Decision mailed: 12/11/09
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JEFFREY FERRIN,
Appellant

v.

D-09-264

CITY OF PITTSFIELD,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Jeffrey Ferrin (hereinafter "Ferrin" or "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the City of Pittsfield (hereinafter "City" or "Appointing Authority") to suspend him for 2 ½ days for leaving a city truck unlocked with the engine running and the emergency lights on while parked in a fire lane outside Berkshire Medical Center for approximately thirty (30) minutes.

The Appellant filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on May 28, 2009. A pre-hearing conference was conducted on July 8,

2009 and a full hearing was conducted on September 16, 2009 at the Pittsfield City Hall in Pittsfield, MA. The hearing was declared private and witnesses were sequestered. The hearing was digitally recorded. The parties submitted post-hearing briefs on October 20, 2009 (Appointing Authority) and October 22, 2009 (Appellant).

FINDINGS OF FACT:

Nineteen exhibits were offered into evidence and I accepted all except proposed exhibits 11 and 14. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Bruce Collingwood, Commissioner of Public Work and Utilities;
- Kevin Jester, Director of Security at Berkshire Health Systems;
- Peter Bruneau, Highway Foreman;
- Thomas Foody, Superintendent of Highways;

For the Appellant:

- Jeffrey Ferrin, Appellant;
- David Brites, Water Department employee;

I make the following findings of fact:

1. The Appellant, Jeffrey Ferrin, is a tenured civil service employee in the City of Pittsfield in the position of highway crafstman. He has been employed by the City since 2004. (Stipulated Facts and Testimony of Appellant)

Prior Discipline

2. On April 11, 2006, the Appellant received a written warning for damaging city equipment. (Exhibit 3)
3. On April 28, 2008, the Appellant received a written letter of reprimand for dereliction of duty and insubordination. According to the written letter of reprimand, the Appellant acknowledged that he shouted at his supervisor and called him an asshole. (Exhibit 3)
4. On August 12, 2008, the Appellant received a verbal warning for general misconduct. (Exhibit 3)
5. On October 23, 2008, the Appellant received a 1-day suspension for leaving work the without permission. (Exhibit 3)
6. On November 13, 2008, the Appellant received a written warning for insubordination. (Exhibit 3)
7. On November 19, 2008, the Appellant received a written letter of reprimand for unauthorized union business during working hours, dereliction of duty and insubordination. (Exhibit 3)
8. On December 23, 2008, the Appellant received a written warning for using a city vehicle for personal business. (Exhibit 3)
9. On January 14, 2009, the Appellant received a written warning for failure to meet work standards. (Exhibit 3)
10. On January 15, 2009, the Appellant received a written letter of reprimand for unauthorized union business during working hours. (Exhibit 3)

11. On January 19, 2009, the Appellant received a written warning for failure to meet work standards. (Exhibit 3)
12. On May 14, 2009, the Appellant received a verbal warning for poor general conduct. (Exhibit 3)
13. On May 18, 2009, the Appellant received a verbal warning to failure to wear his work uniform. (Exhibit 3)
14. On May 20, 2009, the Appellant received two verbal warnings for failure to wear his work uniform. (Exhibit 3)

Disciplinary Appeal currently before the Commission

15. On April 24, 2009, Highway Foreman Peter Bruneau saw the Appellant leaving the DPW yard sometime before 9:00 A.M. with the "chip truck", which is a box truck. (Testimony of Bruneau)
16. Since the Appellant's assignment was to pick up trash, Mr. Bruneau questioned why the Appellant needed to take the chip truck, which is used for chipping. Also, the chip truck did not have a functional radio. (Testimony of Bruneau)
17. Mr. Bruneau decided to get another truck that had a working radio and drive to the location where the Appellant was assigned to pick up trash. Upon arriving at the worksite, Mr. Bruneau observed that neither the Appellant or the chip truck were present. (Testimony of Bruneau)
18. After asking his supervisor to check the City's GPS, Mr. Bruneau learned that the chip truck was located on Charles Street, an access road to the Berkshire Medical Center. (Testimony of Bruneau)

19. After arriving at Charles Street, saw the truck parked with its hazard lights on. Upon further inspection, Mr. Bruneau observed that the keys were in the truck's ignition and the truck was running with its windows down and doors unlocked. Nobody was in the truck. (Testimony of Brueneau)
20. Mr. Bruneau testified that the truck was in a marked fire lane, which the Appellant vigorously disputed. (Testimony of Bruneau and Appellant)
21. Given the relatively close proximity of Berkshire Medical Center to the hearing location, I conducted an on-site visit of the location in question with the parties present. As a result of that visit, I find that there is now no dispute as to where the truck was parked on the morning in question.
22. Although the truck was not parked in a lane marked as a "fire lane", I find that the Appellant actually parked the truck *in* a public way that serves as an access road to Berkshire Medical Center, directly outside of a public parking garage.
23. I observed that this is a relatively busy roadway with several cars driving past as we stood on the sidewalk for 2-3 minutes. It is clear that vehicles, including emergency vehicles en route to the adjacent hospital, would need to steer around a vehicle parked in the roadway, as the chip truck was on the morning in question.
24. While Mr. Bruneau was standing near the chip truck, two security guards from the hospital approached him at separate times, expressed concern about where the truck was parked and asked him to move it. Mr. Bruneau tried to contact the Appellant via his cell phone, but it went directly to voice mail. Unsure what to do, Mr. Bruneau eventually shut the chip truck off and informed Superintendent Foody via radio that

he was leaving the area. Mr. Bruneau left a message on the Appellant's voice mail to return to the DPW yard upon getting his message. (Testimony of Bruneau)

25. Mr. Bruneau was a good witness and I credit his testimony. He offered straightforward, plausible answers to the questions posed to him and did not appear to have any ax to grind with Appellant. Moreover, much of his testimony is not disputed by the Appellant. (Testimony, demeanor of Appellant)

26. The City's GPS report shows that the chip truck in question was stopped at the location near Berkshire Medical Center for thirty-one (31) minutes on the morning in question, which is consistent with video surveillance photographs obtained from the

27. The Appellant does not dispute that he was in the hospital or that he left the unlocked truck running with the keys in the ignition. The Appellant testified that he needed to use the bathroom in the hospital after a sudden case of diarrhea. (Testimony of Appellant)

28. The Appellant introduced a note from a doctor dated September 1, 2009, more than four months after the discipline was imposed by the City on May 22, 2009. The doctor's note states in its entirety: "The patient [the Appellant] has requested a letter regarding an episode in May when, at work, he spent half an hour in the bathroom because of prolonged diarrhea. The patient does have a history of irritable bowel syndrome and such an episode is possible." (Exhibit 19)

CONCLUSION

G.L. c. 31, § 43, provides:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other

rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was

reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

For all of the reasons referenced in the findings, I conclude that the Appellant left a city truck unlocked with the engine running and the emergency lights on while parked in a public way outside Berkshire Medical Center for approximately thirty (30) minutes.

I am astounded by the Appellant's lack of good judgment. Even if were to accept that he spent 30 minutes in the hospital's bathroom on the morning in question, it is outrageous that he would leave an unlocked city-owned truck in a public way outside a hospital with the keys in the ignition and the engine running. It is of no import that the actual location where the truck was parked was not marked as a fire lane. As I witnessed for myself, parking the truck *in* a busy roadway was at least as dangerous – and irresponsible – as it would be to leave the truck in a fire lane. By a preponderance of the evidence, the City has shown that it had reasonable justification to discipline the Appellant for his misconduct.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was a 2 ½ -day suspension.

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

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing

authority.'" Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Town of Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006).

There is no evidence the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. Although the Appellant raised an issue in his post-hearing brief that he was a shop steward for the local union that represented DPW workers at the time of this incident, I found nothing in the evidence or testimony to even suggest that this influenced the City to impose a 2 ½ day suspension against the Appellant. Further, the Appellant's 2 ½ -day suspension appears to be consistent with progressive discipline given that he has previously received numerous verbal and written warnings and a 1-day suspension.

For all of the above reasons, the Appellant's appeal under Docket No. D-09-264 is hereby ***dismissed***.

Civil Service Commission

Christopher C. Bowman, Chairman

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman; Marquis, Stein and Taylor, Commissioners [Henderson, Commissioner – No]) on December 10, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice:
Thomas Donoghue, Esq. (for Appellant)
Fernand J. Dupere, Esq. (for Appointing Authority)