COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

SEAN GILLIGAN,
Appellant

v.

CITY OF QUINCY,
Respondent

Case No.: D1-12-20

DECISION

The Civil Service Commission (Commission) voted at an executive session on November 1, 2012 to acknowledge receipt of: 1) the Recommended Decision of the Administrative Law Magistrate dated September 13, 2012; 2) the Appellant's one-sentence "objection" to the Recommended Decision and request for oral argument; and 3) the Respondent's objection to the Appellant's request for oral argument. After careful review and consideration, the Commission voted 4-1 to adopt the findings of fact and the Recommended Decision of the Magistrate therein – and deny the Appellant's request for oral argument. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby ***dismissed.***

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Ittleman, Commissioner – Yes; Marquis, Commissioner – Yes; McDowell. Commissioner – No; and Stein, Commissioner – Yes) on November 1, 2012.

A true record. Attest.

Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:
S.L. Romano (for Appellant)
Janet S. Petkun, Esq. (for Respondent)
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200
FAX: 617-626-7220
WEBSITE: www.mass.gov/dala

September 13, 2012

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

Re: Sean Gilligan v. City of Quincy
DALA Docket No. CS-12-231
CSC Docket No. D1-12-20

Dear Chairman Bowman:

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

Sincerely,

Richard C. Heidlage
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: S.L. Romano
Janet Petkun

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals
One Congress Street, 11th Floor
Boston, MA 02114
(617) 626-7200
Fax: (617) 626-7220
www.mass.gov/dala
Docket No: D1-12-20
CS-12-231

SEAN GILLIGAN,
Petitioner

v.

CITY OF QUINCY,
Respondent

Appearance for the Appellant:

S.L. Romano
Regional Coordinator
New England Laborer's Labor Management Cooperation
226 S. Main Street
Providence, RI 02903

Appearance for Respondent:

Janet S. Petkun
Assistant City Solicitor
City of Quincy
1305 Hancock Street
Quincy, MA 02169

Administrative Magistrate:

Angela McConney Scheepers, Esq.

SUMMARY OF DECISION

The City of Quincy had just cause to terminate the Appellant from his position as maintenance person in the Sewer/Water/Drain Division of the Department of Public Works. I therefore recommend that the Civil Service Commission dismiss the appeal.

DECISION

INTRODUCTION

The Appellant, Sean Gilligan (hereinafter "Appellant" or "Mr. Gilligan"), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission on January 6, 2012, claiming that the City of Quincy (hereinafter "the City") did not have just cause to terminate him from his

position as maintenance person in the Sewer/Water/Drain Division of the Department of Public Works ("DPW").

The appeal was timely filed. A pre-hearing was held on February 21, 2012 at the offices of the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. A hearing was held on May 11, 2012 at the offices of the Division of Administrative Law Appeals (DALA), One Congress Street, 11th Floor, Boston, MA 02114. The witnesses were sequestered. The hearing was digitally recorded.

Sixteen joint exhibits were submitted into evidence. The Respondent's prehearing memorandum was marked "A" for identification, and the parties' Joint Proposed Hearing memorandum, including a Stipulation of Facts, was marked "B" for identification. The Respondent submitted its proposed decision on July 2, 2012. The Appellant submitted his proposed decision on July 9, 2012.

FINDINGS OF FACT

Based on the documents admitted into evidence and the testimony of:

For the Appointing Authority:

- Daniel Raymondi, DPW Commissioner
- Lawrence Prendeville, DPW Commissioner

For the Respondent:

- Peter Hoyt, Superintendent of the DPW Sewer/Water/Drain Division
- Mark Vialpando, General Foreman of the Sewer/Water/Drain Division
- William Fullerton, Timekeeper
- Robert Wright, Union Steward of the Sewer/Water/Drain Division
- Daniel Mooney, Vice President of Local 1139

I make the following findings of fact:

1. At all relevant times, Sean Gilligan was a tenured civil service employee of the City. He worked as a Water/Sewer maintenance man in the Sewer/Water/Drain Division of the Department of Public Works (DPW) for fourteen years. His primary responsibility was the operation of jet trucks in the cleaning of sewers. (Stipulated Facts)
2. The Appellant had a disciplinary history. He received a verbal warning for showing up to work when he reported to work on March 26, 2008, in no fit condition to perform his duties. (Exhibit 6)
3. On April 2, 2008, DPW Commissioner Lawrence Prendeville advised the Appellant that because he had used six and a half sick days in a manner that qualified as three or more instances in a three month period, he would have to submit a physician's note in order for future absences to be excused. (Exhibit 7)
4. On April 3, 2009, Sewer/Water/Drain Superintendent Brian Carlisle advised the Appellant that due to his use of four sick days in a three month period, he would have to submit a physician's note in order for future absences to be excused. (Exhibit 8)
5. On November 20, 2009, Commissioner Prendeville advised the Appellant in writing that he had used all of his sick time for the year, that he had used sick time without providing the required physician's notes, and that his frequent absences were unacceptable and would not be tolerated. In the same letter, Commissioner Prendeville further advised that the Appellant's "attendance will continue to be monitored and dealt with accordingly." (Exhibit 9)
6. On March 26, 2010, Commissioner Prendeville suspended the Appellant for two days after he refused to work overtime. (Exhibit 10)

7. The City's Drug and Alcohol Testing Policy has applied to all employees since January 1, 1995. (Exhibit 12)
8. In accordance with the policy, the following types of tests are required: (1) pre-employment, (2) post-accident, (3) reasonable suspicion, (4) random, (5) return to duty and follow up. (Exhibit 12)
9. On May 17, 2010, Commissioner Prendeville suspended the Appellant for five days after he tested positive on May 14, 2010 for alcohol. Commissioner Prendeville also recommended that a hearing take place to determine if further disciplinary action should be taken, including the possibility of termination. (Exhibit 11)
10. The City held a disciplinary hearing on May 19, 2010, and sufficient facts were found to warrant dismissal. (Exhibit 5)
11. In lieu of termination, on June 23, 2010, the Appellant entered into a two year Last Chance Agreement with the City, wherein he entered the Quitting Time Intensive Outpatient Program for alcohol/drugs for fifteen days, agreed to release the program to provide any information the City may request without further documentation, agreed to report to the Quincy Medical Center Occupational Health Center to be medically cleared prior to discharge from the program, agreed to be randomly tested as designated by the DPW Commissioner, and agreed to adhere to professional conduct at all times. (Exhibit 11)
12. The agreement provided in part:

> Mr. Gilligan understands that this is a "Last Chance Agreement." Any violation of the terms and conditions of this "Last Chance Agreement" or any violation of a policy, rule or regulation of the City of Quincy, including but not limited to attendance/sick day policies or state or federal law will result in immediate termination. This Agreement shall be in full force and effect for 2 years.

(Exhibit 11)

13. On October 23, 2011, a Sunday, Andrew DeStaci was on call for the weekend at the DPW. The Appellant showed up for work with dried blood on his person, appearing disoriented and confused. He was sent home. (Testimony of Vialpondo, Testimony of Fullerton)
14. The Appellant called the DPW all night, speaking incoherently. He said that people in his building were hunting him. (Testimony of Vialpondo)
15. William Fullerton is the timekeeper for the Sewer/Water/Drain department. He is responsible for reporting attendance and for the Sewer payroll. On October 24, 2011, when he reported to work, DeStaci told him that the Appellant had reported to work the previous day, a Sunday, and had appeared unwell. (Testimony of Fullerton)
16. DeStaci and Fullerton then spoke to Robert Wright, the Union Steward, and called the Appellant at 6:30 a.m. He did not answer his phone. (Testimony of Vialpondo)
17. Fullerton and DeStaci then went to the Appellant's home. (Testimony of Fullerton)
18. They found his apartment door ajar, and the Appellant was in the bathroom attempting to shave. There was a cut above the Appellant's eye and a cut on his chin. There were bruises on his back and he was bleeding. The apartment was in disarray and a door was smashed or broken. The Appellant was speaking nonsense. (Testimony of Fullerton, Testimony of Wright)
19. Fullerton and DeStaci spent more than twenty minutes trying to convince the Appellant to seek medical attention, but to no avail. They then left and returned to DPW in order to let Superintendent Peter Hoyt, Fullerton's direct supervisor, know what was going on. Superintendent Hoyt served as a junior civil engineer for DPW. (Testimony of Fullerton)
20. Fullerton and Superintendent Hoyt left DPW and went to the Appellant's apartment, arriving around 8:00 a.m. The Appellant was in a confused, disoriented, injured and hallucinogenic

state, and continued to refuse medical attention. Superintendent Hoyt called the police. (Testimony of Fullerton, Testimony of Wright)

21. After the police arrived, they called for an ambulance. (Testimony of Wright)
22. The Appellant was transported to Quincy Medical Center, where he remained for four days. On October 28, 2011, he was civilly committed to the High Point Treatment Center per order of the Quincy District Court. The Appellant remained committed until November 11, 2011. (Testimony of Wright, Testimony of Hoyt, Exhibit 14)
23. Mark Vialpando, the general foreman for the Sewer/Water/Drain Division, has been employed by DPW for twenty-three years. His responsibilities include approving vacation requests for employees in the division in conjunction with Superintendent Hoyt. (Testimony of Vialpando)
24. From September 28, 2011 to November 10, 2011, the Appellant worked a total of three days. In that time period, he took two sick days and some vacation days without the approval of either Vialpando or Supervisor Hoyt. The vacation days amounted to unexcused absences, known as "zero pay" or "no pay" days. (Testimony of Vialpando, Exhibit 4)
25. By November 1, 2011, the Appellant had no sick, vacation or personal time available. He was not covered under workers' compensation or the Family Medical Leave Act. (Testimony of Raymondi, Testimony of Prendeville, Testimony of Fullerton, Testimony of Vialpando, Testimony of the Appellant, Exhibit 4)
26. There are approximately thirty-seven employees in the Sewer/Water/Drain Division, which is a twenty-four hour operation. Employees must be available for overtime assignments in order to handle emergencies, in addition to the regular maintenance work. (Testimony of Prendeville)

27. Due to its small size, unscheduled and unexcused absences cause are challenging for the division as employees have to be reassigned. It is also costly since overtime expenses may be incurred in a nonemergency situation. (Testimony of Prendeville)

28. The Sewer/Water/Drain Division had to adapt to Gilligan's absence and "work around" him. (Testimony of Vialpando)

29. After reviewing Gilligan's attendance report, the Last Chance Agreement, and the City's policies regarding alcohol and attendance, on November 16, 2011 Commissioner Daniel Raymondi notified Mr. Gilligan that he was suspended for five days without pay. Commissioner Raymondi wrote:

    1. This Department does not tolerate "zero" or "no pay" days;
    2. You violated the terms and conditions of your Last Chance Agreement with the City of Quincy;
    3. You failed to notify this Department in writing regarding your circumstances and
    4. You abandoned your position;
    5. You violated the Collective Bargaining Agreement between Local Union 1139 and the City of Quincy.

    (Exhibit 3)

30. The Appellant appealed the suspension, and a hearing was held on November 30, 2011 before Stephen J. McGrath, Director of Human Resources. (Exhibit 2)

31. On December 28, 2011, in his recommendation to Mayor Thomas P. Koch, Director McGarth urged that that the Appellant's employment with the City be terminated immediately. (Stipulated Facts; Exhibit 2)

32. On January 3, 2012, Mayor Koch terminated the Appellant's employment. (Stipulated Facts; Exhibit 1).

33. Mr. Gilligan appealed his discharge to the Civil Service Commission on January 6, 2012. (Stipulated Facts; Testimony of the Appellant)

CONCLUSION AND ORDER

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997). The Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray v. Second District Court of East Middlesex, 389 Mass. 508, 514 (1983) and School Committee of Brockton v. Civil Service Commission, 43 Mass.App.Ct. 486, 488 (1997). 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. *Cambridge*, 43 Mass. App. Ct. at 304.

In reviewing an appeal under G.L. c. 31, § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004). The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the Commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the Appointing Authority made its decision." *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

"It is well established that the Commission should give great weight to the provisions of a Last Chance Agreement, a voluntary agreement between an employer and employee, which, typically in lieu of immediate termination, effectively puts an employee on notice that any further discipline will result in his or her termination. The Commission does not make decisions

in a vacuum, however, and it is appropriate to consider the circumstances that gave rise to this particular agreement." *Davis v. Newton*, 20 MCSR 402, 405-06 (2007).

I find that that the City of Quincy was justified in terminating the employment of Sean Gilligan. The Appellant was already subject to a Last Chance Agreement that he had entered into on June 23, 2010, to be in effect for two years. Thus there is no dispute that on the dates of the incident, September 28, 2011 to November 10, 2011, the Agreement was in full force.

The Appellant entered into the Last Chance Agreement in lieu of termination after being suspended for five days after testing positive for alcohol on May 17, 2010. The Appellant already had a history of excessive absenteeism that led to the requirement that he provide physician's notes for his absences. He had been disciplined for refusing to work overtime in a division that was a twenty-four operation.

In the Agreement, the Appellant agreed to many terms including entering the Quitting Time Intensive Outpatient Program for alcohol/drugs for fifteen days, to be randomly tested as designated by the DPW Commissioner, and to adhere to professional conduct at all times. As part of the Agreement, the Appellant agreed that any violation of a policy, rule or regulation of the City of Quincy, including but not limited to attendance/sick day policies or state or federal law would result in immediate termination.

Despite the Last Chance Agreement which he had entered into merely one year earlier, the Appellant had attendance issues in September-November, 2011 that led to suspension, termination and this appeal.

The City argued that those events were a violation of the Last Chance Agreement. The Appellant failed to report for work although he had no sick time or vacation time left. Although he was not eligible, he took vacation time without the approval of the general foreman Mark Vialpondo and Superintendent Hoyt. At his time away, he was not receiving workers'

compensation nor was he entitled to leave under the Family Medical Leave Act. His days away were a violation of the City's policy against unexcused absences, known as "zero pay" or "no pay" days.

I find that Mr. Gilligan's time off, without seeking permission from those authorized to grant it, was a violation of City policy and thus a violation of the Last Chance Agreement. His absence not only caused a decrease in manpower and impacted the efficiency of the City, but manpower hours were drawn away from the City when his co-workers left their assignments to go to check on his wellbeing.

The Appellant has argued that his behavior did not amount to a violation of the Last Chance Agreement. It is apparent that the Appellant has a problem with alcohol. The City tried to work with him by applying progressive discipline, keeping his job open while he received treatment, and by entering into the Last Chance Agreement with him instead of termination in June 2010. From their conduct, it is clear that his DPW peers and supervisors wanted him to get well and succeed at work. However, that could not happen without his participation. Instead of owing up to his shortcomings with DPW management in a timely manner, the Appellant stayed away from work and never officially notified the City that he would be away from work.

The Appellant testified that he telephoned Robert Wright, the union steward, and asked him to apply for a sick bank on his behalf. Daniel Mooney, the vice president of Local 1139 testified that he submitted a sick bank request to the City's Human Resources Department in October 2011, but that he failed to follow up. The Appellant was under the impression that he would receive the benefit of a sick bank. His coworkers believed that since management was aware of the events of October 24, 2011, someone would file the proper paperwork so that the Appellant's behavior would be excused.

Nonetheless, the Appellant's behavior was in violation of the Last Chance Agreement, by which the City could terminate him for a violation of its policies, rules or regulations. The Appellant's unscheduled and unexcused absence from work from September 28-November 10, 2011 violated the Agreement. The City has to prove nothing further.

There is no evidence that the City's decision was based on political considerations, favoritism or bias. Thus the City's decision to terminate the Appellant is "not subject to correction by the Commission." *Cambridge*, 43 Mass. App. Ct. at 305.

Based on the preponderance of credible evidence presented at the hearing, I conclude that the City had just cause to terminate Sean Gilligan. Accordingly, I recommend that the appeal be dismissed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Angela McConney Scheepers
Administrative Magistrate

DATED: SEP 13 2012