

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

EARL FANION,
Appellant

v.

**WORCESTER PUBLIC
SCHOOLS,**
Respondent

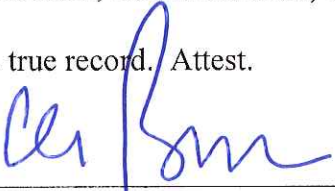
Case No.: D1-12-271

DECISION

The Civil Service Commission (Commission) voted at an executive session on September 19, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated July 19, 2013; the Appellant's written objections to the recommended decision; and the Respondent's response to those objections. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on September 19, 2013.

A true record. Attest.



Christopher C. Bowman
Chairman

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 to:

SL Romano (for Appellant)

Sean Sweeney, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11^H FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200
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July 19, 2013

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: *Earl Fanion v. Worcester Public Schools*
D1-12-271; DALA Docket No. CS-12-689

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections

Sincerely,


Richard C. Heidlage, Esq.

Chief Administrative Magistrate

Enclosure

cc: Salvatore Romano
Sean P. Sweeney, Esq.

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Earl Fanion,
Appellant

v.

Worcester Public Schools,
Appointing Authority

Docket No. D1-12-271
DALA No. CS-12-689
DATED: July 19, 2013

Appearance for Appellant:

Salvatore L. Romano
Massachusetts Laborers' District Counsel
Dispute Resolutionist
7 Laborers' Way
Hopkinton, MA 01748

Appearance for Appointing Authority:

Sean P. Sweeney, Esquire
311 Village Green North, Suite A4
Plymouth, MA 02360

Administrative Magistrate:

Judithann Burke

CASE SUMMARY

The Appointing Authority, Worcester Public Schools, proved that there was just cause to terminate the employment of the Appellant, a school custodian. A preponderance of the evidence reflects that the Appellant threatened his supervisor with physical violence, i.e., "putting a bullet through his head", during a work-related telephone conversation on August 14, 2012.

RECOMMENDED DECISION

Pursuant to G. L. c. 31, §§ 41-45, the Appellant, Earl Fanion, is appealing from the September 18, 2012 action of the Appointing Authority, Worcester Public Schools,

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discharging him from his position as school custodian. (Exhibit 2.) The appeal was timely filed. A Section 43 hearing was held on December 19, 2012 at the Durkin Administration Building, 20 Irving Street, Worcester, MA.

At the hearing, fifteen (15) exhibits were marked. The Appointing Authority presented the testimony of the following witnesses: Michael Santangelo, Custodial Supervisor in the Worcester Public Schools; and, Mark T. Brophy, Director of Instructional Support Personnel in the Worcester Public Schools. The Appellant testified in his own behalf. The hearing was digitally recorded.

The record was left open for the filing by the parties of post-hearing memoranda of law and proposed findings of fact. The last of these was received on March 19, 2013, thereby closing the record.

FINDINGS OF FACT

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Appellant, Earl Fanion, 63 y.o.a., began employment as a school custodian for the Worcester Public Schools on November 13, 1996. At some later time, he became a senior custodian. (Stipulation.)
2. The Appellant's prior discipline includes a thirty (30) day suspension in or about January 2010 for his involvement in an incident wherein he hung onto a student who climbed out a window to retrieve a tool that was outside of the window. After the incident, the Appellant was transferred to another school, the Worcester Technical High School. There was already a senior custodian assigned to the Worcester Technical High

School, so the Appellant resumed the role of junior custodian after the transfer. (*Id.* and Appellant and Brophy Testimony.)

3. The Appellant attempted to have the thirty (30) day suspension removed from his employment record by asking a Mr. Luster, the Human Resources Manager, to do so. He believed that, while he had made a mistake, he had already paid the price for his behavior. (Appellant Testimony.)

4. The Appellant received a letter of reprimand dated April 8, 2010 related to his failure to properly report an absence.

5. On August 29, 2011, Mark Brophy conducted a training session for all custodians. He spoke about various Superintendent's Bulletins, including Bulletin No. 9, which pertained to Appropriate Interpersonal Communications. The Appellant attended the August 29, 2011 training session. (Brophy Testimony and Exhibits 10 -12.)

6. Michael Santangelo is the Custodial Supervisor for the Worcester Public Schools. He issued a letter of reprimand to the Appellant on June 18, 2012 related to the Appellant's failure to accomplish a work task he had been ordered to perform. He had been asked to remove a table and clean the custodial area at the Worcester Technical High School and provide guidance to a more junior custodian in order to complete the task. Mr. Santangelo noted that the Appellant had not taken corrective action by cleaning the area in question or assigning it to a junior staff member. (Santangelo Testimony and Exhibit 1.)

7. The Appellant never filed a grievance related to the June 18, 2012 reprimand. Instead, on July 19, 2012, he asked Mr. Brophy to look into it. He was disappointed

when the letter of reprimand was not removed from his file. He believed that he had been unfairly reprimanded by Mr. Santangelo. (Appellant and Brophy Testimony and Exhibit 8.)

8. At approximately 2:58 PM on August 14, 2012, Mr. Santangelo received a call on his on-call work pager. He did not initially recognize the number. He returned the call in about five (5) minutes. By that time, the Appellant was officially off duty because his shift had ended at 3:00 PM. (Appellant Testimony and Exhibit 2.)

9. When Mr. Santangelo returned the call shortly after 3:00 PM, he initially asked for "George", the Senior Custodian at the Worcester Technical High School. The phone had been picked up by a man whose voice he recognized as the Appellant's.

Mr. Santangelo referred to himself as "Mike" and asked "what's up?"

The Appellant said, "Mike who?"

Mr. Santangelo answered "Mike Santangelo, Custodial Supervisor. You know, I'm the guy whose neck you'd like to put a rope around."

The Appellant did not immediately respond.

After several seconds, the Appellant stated, "Oh, yeah, you. I'd rather put a bullet through your head. It would be quicker."

Mr. Santangelo was immediately taken aback by the Appellant's comment. However, he said nothing about the comment at the time.

Instead, Mr. Santangelo asked, "What can I do for you?" What do you need?"

The Appellant stated that the Superintendent was having a conference at the Worcester Technical High School on Thursday and Friday of that week and that he would

need some overtime approved in order to work on the cafeteria. The Appellant explained the nature and amount of work that was necessary.

Mr. Santangelo approved the overtime that was requested after asking questions about the work and the staff members involved. The Appellant and his crew completed the necessary work. (*Id.*, and Santangelo Testimony and Exhibits 6 and 7.)

10. The August 14, 2013 telephone conversation between Mr. Santangelo and the Petitioner was overheard by other school custodians at the Worcester Technic High School because it was transmitted over a speaker phone in the custodians' break room in the school building. (*Id.* and Exhibits 8, 13 and 15.)

11. The Appellant worked three (3) overtime hours on August 14, 2012, from 3:00 PM to 6:00 PM. (Santangelo and Appellant Testimony and Exhibit 3.)

12. Mr. Santangelo feared for his safety after the conversation with the Appellant. He recalled hearing the Appellant make a similar statement about "putting a bullet in the head" of another school department employee earlier that year after he had been asked to complete a janitorial task. (Santangelo Testimony.)

13. Mr. Santangelo went home and processed the conversation with the Appellant. He reported the incident to his supervisors the next day. They felt that he needed to report it. Mr. Santangelo wrote a summary of the conversation. An investigation was commenced by Mr. Brophy. (Exhibits 2 and 8.)

14. When asked by Mr. Brophy about his comment to Mr. Santangelo, the Appellant indicated that he had merely been responding to Mr. Santangelo's "stupid comment" about the rope around his neck. (Appellant Testimony and Exhibit 8.)

15. On September 18, 2012, after he held a hearing on August 29, 2012, Mr. Brophy recommended to Superintendent Boone that the Appellant be terminated from his employment. Mr. Brophy noted therein that he believed that the Appellant was already upset with Mr. Santangelo because the latter had issued the June 18, 2012 letter of reprimand to the former. Mr. Brophy found that the August 14, 2012 threat on the phone demonstrated another poor judgment on the Appellant's part, and, that no employee should threaten anyone, especially a supervisor. (Exhibit 8.)

16. On September 18, 2012, Dr. Boone notified the Appellant that he was terminated from employment effective on that date. (Exhibit 9.)

17. The Appellant filed a timely appeal.

CONCLUSION AND RECOMMENDED DECISION

After a careful review of all of the testimony and documents in this case, I have concluded that the Appointing Authority had just cause to terminate the Appellant's employment. The Appointing Authority has proven by a preponderance of the evidence that just after 3:00 PM on August 14, 2012, a time at which he was requesting, and would receive, overtime pay, the Appellant threatened his supervisor by stating that he would "rather put a bullet through his head because it would be quicker." His supervisor, Mr. Santangelo, feared for his personal safety. *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997); *Watertown v. Arria*, 16 Mass. App. Ct. 331 (1983); *McIsaac v. Civil Service Commission*, 38 Mass. App. Ct. 473, 477 (1995).

An action is "justified" when it is done upon adequate reasons sufficiently reported by credible evidence, when weighed by an unprejudiced mind, guided by

common sense and by correct rules of law. *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482 (1928) and *Commissioner of Civil Service v. Municipal Court of the City of Boston*, 359 Mass. 211, 214 (1971). In this case, the credibility of any witness is not a dispositive issue. Essentially, there is no material fact in dispute in this case.

Admittedly, Mr. Santangelo denied that he referred to the Appellant wanting to “put a rope around his (Mr. Santangelo’s) neck”. I do believe that Mr. Santangelo made the statement, and that he failed to make mention of the comment in his narrative by virtue of either memory lapse or omission. I also find that the serious and highly inappropriate nature of the Appellant’s response to Mr. Santangelo is not mitigated by the omission. Further, I find the testimony of Mr. Santangelo, that he feared for his safety after hearing the comment, to be extremely credible.

The Appellant admitted to Mr. Brophy and in his testimony at the December 2012 hearing, that he had told Mr. Santangelo that he’d “rather put a bullet through his head”. The statements of his coworkers corroborate this assertion.

The Appointing Authority is correct in its contention that threats of violence, especially those involving references to bullets in the head, should be absolutely impermissible. The Appellant’s insubordination toward Mr. Santangelo and his threat of violence are behaviors which amount to substantial misconduct which adversely impairs efficacy of public service. Mr. Santangelo was neither his friend nor his work peer. There was no room for back and forth “shop banter” between them at that time. The Appellant demonstrated extremely poor judgment as he had in the past. He also

demonstrated an ongoing tendency to resolve grievances and work conflicts through improper channels. Cf. See *Selectmen of Wakefield v. Judge of First Dist. Ct. of Middlesex*, 262 Mass. 477, 482 (1928).

Based on the foregoing, I recommend that the Civil Service Commission affirm the decision of the Worcester Public Schools.

Division of Administrative Law Appeals,
BY:

Judithann Burke, Administrative Magistrate

DATED: July 19, 2013