COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS

LEONARD GAUDETTE,
Appellant

v. Docket No. D-05-51

CITY OF TAUNTON,
Respondent

Appellant's Attorney: Olinda Marshall, Esq.
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Respondent's Attorney: Robert M. Spiegel, Esq.
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Commissioner: John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant filed this appeal claiming that just cause for the Respondent's action did not exist. The Appellant, Leonard Gaudette ("Appellant"), is appealing the decision of the Respondent, City of Taunton ("City") as Appointing Authority, suspending him for five (5) days without pay from his employment as a Senior Foreman in the City's Department of Parks, Cemeteries and Public Grounds for violation

of the sick leave policy. The Appellant filed a timely appeal. A full hearing was held on November 6, 2006. Four (4) audiotapes were made of the hearing. As no written notice was received from either party, the hearing was declared to be private. Witnesses were not sequestered. Proposed Decisions were submitted by both parties as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1-24) and the testimony of the Appellant; Maria Gomez, Personnel Director; and Marilyn Green, Commissioner of Parks, Cemeteries and Public Grounds, City of Taunton, I make the following findings of fact:

1. The Appellant commenced employment with the City of Taunton in 1976. He was employed as a Senior Working Foreman in the Department of Parks Cemeteries and Public Works at the time of this discipline. (Testimony of Gomes, Greene and Appellant)
2. Prior to the year 2003, the Appellant had used very little sick time during the course of his employment. (Testimony of Gomes)
3. In the year 2003, the Appellant used a total of 104 sick days out of a possible 261 working days. He was at work for a total of only 114.5 days that year, or only 44% of the workdays. (Ex. 21, 22)
4. In the year 2004, the Appellant used a total of 84 sick days out of a possible 262 working days. He was at work for a total of only 136.5 days that year, or only 52% of the workdays. (Id.)
5. On January 14, 2004, James Moran, the Chairman of the City of Taunton Cemetery Commission, wrote to the Appellant and indicated that the Department had substantial

concerns regarding his continual absences from work. In the letter, Mr. Moran informed the Appellant that continued excessive use of sick leave may result in disciplinary action, up to and including termination from his position. This letter constitutes a written warning and is the only prior discipline the Appellant ever received from the City. (Ex. 1 and Testimony of Gomes)

6. On July 24, 2004, Dr. Kristine Phillips sent a note addressed "to whom it may concern" indicating that she recommended that the Appellant should avoid heavy lifting and reduce his work hours to no more than one or two days per week for the next six (6) weeks. (Ex. 3)
7. On July 27, 2004, in response to the note from Dr. Phillips, Steve Torres, who was the City's Acting Director of Human Resources, sent the Appellant a letter with an enclosed copy of his job description. Mr. Torres directed the Appellant to provide the job description to his treating physician. Mr. Torres noted that coming to work is an essential function of the Appellant's job. Since Dr. Phillips stated that the Appellant was limited in the amount of time he was able to work, Mr. Torres reasonably suggested to the Appellant that he might require a reasonable accommodation to allow him to perform the essential functions of his job. I find that Mr. Torres clearly sent this letter in an attempt to engage the Appellant in a dialogue about reasonable accommodations. (Ex. 4)
8. On August 2, 2004, in response to Mr. Torres' letter, the Appellant denied that he was disabled or that he needed a reasonable accommodation. He indicated that he would see his doctor at the end of six (6) weeks and then would provide his department head with his doctor's findings. However, the Appellant did not provide Dr. Phillips' findings at the end of six (6) weeks. (Ex. 5)

9. On January 5, 2005, Maria Gomes, the City's Human Resources Director, sent a letter to the Appellant once again directing him to provide a letter from his doctor detailing his medical impairment. She directed the Appellant to provide a copy of his job description to his physician. Ms. Gomes asked for a response by January 14, 2005, but one was not provided by that time. (Ex. 11 and Testimony of Gomes)
10. Even after Ms. Gomes' letter, the Appellant again refused to provide his job description to his physician. Also, the Appellant conceded during the hearing that he did not provide the requested medical information to the City. (Testimony of Gomes and Gaudette)
11. The Appellant did provide notes from his insurance company and physical therapy providers that indicated that he was approved for and receiving physical therapy. However, those notes did not provide sufficient information for the City to make an assessment of the Appellant's physical condition or ability to perform the essential functions of his position. (Ex. 6, 7, 8 & 9 and Testimony of Gomes)
12. According to Ms. Gomes and Ms. Greene, other employees within the City have received physical therapy without missing a full day of work. Other employees schedule their physical therapy appointments around their work. Further, the notes provided by the Appellant do not provide details about the physical therapy appointments or the nature of his physical limitations. (Testimony of Gomes and Greene)
13. Based on the Appellant's refusal to provide sufficient documentation from his treating physician, the City properly scheduled a disciplinary hearing, on January 21, 2005, pursuant to G.L. c. 31, § 41. In the notice of the disciplinary hearing, the City informed the Appellant that he had the right to attend and be represented by his union. (Ex. 12)

14. The City held the § 41 hearing on January 21, 2005, and the Appellant did not attend. The Appellant stated that he did not attend the hearing because he thought he had already been found guilty. There was no evidence submitted to support that he had any basis for this belief. (Testimony of Gomes, Greene and Appellant)

15. On January 25, 2005, the City issued the Appellant a five-day suspension without pay to be served from February 7-11, 2005. The discipline was imposed because the Appellant failed to provide current documentation from his physician, his documented sick days were excessive and he failed to appear at his scheduled hearing. (Ex. 17)

16. The Appellant's testimony indicated that he believed he could use as many sick days as he wanted, without regard to the needs of the department. (Testimony of Appellant)

17. The Collective Bargaining Agreement (hereinafter "CBA") between the City and the Appellant's Union contains a provision regarding the Rights of Management, at Article III, Section 1. (Ex. 20) That section provides, in pertinent part:

> . . . all of the authority, power, rights, jurisdiction and responsibility of the City are retained by and reserved exclusively to the Employer, including but not limited to, the right to manage the affairs of the City and maintain and improve the efficiency of its operation; to determine the methods, means, processes and personnel by which operations are to be conducted, including the contracting out of work; to determine the schedule and hours of work and the assignment of employment to employees; to establish new job qualifications and job duties and functions, and to change, reassign, abolish, combine and divide existing job classifications for all jobs; to require from each employee the efficient utilization of his/her services; to hire, promote, transfer, assign, retain, discipline, suspend, demote and discharge employees with just cause; to relieve employees from duty because of lack of work or other legitimate reasons; to promulgate and enforce reasonable rules and regulations pertaining to operations and employees; and to take whatever action may be conducive to carrying out the mission of the Department.

18. Article VI of the CBA between the City and the Appellant's Union covers sick leave. Of note, in pertinent parts:

> Section 1(a) . . . Sick leave accumulation shall be unlimited and shall not lapse.
>
> Section 5. An employee whose service is terminated for any reason shall not be entitled to compensation in lieu of sick leave not used, except that an employee whose service is terminated by reason of death or retirement in accordance with regulations of the City of Taunton, Massachusetts Retirement system, shall be paid for accumulated sick leave at their regular rate of pay being received at the time of their death or said retirement, payable to the employee or his/her estate. Effective July 1, 1999, the payable amount will not exceed ten thousand dollars ($10,000.00). (Id.)

19. The sick leave provisions of the CBA include an incentive dollar amount for each calendar year. Employees who use no sick leave in a calendar year are entitled to a $600.00 incentive; employees who use one day of sick leave are entitled to a $500.00 incentive; employees who use two days of sick leave are entitled to a $400.00 incentive and employees who use three days of sick leave are entitled to a $300.00 incentive. There are no incentives for employees who use more than three days in a calendar year. Prior to 2003, the Appellant used very little sick leave and received this incentive. (Ex. 20 and Testimony of Gomes)
20. The Appellant retired from the City effective December 2, 2005. (Ex. 19)
21. When the Appellant retired, he received a pay out of $9,489.30, based on the amount of sick leave he had remaining in his bank. The maximum the Appellant could have received upon retirement was $10,000.00. By using so much sick leave in 2003 and 2004, the Appellant reduced the amount of sick leave in his bank and left only that amount of leave for which he would be eligible to be compensated. This indicated an attempt by the Appellant to "burn off", or use up, as much sick time as he could during

the final years of his employment so it would not remain unused or uncompensated at his retirement. (Testimony of Gomes)

22. In 2004, there were several changes within the City of Taunton that impacted the Appellant and the department in which he worked. The Cemetery Department merged into the larger Department of Parks, Cemeteries and Public Grounds. During the time period surrounding the merger, the Department was also short-staffed, due to lay-offs. The Department was very busy during this time period, with a change in management. (Testimony of Gomes and Greene)
23. Prior to the merger, there was a lack of oversight of the Cemetery Department, in part because the Department had no manager. Following the merger, Ms. Greene became the manager for the employees. Ms. Greene works in conjunction with a general foreman, who handles job assignments. (Testimony of Greene)
24. The City maintains 25 cemeteries, five of which are active burial sites. (Id.)
25. The Appellant was a working foreman in the Department. The Appellant worked alongside the other employees doing the work of the Department in maintaining cemeteries, active burials and the other duties of the Department. In addition, the Appellant was one of only two employees at the time who was qualified to operate the backhoe, a necessary piece of equipment. His absences left only one person who was qualified to operate the backhoe. (Ex. 4 and Testimony of Greene)
26. The Appellant's regular work schedule was 7:00 a.m to 3:30 p.m. (Testimony of Greene)
27. During some of the time the Appellant used sick time in 2003 and 2004, he attended physical therapy. He attended physical therapy twice per week for one hour. During the

days he had physical therapy, the Appellant used sick leave and did not report to work at all. (Testimony of Gomes, Greene and Appellant)

28. In a situation such as the Appellant's, where an employee uses a large amount of sick leave, it is standard operating procedure for the City to ask the employee for more details regarding the nature of his illness. It is standard for the City to ask the employee to provide his physician with a copy of his job description so that the physician can assess the employee's ability to perform the essential functions of his position. (Testimony of Gomes)

29. The City has a sick leave policy that applies to all departments and has been distributed among department managers. It has been in effect with the Appellant's Union, the Laborers, since 2003. The policy provides department managers with discretion to require employees who have a high use of sick leave to provide a physician's certificate of illness. (Ex. 24 and Testimony of Gomes)

30. The CBA, at Article VI, Section 1(b), provides:

> Upon the request of the Department Head, any employee covered by this Agreement shall furnish a certificate from an attending physician for all consecutive days off each leave beyond three (3) days, stating the nature of the illness and that the employee is able to return to work.

(Ex. 20)

31. As Ms. Gomes testified, the language at Article VI, Section 1(b) contemplates a one-time, discrete event where an employee is ill. The Appellant's situation was different, because he consistently used two or three consecutive days of sick leave throughout 2003 and 2004. While he did not use sick leave beyond three consecutive days, on the many occasions he used sick leave, his pattern of sick leave use provided the City with reason to further inquire of the nature of his illness. The Appellant's use of sick leave

constituted a pattern of leave that may be considered excessive. Based on the Appellant's pattern of sick leave, it was necessary for the City to seek this medical information. (Testimony of Gomes)

32. The City, on at least two occasions, asked, in writing, for the Appellant to provide a copy of his job description to his treating physician so that the physician could determine whether the Appellant could perform the essential functions of his position. (Ex. 4, 11)
33. The Appellant refused the City's request. At the hearing in this matter, the Appellant was unable to adequately explain why he failed to comply with the directives from Mr. Torres and Ms. Gomes to provide his job description to his physician; other than stating he did not feel he was required to comply with those directives, he offered no explanation. (Testimony of Appellant)
34. While the Appellant provided brief notes from his physical therapy providers indicating that he was scheduled for physical therapy, those notes provided no details regarding the time of day the sessions were to be held, nor did they indicate that the Appellant required an entire day off for each physical therapy session. A physician never indicated that the Appellant required a full day off following his physical therapy appointments. (Ex. 6, 8 & 9)
35. Neither the Appellant nor the Appellant's physician provided the information requested in Mr. Torres' July 27, 2004 letter or Ms. Gomes' January 5, 2005 letter. (Testimony of Gomes and Appellant)
36. Ms. Greene verbally informed the Appellant that he needed to provide documentation for his absences. (Testimony of Greene)

37. It would have been inappropriate for Ms. Gomes or Ms. Greene, or anyone else in the City, to attempt to surmise the Appellant's physical condition without more detailed information from his physician. They needed more information about the Appellant's physical condition because it would have been inappropriate for them to base official human resources decisions on assumptions. (Testimony of Gomes and Greene)
38. The Appellant testified that he had pain that could have placed him in danger while working. (Testimony of Gaudette)
39. I find that the testimony of Ms. Gomes was credible and reliable given its clarity and detail. She was a thoughtful, confident and businesslike witness. She offered forthright answers to questions and did not evade giving answers which may not have been favorable to her position on the matter. I found her to be cooperative and professional. I assign great weight to her testimony in this decision.
40. Ms. Greene exhibited a bit of nervousness when testifying about the Appellant's November 9, 2004 Physical Therapy Evaluation/Treatment report (Ex. 7). She eventually offered clear and convincing answers to multiple questions as to how she viewed the document's veracity and how she handled the document during this matter. I find her mild confusion in this regard to have been overcome and I credit her answers as honest.
41. I credit the testimony of Ms. Greene and Ms. Gomes that the Department is very busy and was especially busy during the time the Appellant was using so much sick leave in 2004.
42. I found the Appellant's testimony to be a reflection of what he sincerely believed, although, not always responsive. He also tended to exhibit poor recall of details. The Appellant did become very animated, and his voice changed from soft and somewhat

garbled to forceful and clear, when asked why he didn't provide his doctor with his job description, as requested by both Ms. Greene and Ms. Gomes. The Appellant testified that he didn't feel he had to provide that information to this doctor and that he believed the City was trying to place him on disability retirement, even though there was no evidence that this was so. His emotional response to this line of questioning compels me to find that his concern about disability retirement led him to be evasive in cooperatively providing information regarding his sick leave.

CONCLUSION

The role of the Civil Service Commission (hereinafter "Commission") is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The proper inquiry for determining if an action was justified is, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest

by impairing the efficiency of the public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be met by a preponderance of the evidence. G.L. c. 31, §43.

The Appointing Authority has established through a preponderance of the evidence that it had reasonable justification for suspending the Appellant for five days. The Appellant's attendance record in 2003 and 2004 was remarkable for the number of days he missed work. He appeared for work less than half the time in 2003, and just over half the time in 2004. A review of the calendars and spreadsheets provided by the City shows a clear pattern of excessive use of sick leave, usually two or three consecutive days per week, almost every week, in 2003 and much of 2004. (Ex. 21 and 22) It was a rare occurrence during that time period for the Appellant to work a full week. This is not simply excessive use of sick leave, but abuse of the sick leave entitlement provided in the Appellant's union contract, without regard to the needs of the City to run a busy department.

The Appointing Authority identified a problem, the Appellant's excessive use and abuse of sick leave, and sought to address that problem. Based on the management rights clause in the CBA, the City had the right to warn the Appellant that failure to improve his attendance could lead to discipline. More importantly, both Mr. Torres and Mr. Gomes asked him to show his physician a copy of his job description so that his physician would be able to fully understand the Appellant's job requirements and provide a knowledgeable opinion about the Appellant's ability to perform the functions of his job when considering his physical limitations. The Appellant

refused to provide such documentation to his physician or to provide a more detailed physician's report to his supervisors.

The City gave the Appellant several opportunities to provide the requested information prior to imposing discipline. In January 2004, Mr. Moran warned the Appellant that failure to improve his attendance could result in disciplinary action, including possible discharge. This constituted a written warning, but the Appellant failed to improve his attendance after receiving this letter.

In July 2004, in response to Dr. Phillips' letter, Mr. Torres issued a reasonable directive to the Appellant for him to provide his job description to his treating physician. Based on the amount of sick leave used, the City had reason to further inquire about the Appellant's ability to do his job. Based on those absences, it was reasonable for the City to suggest that the Appellant might need a reasonable accommodation. The Appellant's own testimony highlights a reason for the City's requests that he show his job description to his physician: it was important for his physician to have an accurate understanding of his job duties so that the Appointing Authority could understand whether he could perform the essential functions of his position with or without an accommodation.

The Appellant completely rejected the City's offer to engage in a dialogue about reasonable accommodations, instead contending that he was not disabled and did not need an accommodation. However, in his August 2, 2004 letter, he stated that he would provide his

doctor's findings at the end of six (6) weeks. He never did this and his attendance records show that even after those six (6) weeks, he continued to use an excessive amount of sick leave.

While the Appellant later provided physical therapy notes, those notes did not adequately respond to the City's requests. They did not address the Appellant's limitations when considered in conjunction with his job description. Whether or not the physical therapy notes the Appellant provided can be considered medical reports, the Appellant continually refused to cooperate with his employer's request. He refused to show his job description to his doctor and he provided no reason for his failure to do so, other than he didn't think he needed to do so. This was after two Human Resources Directors requested that he do so.

One of the cardinal rules of labor relations is "obey now, grieve later." It is well established that if an employee refuses to comply with a supervisor's order to perform a work assignment, the refusal can be the basis for discipline. If the Appellant felt that it was a violation of his CBA for the City to direct him to provide more information from his physician, he could have filed a grievance over it, after complying with the directive. Instead, he failed to comply with a direct order from his employer, which constituted insubordination. Ultimately, after having already received a written warning and his employer having provided him with more chances to comply, he received the five-day suspension.

The Department in which the Appellant worked was experiencing a busy time in 2004 with a department merger and reorganization. It is within the rights of management to question an employee who uses an excessive amount of sick time, as was the situation with the Appellant.

It is clear from the record that the Appellant did use an excessive amount of sick time in 2003 and 2004, and that he engaged in a pattern of sick leave abuse.

Common sense dictates that when an employee uses 103 days of sick leave in one year, and 84 days of sick leave the following year, his employer has a right to ask for an explanation for such a large amount of leave, including the opinion of a qualified medical professional who is able to consider the demands of the employee's job along with the limitations imposed by the employee's physical condition. Common sense also dictates that the language in Article VI of the CBA would not preclude an employer from asking for medical information when there is a clearly recognizable pattern involving the repeated, extensive use of sick leave. It is also common sense that an employer, including a public employer such as a City, cannot function if its employees do not report to work. I credit the testimony of Ms. Greene and Ms. Gomes that the Department is very busy and was especially busy during the time the Appellant was using so much sick leave in 2004.

In 1994, a majority of the Commission affirmed the actions of an Appointing Authority in suspending an employee for five days based on sick leave abuse. Licata v. City of Methuen, Case No. D-4446 (January 12, 1994). The employee in question had an established history of sick leave abuse and refused to authorize the release of her medical records to the Appointing Authority so that the legitimacy of her use of sick leave could be evaluated. In another case, the Commission upheld a suspension for use of sick leave on 20 occasions within a 315-day period. O'Brien v. Massachusetts Bay Transportation Authority Police Department, 11 MCSR 259 (1998) ("[i]t is incomprehensible that any labor contract could provide for the sort of attendance

pattern established in this case."). The Commission has also upheld the suspension of an employee who failed to follow the procedures for documenting his illness following his use of sick leave time. Stroh v. Department of Correction, 8 MCSR 179 (1995).

In the Appellant's case, the City's requests were reasonable, and the Appellant's failure to comply with the City's requests was unreasonable and constituted insubordination. The Appellant provided no satisfactory explanation for not providing his job description to his treating physician so that the physician could assess the effect of the Appellant's physical limitations on his ability to perform his job. The City's witnesses justified the requests for information from a treating physician, while the Appellant failed to explain his failure to provide the requested information. The management rights clause of the CBA provided the authority for Mr. Torres and Ms. Gomes to request the Appellant to provide a copy of his job description to his treating physician. Based on the Appellant's use of 103 sick days in 2003 and 84 sick days in 2004, the City had reason to require him to provide more documentation for his sick leave. During the hearing in this matter, Appellant's Counsel stated that the Appointing Authority may have been in violation of the Family and Medical Leave Act (FMLA) as it applied to the Appellant. We find that the Appellant could well have raised this issue at the Appointing Authority's hearing but chose not to attend. The Commission does not have jurisdiction over claims involving the FMLA.

The Appellant retired in December 2005. He was able to receive $9,489.30 when he retired, based on the value of his accumulated sick leave. Since the maximum payout of accumulated sick leave upon retirement is $10,000.00, an objective observer could view the

Appellant's increased use of sick time in 2003 and 2004 as a way to "burn off" much of his excess, accumulated sick leave prior to retirement. It is unbelievable that burning off this sick leave was not on the Appellant's mind when he used it, given the length of time he worked for the City and the amount of sick leave available in his bank. It would be too much of a coincidence to believe that he happened to retire in 2005 with just under the $10,000.00 cap without having an awareness of his actions while he was using such a large amount of sick leave in 2003 and 2004. When some public employees regard work benefits and incentives as entitlements and, worse, when these benefits are consumed with a "use it or lose it" gusto, all public employees suffer a further erosion of the taxpayers' esteem.

The Appellant's responses to the City's letters seeking more detailed information from his treating physician, as well as his testimony at the hearing, indicate that he believed he could use his accumulated sick leave as he saw fit, without regard to the needs of the City. Pursuant to the management rights clause of the Laborers' contract, the City retains the right to manage its affairs and maintain the efficiency of its operation. Based on the management rights clause, the City was justified in directing the Appellant to show his job description to his treating physician in order for the physician to assess the Appellant's ability to perform the functions of his job and the Appellant was wrong for refusing this reasonable directive. The City was not trying to prevent the Appellant from using his sick leave, and indeed paid him for all sick leave time he used. The City was merely trying to assess whether the Appellant's use of sick leave in 2003 and 2004 was excessive. The Appellant never provided that information, repeatedly disregarding his employer's directive. Therefore, it was within the discretion of the Appointing Authority to

issue the five-day suspension. The decision to suspend for five days was made upon adequate reasons sufficiently supported by a preponderance of the credible evidence.

Therefore, the appeal on Docket No. D-05-51 is hereby ***dismissed***.

Civil Service Commission

_____
John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Guerin, Marquis and Bowman, Commissioners) [Taylor, Commissioner absent] on April 5, 2007.

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. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Olinda Marshall, Esq.
Robert M. Spiegel, Esq.