**COMMONWEALTH OF MASSACHUSETTS**

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

GARY FLYNN,
Appellant
v.

D1-19-194

LOWELL HOUSING AUTHORITY,
Respondent

Appearance for Appellant: Jack Merrill, Esq.
KSR Law
160 Gould Street
Needham, MA 02494

Appearance for Respondent: Brian M. Maser, Esq.
KP Law, PC
101 Arch Street
Boston, MA 02110

Commissioner: Cynthia A. Ittleman

DECISION

On September 4, 2019, the Appellant, Gary Flynn (Mr. Flynn or Appellant), pursuant to G.L. c. 121B, § 29 and G.L. c. 31, § 43, filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Lowell Housing Authority (Authority or Respondent) to terminate him from employment. A pre-hearing conference was held on October 28, 2019.[1] At the pre-hearing conference, the Appellant's counsel sought to amend the appeal, which the Appellant filed pro-se prior to retention of counsel, to allege, pursuant to G.L. c. 31, § 42, that the Authority failed to follow the procedural requirements provided for in G.L. c. 31, §

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

41. Following receipt of the Appellant's written Motion to Amend and the Authority's Opposition, the Commission allowed the Appellant's Motion to Amend. A full hearing was held over a two-day period on December 9, 2019 and December 23, 2019 at the Armand P. Mercier Community Center in Lowell, MA. As no written notice was received from either party, the hearing was declared private. The full hearing was digitally recorded.[2] Both parties submitted post-hearing proposed decisions.

**FINDINGS OF FACT**:

Forty-four (44) Exhibits and two (2) Appointing Authority Exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

*For the Lowell Housing Authority:*

- Janice Gomes, Assistant Property Manager;
- Denis Ryan, Property Manager;
- Adam Garvey, Assistant Executive Director;
- William Cassella, President of Local Union 115; and
- Dr. Gary K Wallace, Executive Director

*For the Appellant:*

- Gary Flynn, Appellant

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

1. The Appellant, Gary Flynn, began his employment with the Lowell Housing Authority in 2001 as a temporary Custodian. He became a permanent Custodian with the Authority in 2002. In 2009, based on seniority, Mr. Flynn was promoted from Custodian to Maintenance

[2] Subsequent to the hearing and the submission of post-hearing briefs, the Commission had a written transcript prepared of the hearing.

Technician. He was employed at the Authority as a Maintenance Technician from 2009 to 2019. (Testimony of Mr. Flynn; Ex. 2, 3, 4). Mr. Flynn's father had been a member of the Authority Board of Commissioners sometime prior to 2017. (Ex. 14)

2. Mr. Flynn is a member of the Local Union 115 of the International Union of Public Employees (Union). The Union and the Lowell Housing Authority are signatories to a Collective Bargaining Agreement (Agreement) that is effective by its own terms through September 30, 2020 and was in effect at all times relevant to this appeal. (Ex. 1; Testimony of Flynn and Cassella)
3. Pursuant to the Agreement's Article XXIV Separation from Service, Section 24.1 entitled "Dismissals," an employee … "who has violated the Standards of Conduct as outlined in Article XVIII shall be subject to suspension and/or dismissal. The Authority will comply with the provisions of G.L. c. 31, § 41 to 45 for those employees with more than five (5) years of uninterrupted service." Mr. Flynn is an employee with more than five (5) years of uninterrupted service, having begun his permanent employment with the Authority in 2002. (Testimony of Flynn; Ex. 1, 2)
4. Article XVIII of the Agreement entitled "Standards of Conduct" promulgates the Authority's policy to have a productive work environment and prohibits conduct that may harass, interfere, or disrupt another's work performance. (Ex. 1, p. 27)
5. Sections 18.2(2)(d) and (k) of the Agreement set forth specific prohibited conduct that will subject an employee to disciplinary action, up to and including termination, and are relevant to the subject of this appeal. Subsection (d) prohibits "[i]nsubordination or the refusal by an employee to follow management's instructions concerning a job-related matter" while

subsection (k) prohibits "[u]nauthorized absence from work area, wasting time, loitering or sleeping." (Ex. 1, p. 27)

6. Suspensions of employees for three (3) days or less and lesser disciplinary sanctions, such as verbal warnings and written warnings, may be issued by Deputy Directors, Property Managers, and Division Directors, with the approval of the Executive Director of the Authority. (Ex. 42)
7. Suspensions of employees greater than three (3) days in length, demotions, or terminations may only be issued, exclusively, by the Executive Director of the Authority. (Ex. 42)
8. The Executive Director is the Appointing Authority for the Lowell Housing Authority. The Executive Director has appointment and removal powers of personnel as delegated to him by the Authority's Board of Commissioners, as set forth in the Executive Director's job description and the Authority's Personnel Policy. (Ex. 40, 42; Testimony of Wallace)
9. The buildings that house residents of the Lowell Housing Authority are divided into four (4) Federal Asset Property Management Properties, commonly referred to as an "AMP." Each AMP is made up of several buildings. Maintenance staff are assigned to each AMP to provide unskilled, semi-skilled, and skilled maintenance and repair services. (Testimony of Wallace and Garvey)
10. The hierarchy of the maintenance staff at an AMP includes the Property Manager at the top, followed by the Assistant Property Manager, the Housing Technicians, the Mechanics, Maintenance Technicians, and then the Custodians. (Testimony of Gomes)
11. The Assistant Superintendent of Facilities is the Property Managers' supervisor. Above the Assistant Superintendent of Facilities is the Superintendent of Facilities. The Assistant

Executive Director Supervises the Superintendent of Facilities and the Executive Director supervises the Assistant Executive Director. (Testimony of Wallace)

12. Dr. Gary K. Wallace serves as the Executive Director of the Authority and has served in that capacity since March 2002. Dr. Wallace began his employment with the Authority as a Housing/Property Manager in March 1987 and has held various positions of increasing responsibility prior to being named Executive Director. As the Executive Director, among his other duties and responsibilities, Dr. Wallace has appointment and removal powers of Authority personnel as delegated to him by the Authority's Board of Commissioners and as set forth in his job description, and the Authority's Personnel Policy. (Exs. 38, 39, 42, and 43)
13. Adam Garvey was named the Authority's Assistant Executive Director on April 1, 2019. He has been employed by the Authority for 11 ½ years. Immediately prior to his appointment as Assistant Executive Director, Mr. Garvey held the position of Chief Accountant for the Authority in 2008 and was promoted to the position of Chief Financial Officer (CFO) in November 2011. Mr. Garvey served as the Authority's CFO through March 31, 2019, when he was promoted to his current position. (Testimony of Garvey)
14. Mr. Garvey performs various job functions as the Assistant Executive Director, including tasks delegated to him by the Executive Director, as set forth in the position's job description. The Assistant Executive Director "may act for, and in the absence of, the Executive Director." (Testimony of Garvey and Wallace; Exs. 40 and 42)
15. The Property Manager determines the workload for the day, prioritizes work orders, and supervises the maintenance staff's time, among other responsibilities. If the Property Manager is out of the office, those below the Property Manager in the hierarchy report to and

take direction from the Assistant Property Manager. This system has been in place since 2002/2003; this system had been set up by Dr. Wallace, the Executive Director of the Authority.[3] (Testimony of Wallace, Gomes, Ryan and Garvey)

16. Maintenance staff are assigned maintenance tasks by written work orders that are typically prepared by the Property Manager or the Assistant Property Manager. A tenant will typically alert management to an issue in their unit that requires the attention of maintenance staff. A work order is then prepared, detailing the parameters of the job required. The job is either classified as "routine" or "emergency."[4] (Testimony of Ryan and Garvey)

*Appellant's Disciplinary History with Lowell Housing Authority*

17. The Appellant had the lengthiest disciplinary record of any employee of the Authority at the time his employment was terminated. (Testimony of Wallace)

18. On or about February 3, 2003, approximately one (1) year after the Appellant was hired, he received a five (5)-day suspension without pay for violation of Section 18.2 (2)(k), (t), and (w) for an unauthorized absence from the work area; engaging in behavior or conduct that

[3] Dr. Wallace testified that when he first became Executive Director in the early 2000's, he revamped the management model of the AMP. Previously, the management was bifurcated with a Housing Manager, who had authority over the residents, and a Maintenance Supervisor, who had authority over the maintenance staff. Dr. Wallace wanted to change that model and make one person in charge of the AMP, creating a "strong property manager model." This would make the Property Manager in charge of the AMP, and if the Property Manager was absent, the Assistant Property Manager would take the reins. (Testimony of Wallace).

[4] The Appointing Authority entered an exhibit at the hearing entitled "Lowell Housing Authority Emergency Policies." (AA Ex. 2) The emergency policy appears to advise mainly residents what the Authority considers an emergency as it relates to when maintenance can be expected to repair the issue. Included in the list is "electric power failure" and "sewer blockage (water closet and main line)." Neither a broken light switch nor a clogged bathroom sink was on the list specifically, although the Respondent argued that the risk of electrocution or shock from the broken light switch fell under an electrical emergency and the Appellant, in his brief, argued that a clogged bathroom sink fell under the sewer blockage. Upon review of the list, the Executive Director testified that the emergency list should be augmented in the future. (Testimony of Wallace). However, I do not find the Emergency Policies document to be controlling since the list is mainly for residents to refer to, not necessarily a list of what a property manager or assistant property may deem an emergency when prioritizing work on work orders. Moreover, the issue here is that the Appellant repeatedly refused to perform the task his supervisor asked him to do, asserting, in essence, that he had decided that the earlier task he was assigned was a higher priority, assuming authority he did not have.

was offensive, undesirable or contrary to the Authority's best interest, or engaging in behavior or conduct which brings discredit or dishonor to the Authority; and for engaging in criminal, infamous, dishonest, or notoriously disgraceful conduct. (Ex. 26)

19. On or about October 26, 2006, Mr. Flynn received a three (3)-day suspension without pay for violation of Section 18.2(2)(d), (g), (k), (t), and (w). Such violations included: insubordination; knowingly falsifying and/or altering LHA records (time sheets and work orders); unauthorized absences from work area and wasting time; behavior undesirable to the Authority's best interest; failure to perform tasks efficiently and in accordance with established quality standards; dishonesty; and misuse of LHA property and equipment. Within the Deputy Director of Facilities Management's Suspension Letter, he advised that he would be recommending to the Executive Director that Mr. Flynn's employment be terminated following the suspension period. (Ex. 25)
20. On or about November 1, 2006, rather than terminate Mr. Flynn, the Authority's Executive Director suspended Mr. Flynn for an additional fifteen (15) days without pay for violation of the Standards of Conduct in the Agreement, as alleged by the Deputy Director of Facilities Management. The reason for the suspension was insubordination; knowingly falsifying or altering a record; unauthorized absence from the work area; engaging in behavior or conduct offensive, undesirable or contrary to the Authority's interests; and criminal, infamous, dishonest or notoriously disgraceful conduct. (Ex. 24)
21. Four (4) months later, on or about March 30, 2007, Mr. Flynn was suspended for three days without pay for violation of Article 18 of the Agreement as a result of making an obscene gesture to the Authority's Director of Facilities Management. For the second time, the Deputy Director of Facilities Management, William Duggan, "highly recommended" that

Mr. Flynn be terminated from his employment with the Authority. Mr. Duggan noted of Mr. Flynn that "[Y]our tenure with the LHA has been and continues to be nothing more than disruptive, offensive, and hostile to the people you work with and the people you work for. In combination with your less than satisfactory work performance, I am also highly recommending that your employment with the LHA be terminated." (Ex. 23)

22. On or about April 24, 2007, Mr. Flynn agreed to a thirty (30)-day unpaid suspension and executed a Last Chance Agreement (2007 Last Chance Agreement) with the Authority for excessive sick leave; insubordination; and engaging in conduct deemed offensive, undesirable or contrary to the LHA's best interest. Additional unacceptable behavior considered within this suspension occurred on October 26, 2006, which included: insubordination; knowingly falsifying or altering LHA records; unauthorized absence from work area; behavior undesirable to the Authority's best interest, which conduct included yelling various offensive statements at an Authority contract vendor and asserting that his father is on the Authority Board of Commissioners when his father was no longer on the Authority Board. (Exs. 21 and 22)
23. The Appellant's 2007 LCA required Mr. Flynn to attend the Authority's Employee Assistance Program and to immediately register for the Anger Management Program. (Ex. 22).
24. The 2007 Last Chance Agreement provided, in relevant part, that "[t]he Employee understands and agrees that this is a last chance Agreement and that violation of any of the terms and conditions of this Agreement could result in discipline up to and including termination." (Ex. 22).

25. On or about June 22, 2011, Mr. Flynn received a warning by the Authority for insubordination and violation of the Authority's rules of conduct. (Ex. 20)
26. Three (3) months later, on or about September 17, 2011, Mr. Flynn was suspended for one (1) day without pay for sexual harassment in violation of Section 18.2(2)(n) of the LCA, which prohibited engaging in any form of sexual harassment. (Ex. 19)
27. On or about July 30, 2015, Mr. Flynn was issued a written warning by his Property Manager for not being at an assigned vacant unit, in violation of Section 18.2(2)(k) of the Agreement. (Ex. 17)
28. Six (6) months later, on or about January 20 and 21, 2016, Mr. Flynn was issued a verbal warning by his Property Manager for improper conduct and lack of cooperation/teamwork. (Ex. 16)
29. Six (6) months later, on or about June 16, 2016, Mr. Flynn received a written warning for failure to follow instructions; lack of cooperation/teamwork; and improper conduct. (Ex. 15)
30. On or about June 7, 2017, Mr. Flynn was suspended without pay for three (3) days for violation of Section 18.2(2)(b) and (t) of the Authority's Standards of Conduct. (Ex. 14)
31. On or about July 12, 2017, the Authority, Mr. Flynn, and Mr. Flynn's Union agreed to reduce the three (3)-day suspension issued on June 7, 2017, to a two (2)-working day suspension without pay. The parties entered into a Last Chance Agreement on this date, the second Last Chance Agreement in Mr. Flynn's tenure. (Exs. 13 and 14)
32. This second Last Chance Agreement between the Appellant, his union and the Authority provided, in relevant part: "[t]he Union and Mr. Flynn acknowledge that they have had a full and fair opportunity to review and understand the terms of this Agreement prior to executing it, and they further acknowledge that they enter into this Agreement freely and voluntarily,

and not as a result of any coercion or duress." (Ex. 13) Although the Appellant asserted that he had no union assistance in regard to the second LCA, the union representative signed it, along with the Appellant. (Testimony of Appellant; Ex. 13)

33. The final paragraph, number 6, of the 2017 Last Chance Agreement states that the parties agree that "[i]n light of Mr. Flynn's past disciplinary record with the Authority, which includes a five (5) day unpaid suspension in 2003, a fifteen (15) day unpaid suspension in 2006, a three (3) day unpaid suspension in March 2007, and a thirty (30) day unpaid suspension in April 2007, together with the execution of a Last Chance Agreement at that time, the Union and Mr. Flynn acknowledge that this settlement agreement serves as his final and last chance with the Authority and both the Union and Mr. Flynn are hereby on expressed notice that if Mr. Flynn commits any future violation of the Authority's Standards of Conduct, his employment with the Authority will be immediately terminated." (Ex. 13) Beside Mr. Flynn, no other Authority employee has been issued a last chance agreement (LCA), let alone two (2) LCAs. (Testimony of Wallace)

34. The Appellant did not recall his misconduct that resulted in a number of the disciplines issued against him by the Authority. (Testimony of Appellant) In connection with one disciplinary matter, which the Appellant could not specify or recall, he believed that he spoke to a union attorney. At another time in his testimony, the Appellant asserted that the union did not help him respond to his disciplinary suspensions. At yet another time in his testimony, the Appellant stated that a union representative may have aided him by negotiating the length of a suspension. Although a union representative co-signed the Appellant's 2017 LCA, the Appellant stated that the union did nothing in connection with that LCA. (Testimony of Appellant; Ex. 13) The Appellant believes that he may have

grieved one of his disciplines but he did not pursue it beyond Step 1 of the grievance process. (Testimony of Appellant)

*August 16, 2019*

35. On Friday, August 16, 2019, Mr. Flynn was working in his capacity as a Maintenance Technician assigned to the City View Towers in Asset Management Property 4 (AMP 4). On that date, he was the only Maintenance Technician on duty during his shift. The Appellant worked from 8 a.m. to 12 p.m. that day, leaving his shift early as he had scheduled. (Testimony of Flynn and Gomes)

36. Janice Gomes was working at AMP 4 on August 16, 2019, as the Assistant Property Manager. Ms. Gomes has been employed by the Authority for eight (8) years and had held her current position at AMP 4 since July 2019. Prior to that, she had been an Assistant Property Manager at two (2) other Authority properties, AMP 2 and AMP 3, for just under three (3) years. Prior to that, she was a Housing Technician for the Authority. (Testimony of Gomes)

37. On August 16, 2019, Ms. Gomes was managing the maintenance staff in AMP 4, since the Property Manager, Denise Ryan, was not in that morning. When the Property Manager is absent, for whatever reason, the Assistant Property Manager assumes the duties of the Property Manager. (Testimony of Wallace, Garvey, Ryan and Gomes) Mr. Flynn asserted that he did not know that Ms. Gomes served as the Manager of the Maintenance staff when Ms. Ryan, the Property Manager is absent. (Testimony of Appellant)

38. A resident who was preparing to move into Unit 222 of AMP 4 came into Ms. Gomes's office at 8:55 AM that morning holding the toggle piece of a light switch. The resident alerted her that the light switch broke off at the widest part inside of the opening in the switch

cover. Ms. Gomes was worried about the light switch, since she was concerned that wires might be sticking out of the light plate, which would pose a risk of electric shock to anyone who touched it. The resident also told Ms. Gomes that the door to the unit was not opening or closing properly. (Testimony of Gomes; Ex. 9)

39. At 8:59 AM, Ms. Gomes texted Mr. Flynn to alert him to an emergency regarding the light switch. She told him that she would prepare a work order. She asked that he text her back to confirm that he got her text, immediately upon receipt. Mr. Flynn never texted her back. (Testimony of Gomes; Exs. 9 and 12)

40. Ms. Gomes prepared the work order #447740 at 9:00 AM and marked it as an "emergency" since the broken light switch could pose an electrical hazard. [5] If wires were sticking out, a resident could be shocked or electrocuted. The work order was then sent to the printer downstairs in the shop where Mr. Flynn works out of, along with other maintenance staff. (Testimony of Ms. Gomes; Exs. 9 and 11)

41. Ms. Gomes immediately went down to the shop to be sure that the work order printed, since she was having prior difficulties with the orders printing in the correct locations. She also carried a hard copy of the work order downstairs with her. It was a little after 9:00 AM and she expected no one to be in the shop, since the morning break for maintenance was not until 9:15 AM. (Testimony of Ms. Gomes; Ex. 9)

42. When Ms. Gomes opened the door, she was surprised to see Mr. Flynn sitting at the table with a donut and coffee.[6] He jumped up quickly, as if he was startled, and strode quickly to

[5] The due date on the work order said August 17, 2019, the next day. This is automatically generated by the system. (Testimony of Gomes; Ex. 9).

[6] When asked at the Civil Service Commission hearing if he had coffee and a donut when Ms. Gomes arrived at the shop shortly after 9 AM and prior to the 9:15 AM break, the Appellant said "ridiculous!" However, the Appellant later changed his mind and said that he was having coffee but no donut.

the printer and picked up the work orders that were sitting there. Ms. Gomes explained to Mr. Flynn to only worry about the work order she just sent down, regarding the broken light switch, which was located in an apartment two (2) flights up the stairs from the shop where the Appellant was located. She even noted that he should ignore the broken lock/stuck door in that same unit – to just focus immediately on the light switch due to the emergency nature of it. (Testimony of Gomes; Ex. 9)

43. Mr. Flynn told Ms. Gomes that he was waiting for a mechanic from AMP 3, Mr. M, to join him at AMP 4 to continue working on a blocked pipe in a bathroom sink in unit 130, which was also in the same building as the shop where the Appellant was sitting. The Appellant and/or Mr. M had begun the work on the sink the day before. The work on the sink was marked as "routine" in the work order prepared for that job.[7] (Appointing Authority Ex. 1). This conversation took place before 9:15. Mr. Flynn had been at work since 8:00AM. His morning break is from 9:15 to 9:30 AM. (Testimony of Gomes; Ex. 9)

44. Notwithstanding the sink clog worker order's classification as a "routine" matter, the Appellant asserted at the Civil Service Commission hearing that repair of the sink clog was a "priority". However, when he later left work that day at noon, the "priority" sink clog had not been repaired and the Appellant did not notify anyone that it had not been repaired and that it would remain unrepaired for the weekend. The Appellant further asserted at the Civil Service Commission hearing that when he is given a paper work order, there is no other work he can do. (Testimony of Appellant)

[7] The bathroom sink in Unit 130 was not considered an emergency since the residents of the unit could still use their kitchen sink. The toilet and the tub were not affected by the sink clog. The water was shut off to the sink so that there was no water leaking and no flooding as a result of the sink clog. (Testimony of Ryan)

45. Ms. Gomes told Mr. Flynn that there was more than enough time to work on the light switch and that she needed him to take care of it. She explained that she had made the same type of repair at her house and it would only take a couple minutes. The parts needed for it were in the shop in the building and the circuit box was in the unit where the work was to be performed. At that point, Mr. Flynn sat back down at the shop table again. (Testimony of Gomes; Ex. 9)
46. Mr. Flynn then said, "if you know how to do it, then do it yourself" and then proceeded to take a drink of his coffee and a bite of his donut. (Testimony of Gomes; Ex. 9)
47. Ms. Gomes asked Mr. Flynn again to fix the switch, saying that she really needed him to do it and that there's time. Mr. Flynn repeated again that, if you know how to do it, do it yourself. (Testimony of Gomes; Ex. 9)
48. Ms. Gomes then said, "so you're not going to do it?" Mr. Flynn said, "no." This was the third time Mr. Flynn told Ms. Gomes that he would not fix the light switch. (Testimony of Gomes; Ex. 9)
49. When asked at the Civil Service Commission hearing about his exchange with Ms. Gomes on August 16, 2019, the Appellant offered inconsistent statements. On one occasion, he asserted that Ms. Gomes asked him to repair the light switch when he had the time but then he asserted that he did not recall what Ms. Gomes said to him. He also asserted on yet another occasion that he never refused Ms. Gomes's request that day. (Testimony of Appellant)
50. When the Appellant refused to repair the electric switch for the third time, Ms. Gomes left the shop. She was upset and shocked. She felt that the light switch repair was an important matter that needed to be addressed. AMP 4 was short staffed that morning and there was no

one else to call. She was unable to fix the switch herself because she is not part of the union and she is not allowed to do that type of work. (Testimony of Gomes; Ex. 9)

51. Ms. Gomes then texted the Property Manager, Denise Ryan, who was out that morning and explained the situation. Ms. Gomes also quickly informed Assistant Superintendent of Facilities Brian Dean and the Superintendent of Facilities Brian Moriarty that same day "because of the pushback" that Mr. Flynn gave her. Mr. Dean, in turn, informed Adam Garvey, the Assistant Executive Director of the Authority. (Testimony of Gomes and Garvey)
52. Ms. Gomes was unaware of Mr. Flynn's disciplinary history. She had not worked with him before or had any issues with him in the past. (Testimony of Gomes)
53. Denise Ryan was the Property Manager at AMP 4 on August 16, 2019. She was at a personal appointment in Boston on the morning of Mr. Flynn and Ms. Gomes's interaction at the shop. (Testimony of Ryan and Gomes)
54. Ms. Ryan has been a Property Manager for the Lowell Housing Authority for ten (10) years, two (2) of those years at AMP 4. Ms. Ryan had disciplined Mr. Flynn several times in the past. (Testimony of Ryan).
55. Mr. Flynn texted Ms. Ryan at 9:16 AM, asking Ms. Ryan if she wanted him to work on the sink clog or to work on any calls received. Ms. Ryan responded simply that she was not at work today. (Testimony of Ryan; Ex. 41)
56. Ms. Ryan returned to work on the afternoon of Friday, August 16, 2019 between 2:00 and 3:00 PM and met with Ms. Gomes, who told her that she had had an argument with Mr.

Flynn, that she had asked him to address the electric switch work order, and that he refused to do it three times. Ms. Ryan took notes.[8] (Testimony of Ryan)

57. Since Ms. Ryan was occupied on the Monday after August 16, 2019 with evictions in court and other work, the next time Ms. Ryan spoke with anyone about this incident was on Tuesday, August 20, 2019. On August 20, Ms. Ryan sat down with Ms. Gomes, who told Ms. Ryan in full, once again, about what had happened with the Appellant on August 16. (Testimony of Ryan)

58. Ms. Ryan believed the situation to be "pretty serious," so she began to prepare the appropriate disciplinary form to submit to her supervisor, Assistant Executive Director Adam Garvey. (Testimony of Ryan)

59. Ms. Ryan and Ms. Gomes discussed the situation with Mr. Garvey that same day, August 20, 2019. Ms. Ryan told Mr. Garvey that she was in the process of writing Mr. Flynn up for discipline but she had not done so yet. She was still identifying the pertinent standards of conduct that the Appellant's conduct had violated. Mr. Garvey asked Ms. Gomes for a written narrative of what occurred and asked Ms. Ryan to prepare a disciplinary report. (Testimony of Garvey and Ryan)

60. Following Mr. Garvey's discussion with both Ms. Ryan and Ms. Gomes, Mr. Garvey sent an email to Ms. Ryan and Ms. Gomes. In his email, Mr. Garvey listed the rules of conduct that he believed Mr. Flynn's conduct violated based on their conversation and based on his own review following their discussion.[9] (Testimony of Garvey and Ryan; Ex. 8)

[8] Ms. Ryan's notes are not in evidence.

[9] Ultimately, the disciplinary form Ms. Ryan wrote up for this incident did not include every subsection of the Standards of Conduct that Mr. Garvey listed as potential violations. Ms. Ryan used her discretion and determined that Mr. Flynn had violated two (2) rules of conduct [sections 18.2(2) (d) and (k)]. (Testimony of Ryan; Ex. 8).

61. Ms. Ryan completed the disciplinary form, which indicates that the incident with the Appellant occurred at 9:02 AM on August 16, 2019. She checked off two (2) specific boxes to describe the nature of the incident, which was (1) lack of cooperation/teamwork and (2) insubordination. She indicated that Mr. Flynn refused to follow direction, in violation of the Collective Bargaining Agreement Section 18.2(d) - Insubordination or the refusal of an employee to follow management instructions concerning associated matter. She also indicated that Mr. Flynn violated Section 18.2 Part 2(k) of the Agreement – Unauthorized absence from work area, wasting time, loitering or sleeping during work hours. She indicated that he took an early break and was eating in the shop room of the building. Ms. Ryan signed the form, as Mr. Flynn's supervisor. (Testimony of Ryan; Ex. 8)
62. Mr. Garvey put an "X" next to the word "Other" in the section of the disciplinary form that denotes which action would be taken against the employee. In the blank space next to the word "Other," Mr. Garvey wrote the word "pending." (Testimony of Garvey; Ex. 8)
63. Thereafter, Ms. Ryan spoke with Mr. Flynn in the maintenance room outside the maintenance shop in the basement of City Towers. Mr. Flynn took the situation "very lightly" in Ms. Ryan's estimation. She told him that she had to write him up and that it was her decision to do so. He told her that he would not sign the disciplinary form where required. When she brought up his encounter with Ms. Gomes on August 16, 2019, Mr. Flynn said, "oh that." He did not say anything else. (Testimony of Ryan; Ex. 8)
64. Ms. Ryan had worked with Ms. Gomes at AMP 3 prior to working with her at AMP 4. She described Ms. Gomes as very nice, trustworthy, and a very honest person and that she had never had any issues with her. Ms. Ryan had worked with Mr. Flynn over the years and had

disciplined him for other issues. She described him as argumentative. (Testimony of Ryan; Ex. 15, 16, 17)

65. On August 21, 2019, Mr. Garvey received Ms. Gomes's narrative about her encounter with Mr. Flynn on August 16, 2019. Mr. Garvey received Ms. Ryan's disciplinary form on August 22, 2019. (Testimony of Garvey; Exs. 8 and 9)

66. On Wednesday, August 21, 2019, Mr. Garvey informed the Executive Director of the Lowell Housing Authority, Dr. Gary Wallace, of the incident between Mr. Flynn and Ms. Gomes. This conversation took place at approximately10:30 AM. Mr. Garvey provided Dr. Wallace with Ms. Gomes's narrative and Mr. Flynn's 2017 Last Chance Agreement. Mr. Garvey did not yet have Ms. Ryan's disciplinary form. During this discussion, Mr. Garvey and Dr. Wallace discussed Mr. Flynn's extensive disciplinary history and that the Authority would move forward with a termination hearing the following week.[10] (Testimony of Garvey and Wallace)

*August 22, 2019 Meeting with Executive Director, Asst. Exec. Director, Mr. Flynn and Union*

67. On August 22, 2019, Dr. Wallace, Mr. Garvey, Mr. Flynn and the Local 115 Union President, William Cassella, met in Dr. Wallace's office. Dr. Wallace told Mr. Flynn that he was told about the incident between him and Ms. Gomes on August 16, 2019. Based on what he had learned of the incident, Dr. Wallace told Mr. Flynn that he was immediately being placed on unpaid suspension. (Testimony of Garvey and Wallace) There is no indication in the record that Dr. Wallace informed the Appellant of the length of his unpaid suspension. (Administrative Notice)

[10] Mr. Garvey and Dr. Wallace reviewed Mr. Flynn's entire disciplinary history. (Testimony of Garvey)

68. At the August 22 meeting, Mr. Flynn was given Ms. Ryan's discipline report and Ms. Gomes's narrative report. Mr. Flynn reviewed the documents briefly. Neither Mr. Flynn nor Mr. Cassella, his union representative, made any statement in response to the allegations at this meeting. (Testimony of Garvey and Wallace; Exs. 8 and 9)
69. William Cassella has the President of the International Public Employees Local 115 Union since June 2019. Prior to the August 22, 2019 meeting with the Executive Director, Mr. Cassella spoke with Angelo Karabatsos, the Union's business agent, about the allegations against the Appellant. Mr. Karabatsos told Mr. Cassella that the Authority was going to give Mr. Flynn the opportunity to resign or he would be fired ultimately. (Testimony of Cassella)
70. Mr. Cassella also spoke to Mr. Flynn on the telephone prior to the August 22, 2019 meeting wherein the two discussed the incident between Mr. Flynn and Ms. Gomes on August 16, 2019. Mr. Cassella advised Mr. Flynn not to make a statement or say anything during the meeting with Mr. Garvey and Dr. Wallace. Mr. Cassella was concerned that the Appellant would be terminated immediately. (Testimony of Cassella; Exs. 8 and 9)
71. When the August 22 meeting concluded Mr. Flynn was told that the Authority would be scheduling a termination hearing for the following week and he was escorted through the main office and to his locker, where he retrieved his personal belongings and returned his keys. He then left the Authority's premises. (Testimony of Flynn and Garvey)
72. The union then contacted the Appellant about scheduling the Authority hearing. The Appellant asked that the union attorney assist the Appellant at the Authority hearing but the union told the Appellant that the union attorney had a conflict. (Testimony of Appellant)
73. Although it was not discussed at the August 22 meeting, the Appellant had been given the option to resign prior to the meeting. (Testimony of Cassella)

74. Dr. Wallace believed that there "was no justification [he] could think of keeping Gary Flynn employed by the Lowell Housing Authority" in view of the fact that Mr. Flynn had violated the code of conduct so many times, his conduct was so egregious, and in view of Mr. Flynn's 2017 Last Change Agreement, which was the Appellant's second LCA. (Testimony of Wallace)

75. After the August 22, 2019 meeting, Dr. Wallace and Mr. Garvey discussed the termination hearing and agreed to conduct the termination hearing the following week. However, Dr. Wallace explained that he would be out of the country and that Mr. Garvey was authorized to assume all of Dr. Wallace's duties as the Executive Director while he was away. (Testimony of Wallace and Garvey; Ex. 7)

76. Dr. Wallace sent a follow-up email that same day to Mr. Garvey to memorialize this authorization, stating, "[A]s you know I will be on Annual Leave from August 23rd – September 1st. As your job description notes you are to assume the duties of Executive Director and may act on my behalf during this time…. As you know there is a scheduled disciplinary hearing for employee Gary Flynn during my absence. Therefore, I am appointing you as Hearing Officer to decide in the best interest of the agency." (Testimony of Wallace and Garvey; Ex. 7)

*Scheduling Termination Hearing*

77. On Friday, August 23, 2019, the day after the meeting, Mr. Cassella met with Mr. Flynn in Flynn's local home driveway, wherein he provided Mr. Flynn with the packet of documents provided by the Authority, including the offer to resign, the 2017 Last Chance Agreement, the Gomes narrative and the Ryan discipline form. He gave the documents to Mr. Flynn so he

could think about his options over the weekend. Mr. Cassella told Mr. Flynn that he would let him know when he found out when the termination hearing was. (Testimony of Cassella)

78. On August 23, 2019, the Authority coordinated with its labor counsel[11] to schedule the hearing on Friday, August 30, 2019, at 10:00 AM. Also on August 23, Mr. Garvey informed Dr. Wallace, Union President Cassella, and Angelo Karabatsos, the business agent for the union, of the August 30 hearing date and time. Mr. Garvey asked that Mr. Cassella and Mr. Karabatsos contact Mr. Flynn to inform him hearing in writing. Mr. Garvey wanted to know the best way to serve Mr. Flynn with the hearing notice. (Testimony of Garvey)

79. Mr. Flynn told Mr. Cassella that Mr. Flynn refused to have an Authority employee drop off written notice to him at his local home. Mr. Flynn also refused to go to the Authority to pick up the notice of the hearing. Mr. Flynn informed the union that the only way to serve him with the hearing notice was to mail it to a PO Box in New Hampshire. (Testimony of Flynn, Cassella and Garvey)

80. On August 27, 2019, Mr. Garvey mailed the Authority's notice of hearing to the New Hampshire PO Box that the Appellant provided. Mr. Garvey waited until Tuesday, August 27,, 2019 to mail the notice because Mr. Flynn had the resignation agreement, and it was his understanding that Mr. Flynn and the Union were "going to mull it over". (Testimony of Garvey; Ex. 6)

81. The notice of hearing sent to the Appellant stated that "[d]ue to an incident that occurred on Friday, August 16, 2019, a termination hearing has been scheduled for Friday, August 30, 2019 at 10:00 a.m. EST. If substantiated, your conduct would be conduct unbecoming an employee of the Authority and, per the last chance agreement you signed with the Authority,

[11] The Authority's labor counsel at the time was Attorney Brian Maser, who represented the Authority at the Civil Service Commission proceedings pertaining to this appeal.

would call for the termination of your employment. The hearing will be held at the Lowell Housing Authority Executive Office at 350 Moody Street, Lowell, MA. You are invited to appear with a Union representative. Failure to appear will result in your immediate termination from employment." (Testimony of Garvey; Ex. 6)

82. The union, including Mr. Cassella and Mr. Karabatsos, had been verbally notified of the hearing date as of August 23, 2019. As of August 22, 2019, Mr. Flynn had already been given the Authority's documentary evidence of the allegations against him, including the sections of the rules of conduct that he was alleged to have violated, in addition to a lengthy narrative by Ms. Gomes regarding her memory of what transpired between them on August 16, 2019. (Testimony of Garvey; Exs. 8 and 9)
83. Mr. Cassella testified that Cassella informed Mr. Flynn of the August 30 hearing date on Monday, August 26, 2019. (Testimony of Flynn and Cassella)
84. Mr. Flynn did not receive the mailed written hearing notice prior to the hearing but he was aware of the date and time of the hearing and had received the reports of Ms. Gomes and Ms. Ryan when the union gave him that information in person at the Appellant's local address. (Testimony of Appellant) The Appellant did not identify the date that he received the written hearing notice. (Administrative Notice)

*August 30, 2019 Termination Hearing*

85. On Friday, August 30, 2019, the Authority convened the pre-scheduled termination hearing. Mr. Garvey was the designated Hearing Officer, and the Authority was represented by labor counsel. Mr. Cassella and Mr. Karabatsos of the Union attended the hearing. The hearing began at 10:00 AM and labor counsel introduced four (4) documents into the Authority hearing record. Mr. Flynn arrived at 10:10 AM and Mr. Garvey, as hearing officer,

restarted the hearing and the Authority presented its evidence a second time for Mr. Flynn's benefit. (Testimony of Garvey and Flynn)

86. The Authority, through counsel, offered documentary evidence into the hearing record, to include (1) notice of termination hearing dated August 27, 2019; (2) Denise Ryan's/Property Manager disciplinary write-up with Janice Gomes's/Assistant Manager statement of incident; (3) Gary Flynn's 2017 Last Chance Settlement Agreement dated July 12, 2017; and (4) a disciplinary history package. Copies of the exhibits were provided to the union representatives. The Authority did not offer witness testimony at the hearing. (Testimony of Garvey)

87. During the Authority hearing, the Appellant and his union representatives stepped out of the hearing room into the hallway at some point in time to discuss the hearing. When they returned to the hearing, neither the Appellant nor his union representatives provided any statements. (Testimony of Appellant)

88. The Union and Mr. Flynn were offered the opportunity to present evidence and/or statements but both declined. Mr. Flynn stated that he would be presenting his evidence and statement at a later date. The Authority's labor counsel told the Appellant that this would be an appropriate time to present the Appellant's information. Mr. Flynn again declined to comment or provide any evidence and stated that he had ten (10) days to provide information. Labor counsel further stated to Mr. Flynn that the hearing officer could only consider the evidence submitted. Mr. Flynn stated that he understood and declined to comment. (Testimony of Garvey and Appellant; Ex. 5)

89. At one point during the Civil Service Commission's hearing, the Appellant stated that he did not ask the union to help him at the Authority hearing. On the other hand, the Appellant

complained that the union did not help him prepare for the hearing or tell him what to bring to the Authority hearing. On yet another occasion, the Appellant said that the union told him it could not help him in connection with the termination matter. (Testimony of Appellant)

90. Mr. Garvey prepared a report for Dr. Wallace setting forth what occurred at the termination hearing. He also informed Dr. Wallace that Mr. Flynn did not offer anything to rebut the allegations against him. Mr. Garvey recommended termination and Dr. Wallace agreed. Had Mr. Flynn presented his side of the story, Mr. Garvey would have taken that into consideration. (Testimony of Garvey and Wallace)

91. At Dr. Wallace's request, Mr. Garvey thereafter prepared and sent a termination notice to the Appellant, having been authorized to sign the document for Dr. Wallace. The termination notice was sent to Mr. Flynn, together with his final paycheck. Mr. Garvey then informed Mr. Karabatsos of the Authority's personnel action against Mr. Flynn. (Testimony of Garvey and Wallace; Exs. 4, 5, 32)

92. Upon returning from the Labor Day break, Mr. Garvey received an e-mail on or about September 2, 2019, with a typed statement from Mr. Flynn that set forth his version of what transpired with Ms. Gomes on August 16, 2019. This statement is dated August 21, 2019. Mr. Garvey shared Mr. Flynn's statement with Dr. Wallace. (Testimony of Garvey and Flynn; Ex. 27) The Appellant's email message states, in full:

> "8/21/2019
>
> At 8:59 I received a text message that Apt 222 needed a door lock adjusted and that the light switch was broken. I had returned to the shop to charge my phone as I receive LHA calls and work orders on my phone. I was going to the restroom when Janice [Gomes] entered the shop to follow up on a work order she had sent down which was in the tray. I explained to Janice that I had a double sink blockage effecting apartments 130 and 132 which are plumbed back to back and that one of the units had an active leak coming out of the drain along with the fact that the tenant in apartment 130 had been without water since the previous day. At no time did I say to Janice that I would not do work order for the switch & lock explaining that Denise had assigned me the

> blockage to be completed that day. I was taking my break after helping with trash then returning to finish clearing the blockage. Janice responded that she had repaired a light switch recently at her own house to which I replied that she could not do the repair here. I never said for her to complete the work order herself. After completing my break I returned to blockage effecting 130-132." (Ex. 27)

The Appellant acknowledged at the Civil Service Commission hearing that he sent the email on August 31, 2019, not August 21. (Testimony of Appellant)

93. Mr. Garvey shared the Appellant's post-hearing email with Ms. Gomes and asked her to comment about Mr. Garvey's statements therein. Ms. Gomes responded in writing on September 5, 2019, refuting the Appellant's email and characterizing it as either "fabricated" or the product of a faulty memory. (Testimony of Garvey and Gomes; Ex. 34)
94. Mr. Flynn's email did not persuade the Authority to reconsider its decision to terminate the Appellant's employment. Mr. Garvey and Dr. Wallace, through their experience with Ms. Gomes and Mr. Flynn, believed Ms. Gomes to be much more credible than Mr. Flynn, noting that she had no reason to fabricate any of her testimony and that they had always known her to be an upstanding, honest employee. Dr. Wallace read Mr. Flynn's email message and did not think it was credible. (Testimony of Garvey and Wallace)
95. A notice of termination was mailed via certified mail to Mr. Flynn on or about August 30, 2019, to which was attached copies of Sections 41-45 of G.L. c. 31. (Testimony of Garvey; Ex. 4)
96. Mr. Flynn timely filed an appeal of the termination with the Civil Service Commission on or about September 4, 2019. (Ex. 28)

*Comparative Discipline*

97. Assistant Executive Director Garvey conducted staff interviews and researched personnel files for comparative discipline. Before Mr. Garvey was appointed to the position of

Assistant Executive Director, he had worked closely with the Executive Director and the prior Assistant Executive Director as a three (3)-member team, collaborating on strategy, development and resident issues. He had had access to personnel files as CFO and knew of employees' no-pay status and suspensions without pay. Based on his memory and what he found in the personnel files, he found one (1) instance of discipline for insubordination in 2016, along with other charges, wherein Employee A was given a five (5)-day suspension without pay. (Testimony of Garvey)

98. Employee A had a clean disciplinary history and had been employed by the Authority for twenty-five (25) years at the time of his 2016 suspension. Employee A, unlike Mr. Flynn, was not subject to a Last Chance Agreement. (Testimony of Garvey and Wallace; Ex. 36)

99. Employee A's misconduct on that date in 2016 for insubordination and other charges was considered to be more egregious than Mr. Flynn's misconduct on August 16, 2019. However, the Authority considered Employee A's disciplinary history and Mr. Flynn's disciplinary history (including two (2) last chance agreements) to conclude, pursuant to Dr. Wallace's authorization, that the Appellant's employment should be terminated. (Testimony of Wallace; Ex. 36)

100. Mr. Garvey could find no evidence that any other Authority employee had been terminated for insubordination. (Testimony of Garvey)

101. Only one other employee, Employee B, has been terminated by the Authority since 2015. Employee B's employment was terminated when he failed to appear for a termination hearing regarding his inability to perform the essential functions of his job. (Ex. 37; Testimony of Wallace)

*Legal Standard*

A tenured housing authority employee (with at least five years' service) may be "involuntarily separated" only for "just cause" after due notice, hearing (which must occur prior to discipline if it involves a suspension of more than five days) and a written notice of decision that states "fully and specifically the reasons therefore." G.L. c. 121B, § 29; G.L. c. 31, § 41.

An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L. c. 31, § 42 and/or § 43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). As prescribed by G.L. c. 31, § 43, ¶ 2, the Appointing Authority bears the burden of proving "just cause" for the discipline imposed by a preponderance of the evidence.

> 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.

The Commission determines just cause 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 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.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. *See also* Town of Brookline v. Alston, 487 Mass. 278 (2021)(analyzing broad scope of the Commission's jurisdiction to enforce basic merit principles under civil service law); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971) (appointing authority must provide "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law" for discharge of public employee), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (justification for discharge of public employee requires proof by a preponderance of evidence of "proper cause" for removal made in good faith). It is also a basic tenet of merit principles, which govern civil service law, that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "[only] separating employees whose inadequate performance cannot be corrected." G.L. c. 31, § 1.

Section 43 of G.L. c. 31 also vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. *See, e.g.*, Police Comm'r v. Civil Service Comm'n, 39 Mass. App. Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority"). *See also* Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

*Analysis*

Appeal of *Suspension* pursuant to G.L. c. 31, § 42

Although not specifically alleged in the initial appeal and not the focus of the appeal before the Commission per se, the Appellant challenged the *suspension* imposed on him during

the hearing of this *termination* appeal, claiming that the Authority failed to follow the necessary due process requirements of G.L. c. 31, § 41. During their August 22, 2019 meeting, Executive Director Wallace informed Mr. Flynn that he was "suspended indefinitely" as of that date and that a termination hearing would be scheduled for the following week. Executive Director Wallace did not state how long the suspension was set to last, other than that it was immediate and indefinite. Ultimately, Mr. Flynn's suspension lasted six (6) days since he was terminated on day 6 (the calculation of which excludes Saturdays, Sundays, and holidays per the statute). In the Appellant's post hearing brief, he claimed that the suspension he received prior to his termination hearing should be reversed and compensation awarded to him for the Authority's failure to follow the requirements of GL c. 31, § 41. I agree.

Just as with a termination, a suspension of a tenured employee for more than five (5) days requires that an Appointing Authority follow the procedures set forth in G.L. c. 31, § 41, to include written notice by the Authority, which includes the contemplated action, the specific reason for the action, and a copy of the statutes; the employee shall also be given a full hearing concerning such reasons before the appointing authority. With regards to the suspension of Mr. Flynn, none of these procedural steps were afforded to him prior to his suspension. Unlike the steps the Authority took prior to his Termination Hearing - which included advanced verbal notice of the hearing, the offer to hand-deliver written notice of the hearing, the mailing of the notice, the offer to resign, the production of witness statements and disciplinary reports one week prior to the termination hearing, and a meeting with the Executive Director one week prior to the hearing - none of these steps were taken prior to Mr. Flynn's suspension, which lasted from August 22, 2019 to August 30, 2019 (the date of the termination hearing). As such, I find that the Lowell Housing Authority has failed to meet its burden under the statute to uphold Appellant's

*suspension* since, at the very least, no hearing was ever afforded to the Appellant prior to the suspension and his rights have been prejudiced thereby.

Appeal of *Termination* pursuant to G.L. c. 31, § 42

The Respondent has established by a preponderance of the evidence that it had just cause to terminate the Appellant's employment. The Appellant's arguments to the contrary lack merit.

The Appellant avers that his appeal of his *termination* before the Commission should be allowed due to the Respondent's failure to comply with G.L. c. 31, §41 and that he was prejudiced by the Authority's failure to comply. Specifically, Mr. Flynn contends that the Authority failed to deliver the notice of termination hearing within three (3) days before the August 30, 2019 termination hearing, the Authority failed to give specific enough reasons for his potential firing in the Notice of Hearing, and it failed to provide copies of, or refer to G.L. c. 31, §§ 41-45. Lastly, the Appellant claims that since the Appointing Authority, more specifically the Executive Director, was not the official who notified Mr. Flynn of the hearing (as the Assistant Executive Director did) then the notice is null and void. In sum, the Appellant asserts that he was not given a hearing pursuant to G.L. c 31, § 41.

While the Appellant contends that he was not provided a hearing pursuant to G.L. c. 31, § 41, the case law is clear that the hearing required is not to be conducted in the vein of a trial. *See, e.g.*, Chmielewski v. Massachusetts Office of Commr. of Probation, 513 F. 3d. 309, 316 (1st Cir. 2008) ("The termination hearing is not a court of law, and the same level of process is not required."). The Commission has recognized that the §41 hearing "is often a mere formality preceding the de novo, "disinterested", review at the Commission level. Villare v. Town of North Reading, 8 MCSR 44 (1995). This is buttressed by extensive case law, which makes clear that the purpose of the § 41 hearing is to "give the employee an opportunity to notice and present his side

of the story", i.e., because the employee has "extensive post-deprivation remedies" in the form of a § 43 hearing before the Commission. Id. There is no requirement in the statute that the local hearing officer be impartial, pretrial discovery is not permitted, the rules of evidence do not apply (even at the agency level) except with regard to the rules of privilege, and the employee has no right to subpoena witnesses to appear before the hearing officer. *See, e.g.*, Chmielewski at 318, G.L. c. 30A, § 11 (formal rules of evidence do not apply before agencies, including the Commission); G.L. c. 233, § 8 (permitting, but not requiring, a Board of Selectman to summons a witness to a public hearing if they choose).

The Appellant indicated that he received the notice of the Authority's hearing but not until the hearing was held, although he did not indicate the date that he received it. The Authority admits that the written Notice of Hearing was not mailed until August 27, 2019 even though the Termination Hearing was held on August 30, 2019. The Authority did not mail the Notice as early as it should have because it had offered Mr. Flynn the option to resign on August 22, 2019 and, according to the union, Mr. Flynn was thinking about it over the course of that weekend. Mr. Flynn never offered his resignation. The Authority should have mailed the notice of hearing at its earliest opportunity; however, I find that, for many reasons, Mr. Flynn was not prejudiced thereby because, by his own admission, the Appellant knew about the scheduling of his local disciplinary hearing well in advance of the three (3)-day requirement because the union told him and had given him the documents that the Authority offered at the hearing. Mr. Flynn knew as early as August 22, 2019 (8 days prior to the hearing), that a termination hearing was going to be scheduled by the Appointing Authority for the following week, since the Executive Director told him of that fact at their in-person meeting on August 22. The Authority informed the union of the hearing date as early as August 23, 2019, seven (7) days prior to the hearing.

Additionally, as early as Friday, August 23, 2019, the Authority tried to accommodate the Appellant with service in-hand of written Notice of Hearing by contacting the Union representatives, inquiring of them where the best place to personally serve Mr. Flynn with notice. Mr. Flynn ***refused*** to have the Notice delivered to his local address. He also ***refused***, in the alternative, to pick up the Notice at the Authority. Instead, he asked that the Notice be mailed to him at an out of state PO Box. Mr. Flynn cannot complain of a flawed notice when he was the one who caused the flaw. Having unclean hands, and knowing that the Appellant knew the date, time location and substance of the Authority hearing, and having actually attended the hearing, the Appellant was not prejudiced by the apparent untimely written notice.

Mr. Flynn also contends that the content of the Notice of Hearing itself was insufficient to satisfy the requirements of the statute since, he alleges, it did not adequately inform him of the specific allegations against him and it failed to include reference to Civil Service law. The introductory sentence of the Notice states: "[d]ue to an incident that occurred on Friday, August 16, 2019, a termination hearing has been scheduled for Friday, August 30, 2019 at 10 AM EST." By his own admission, Mr. Flynn stated that he knew exactly what the termination hearing was about when he arrived at the hearing. Furthermore, he was aware of the Assistant Property Manager's allegations against him since he attended a meeting with the Executive Director, the Assistant Executive Director, and the Union President on August 22, 2019. At that meeting, Mr. Flynn was provided the opportunity to review the Assistant Manager's narrative statement and the Property Manager's disciplinary form and was given the opportunity to make a statement. Both he and the Union declined to make any statement.

Prior to this August 22, 2019 meeting with the Executive Director, the Appellant also was made aware of the details of the allegations against him when he spoke to the Union President by

telephone. The Appellant further admits that on Monday, August 26, 2019, he met with the Union President at the Appellant's house, wherein he was provided a packet of documentary evidence from the Authority which detailed the allegations against him by Ms. Gomes and Ms. Ryan, including which portions of the rules of conduct he was alleged to have violated, the offer to resign, and his prior discipline. In addition, the Appellant had spoken with Ms. Ryan about exactly what Ms. Gomes told her (Ms. Ryan) on August 21. The Appellant was nonchalant about the allegations by Ms. Gomes and stated, "oh that?" It was during this discussion that Ms. Ryan showed him her disciplinary form, which outlined the sections of the rules of conduct that he allegedly violated. The Appellant refused to sign the disciplinary form.

Between the Appellant's communications with Ms. Ryan, Dr. Wallace, Mr. Garvey, and his union representatives, along with the detailed documents provided to him in advance of the hearing, which were entered into the Authority's hearing record, I find it abundantly clear that the Appellant was fully aware of the allegations against him prior to the hearing and that he did not avail himself of the opportunity to present his views at the Authority hearing. Under similar circumstances, courts have found that due process has been observed. *See, e.g.,* Hall-Brewster v. BPD, 96 Mass.App.Ct. 12 (2019)(pre-deprivation proceeding is an initial check against mistaken decisions, a determination of whether there are reasonable grounds to believe that the charges against a public employee are true and support the proposed action); Perkins v. City of Attleboro, 969 F.Supp.2d 158 (D. Mass. 2013) ("due process is flexible and calls for such procedural protections as the particular situation demands" and Deputy Chief's gathering of written statements, meeting with the plaintiff prior to any adverse employment action being taken, and appeal to the Commission with a hearing was adequate process); Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 545 1985)(pre-deprivation hearing need not be elaborate and, where

more comprehensive post-termination procedures are available, the pre-termination hearing need only provide 'an initial check against mistaken decisions).

The Appellant's assertion that the Authority hearing notice was flawed because it did not include a reference to G.L. c. 31, §§ 41-45 or attach those statutes lacks merit. Such notice is required when the appointing authority notifies an appellant of its decision following a hearing, not in the notice of hearing. The Authority appropriately referred to G.L. c. 31, §§ 41-45 in the notice of termination sent to the Appellant. When the Appellant was asked at the Civil Service Commission hearing if the termination notice sent to him after the Authority hearing included copies of G.L. c. 31, §§ 41-45, he cagily responded that he was "not positive". However, the Appellant timely filed an appeal with the Civil Service Commission following his termination.

Additionally, I find that the Assistant Executive Director Garvey was fully authorized by Executive Director Wallace to send the Notice of Termination to Mr. Flynn, serve as the Hearing Officer at the termination hearing, and send notice of Mr. Flynn's official termination, which was decided by the Executive Director, following the hearing. In short, there was no failure to provide a full hearing and no prejudice to the Appellant that would support reversal of the Authority's termination of the Appellant's employment pursuant to G.L. c. 31, § 42.

Appeal of *Termination* pursuant to GL c. 31, § 43

By a preponderance of the evidence, the Authority has established that Mr. Flynn engaged in substantial misconduct on August 16, 2019 that adversely affects the public interest. The Authority presented abundant credible evidence that Mr. Flynn refused to follow Assistant Property Manager Gomes's instructions to fix a broken light switch. I find that Ms. Gomes's testimony is credible in that she provided consistent testimony in a thoroughly professional and even-handed manner, exhibiting no bias toward the Appellant. By contrast, the Appellant's

testimony had limited credibility in that he provided inconsistent, if not conflicting, accounts of what he said and did or did not say and do, what Ms. Gomes said or did or did not say or do, or what the union representatives said or did or did not say or do. Further, the Appellant's memory of previous discipline was remarkably limited. Ms. Ryan was not onsite the morning of August 16, 2019 and, pursuant to the longstanding rules of conduct, Ms. Gomes was to assume Ms. Ryan's responsibilities. Ms. Gomes asked Mr. Flynn three times to fix a broken light switch, which she deemed urgent based on her experience. She was concerned that the light switch could pose a risk of electric shock if any wires were sticking out. The work order for the light switch denotes that she deemed it an "emergency." Mr. Flynn contends that he was working on a "priority" in another unit involving a blocked bathroom sink. The work order for the sink was marked "routine." Twice Mr. Flynn told Ms. Gomes that if she wanted it fixed, she should fix it herself. Mr. Flynn was insubordinate to Ms. Gomes when he repeatedly refused to perform the work that Ms. Gomes requested, which conduct violated the rules of conduct in Collective Bargaining Agreement, section 18.2(2)(d).

At the time of Ms. Gomes's interaction with Mr. Flynn, just a few minutes past 9:00 AM, Mr. Flynn was in the shop/break room. His break did not begin until 9:15 AM. His shift began at 8:00 AM. He was having a coffee and a donut when Ms. Gomes entered the room. He jumped up, as if he was startled. Ms. Gomes did not expect anyone to be in the shop/break room, given the time. The Appellant admits he was in the break room, having coffee, waiting for a coworker to arrive from another AMP to assist him with repairing a sink clog in one of the apartments. The Appellant's conduct in this regard violated the rules of conduct regarding an unauthorized absence from work, pursuant to section 18.2(2)(d) of the rules of conduct.

Ms. Gomes had not had an issue with any other employee that would cause her to write the employee up for discipline. She had never worked with Mr. Flynn before. Immediately after she left Mr. Flynn in the shop/break room, she texted her supervisor, Ms. Ryan, because she was shocked and rattled. In addition, Ms. Gomes also told Assistant Superintendent of Facilities Brian Dean and the Superintendent of Facilities, Brian Moriarty what had occurred. They, in turn, informed the Assistant Executive Director a couple days later when he returned to work, who in turn, informed the Executive Director on August 21, 2019.

Given Mr. Flynn's extensive disciplinary history with the Authority, the Authority had just cause to terminate Mr. Flynn's employment for his most recent misconduct. Prior to this 2019 incident, Mr. Flynn had been suspended without pay for a total of fifty-nine (59) working days. He has been suspended for a multitude of violations of the Collective Bargaining Agreement rules of conduct, including engaging in offensive and undesirable conduct; using profane language; sexual harassment in the workplace; excessive sick leave usage; knowingly falsifying Authority records; misuse of Authority property; failing to perform tasks efficiently; unauthorized absence; dishonesty; and criminal, infamous, dishonest or notoriously disgraceful conduct. Additionally, Mr. Flynn has been issued multiple warnings and reprimands for conduct that did not meet the Authority's standards of conduct. Furthermore, the Appellant has had more instance of discipline than any other Authority employee at the time his employment was terminated. Finally, he is the only employee at the Authority to ever be subject to a Last Chance Agreement, never mind two (2) of them.

The Appellant alleges that he was terminated not because of his conduct but because he had requested leave under the federal Family and Medical Leave Act (FMLA) a month earlier. Mr. Flynn had been granted intermittent FMLA leave in the past, including years when he had

been disciplined previously for conduct that did not meet the rules of conduct. It appears that the Authority has been more than forgiving of Mr. Flynn's conduct since his hiring in 2001. I am unpersuaded that the Authority is using this instance of misconduct as pretext for wanting to terminate Mr. Flynn for FMLA usage. The Assistant Executive Director and the Executive Director, longtime employees of the Authority, testified that at no time was the Appellant's FMLA usage discussed relative to terminating Mr. Flynn. I credit their testimony. The Appellant offered no credible, persuasive evidence to the contrary that plausibly infers that the Authority's termination of Mr. Flynn was motivated by any reason than his misconduct, and was not related to his FMLA usage or for any other pretextual reasons.

Similarly, I am unpersuaded that Mr. Flynn was treated differently than other similarly situated employees who have been disciplined by the Authority. An Authority witness testified that no single employee has been disciplined as many times as Mr. Flynn. The Appellant avers that Employee A was also disciplined for insubordination (like the Appellant) and for other charges and yet he was only suspended for five (5) days. However, Employee A had a clean discipline history for twenty-five (25) years at the Authority. Further, Employee A was not under a Last Chance Agreement when he received his discipline, unlike Mr. Flynn. That the Authority never acted upon the Appellant's first Last Chance Agreement with termination, given Mr. Flynn was disciplined with warnings and suspensions after the *first* last chance agreement, is a testament to the Authority's patience. On August 16, 2019, the Appellant refused to respond to a work order involving an electric switch after having been asked three (3) times by his supervisor to respond to it. His response to his supervisor was that if she wanted it done, to do it herself. I find that the Appellant's misconduct merits discipline and, in consideration of his lengthy discipline history and violation of the 2017 Last Chance Agreement, his August 2019 misconduct provides just cause

for his termination. Finding no bias or other inappropriate motive in this matter, modification of the discipline issued is not warranted.

*Conclusion*

For all of the foregoing reasons, the Appellant's appeal of his *termination* pursuant to Section 43 of G.L. c. 31, under Docket No. D-19-194 is ***denied.***

The Appellant's appeal of procedural error pursuant to Section 42 of G.L. c. 31, with respect to his eight (8)-day suspension without a prior hearing, is allowed. The Commission finds that the Appellant was not afforded his G.L. c. 31, § 41 rights relative to his indefinite *suspension* by the Respondent and it orders that the Respondent restore the Appellant's loss of compensation and benefits as required by civil service law for the eight (8) days he was suspended before his employment was terminated.

Civil Service Commission

*/s/ Cynthia A. Ittleman*
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 10, 2022.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Jack Merrill, Esq. (for Appellant)
Brian M. Maser, Esq. (for Respondent)