeal. Mr. Gallagher always presents as a man of integrity to this hearing officer and his testimony at this hearing was no exception. He credibly testified that the Appellant approached him at approximately 7 a.m. on March 17, 2007 and requested him to speak to Mr. Fuqua relative to the discipline threat. (Testimony of Mr. Gallagher)
20. Mr. Gallagher was told by Mr. Fuqua that Mr. Fuqua would deal with the situation later, after the snow removal operation had been completed. Mr. Gallagher had been involved with working long hours himself and also was very tired. Mr. Gallagher testified that two other employees had indicated to him that they had issues with the

lengthy hours of the schedule when it was posted, but he urged these employees to "work the schedule." He also testified that he did not urge the Appellant to keep working because the Appellant looked tired and he "didn't want to urge someone to work beyond their capacity." (Id.)

21. Mr. Gallagher was credible when he testified at hearing that no indication was made to him by the Appellant that he had health or equipment licensure issues, only that he was tired. The Appellant corroborated this testimony with his own testimony at hearing. As such, Mr. Gallagher did not relate any health or equipment licensure issues to Mr. Fuqua during their meeting prior to the suspension of the Appellant. (Id.)
22. As a result of the Appellant's refusal to work the shift, Mr. Fuqua had to remove an individual who was assigned to clear sidewalks with the trackless sidewalk machine from that duty and assign him to work the snow blower in the Appellant's place. The DPW had to forego having someone use the trackless machine to plow the sidewalks. (Testimony of Mr. Fuqua)
23. A letter from Mr. Fuqua, dated March 19, 2007, was sent to the Appellant informing him that he was suspended without pay for a period of three (3) days for refusing a work assignment during the snowstorm of March 17, 2007, as directed by Mr. Fuqua. (JE 5)
24. The Appellant appealed the suspension to the Board of Public Works. (JE's 6 and 8)
25. In accordance with the provisions of c. 31, § 41, the Board of Public Works – the actual Appointing Authority for the City's DPW - met in Executive Session on May

7, 2007 regarding the Appellant's three (3) day suspension and upheld the three (3) day suspension for insubordination. (Id.)

26. Holyoke DPW General Safety and Conduct Rules and Regulations provide that Section II offenses "may be cause for a suspension up to five days or discharge based upon the circumstances surrounding the incident." (JE 3)
27. Insubordination (refusal or failure to perform work assigned, or to comply with the instructions of a supervisor) is a Section II Offense. (Id.)
28. A letter dated May 9, 2007 was sent to the Appellant formally notifying him of the Board's decision. The Appellant appealed the suspension to the Commission on May 11, 2007. (JE 6 and Administrative Notice)

CONCLUSION

The role of the Civil Service 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." City of Cambridge *v.* Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997*).* See Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

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); School Committee of Brockton *v.* Civil Service Commission, 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 reviewing an appeal under G.L. c. 31, § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth *v.* Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

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 *v.* Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Respondent did show by a preponderance of the evidence that it had just cause to suspend the Appellant from employment for a period of three (3) work days, without pay.

Early on Friday, March 15, 2007, Mr. Fuqua posted a schedule for DPW workers for the purpose of providing them notice of expected snow removal assignments. Removal of the snow was considered a top emergency priority for the City, given that the City's population was expected to increase by hundreds of thousands of people because of the Parade Weekend. The purpose of posting the schedule was so that Mr. Fuqua could address any conflicts or other issues that the DPW workers had with the assigned shifts in advance of the start of the snow removal so that all necessary work would be completed. As a HMEO, the Appellant was assigned to work three shifts for the purpose of helping to remove snow from the roadways and sidewalks.

On March 16, 2007, it snowed as predicted. The Appellant worked his first shift on March 16, 2007. He had an eight (8) hour break after that shift, and then he commenced his second shift. At the end of his second shift, on the morning of March 17, 2007, the Appellant was heard complaining to co-workers about being required to work an additional shift and stated to them that he was going home instead. Mr. Fuqua then asked to speak with the Appellant. When questioned as to why he wished to go home, the Appellant indicated *only* that he was tired and was going home. Mr. Fuqua responded that everyone was tired, the Appellant was required to work the assigned shift and that he would be disciplined if he did not. The Appellant then stated, "do what you gotta do" and, when he left the office, continued to complain and act in a disrespectful manner toward Mr. Fuqua in front of staff. It was Mr. Fuqua's belief that the emergency nature of the snow removal was heightened in light of the Parade Weekend and the Appellant only claiming that he was tired was not a reasonable or satisfactory excuse for refusing

the assignment given the circumstances. Mr. Fuqua had authority to make this determination in accordance with the CBA.

Despite ample opportunity to do so, the Appellant did not provide any specific reason to Mr. Fuqua for his refusal to work except to say that he was tired. The Appellant was aware that the DPW was faced with an emergency snow situation which was heightened because of the Parade Weekend and this was the reason Mr. Fuqua posted the snow removal schedule that all DPW workers were required to work. The Appellant was aware that any refusal to work the snow removal assignment would be sorely felt. He had testified that he knew the Parade Weekend was a "big affair." He should have known that a refusal to work without providing Mr. Fuqua with a reasonable justification would be deemed unsatisfactory under the circumstances.

The DPW General Conduct Rules and Regulations define insubordination as the "*refusal or failure to perform work assigned, or to comply with the instructions of a supervisor."* Mr. Fuqua is the Appellant's Supervisor and Manager. Mr. Fuqua posted a notice regarding the snow removal assignment in advance of the extra shifts. The CBA and an acknowledgment signed by the Appellant make clear that employees are expected to work overtime for the removal of snow in inclement weather. Mr. Fuqua even met with the Appellant the morning of March 17, 2007 and specifically directed him in person to work the assigned shift. The Appellant refused. The fatal flaw in this appeal occurred when the Appellant did not provide a reasonable excuse, but told Mr. Fuqua "do what you gotta do" when provided notice that his refusal to work would lead to discipline.

This is a Section II Offense under the DPW Rules and Regulations which authorizes suspensions up to five (5) days or discharge depending on the facts. For this infraction, the Appellant was suspended for three (3) days for which there is just cause under the circumstances, given the fact of the Appellant's failure to provide a legitimate excuse for refusing to comply with Mr. Fuqua's appropriate direction.

By a preponderance of the credible evidence presented at this hearing, I find that the City of Holyoke has sustained its burden of proving just cause to issue the three (3) day suspension to the Appellant. Therefore, the appeal on Docket Number D-07-181 is hereby ***dismissed***.

Civil Service Commission

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John J. Guerin, Jr.
Hearing Officer

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman, Marquis, Stein and Taylor, Commissioners [Henderson, Commissioner – No]) on July 3, 2008.

A true record. Attest:

_____
Chairman

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 to:
Marshall T. Moriarty, Esq. (for Appellant)
Layla G. Taylor, Esq. (for Appointing Authority)