

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

PABLO GUERRERO,
Appellant
v.

Case No.: D1-21-212

CITY OF BOSTON,
Respondent

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission and the parties had thirty days to provide written objections to the Commission. No objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate thus making this the Final Decision of the Commission.

To ensure clarity, the Commission, in affirming the Magistrate's decision, considered whether there was "just cause" to discipline the Appellant.

Section 43 of G.L. c. 31 states, in relevant part:

" ... 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’” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism, and bias in governmental employment decisions.’” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited.

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task ... is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Id., quoting internally from Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

In regard to whether or not the penalty imposed here (termination) should be modified, the Commission considered the following:

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. 31, § 43 (‘The commission may also modify any penalty imposed by the appointing authority.’) ... Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the ‘equitable treatment of similarly situated individuals.’ Police Comm’r of Boston v. Civ. Serv. Comm’n, 39 Mass. App. Ct. 594, 600 (1996). However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system— ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’” Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 823-824 (2006), quoting Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997).

“Unless the commission’s findings of fact differ significantly from those reported by the [appointing authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the [appointing authority] on the basis of essentially similar fact finding without an adequate explanation.” Falmouth v. Civ. Serv. Comm’n, 447 Mass. at 824, citing Police Comm’r of Boston v. Civ. Serv. Comm’n, 39 Mass. App. Ct. at 600.

Here, the Magistrate’s findings, made after making credibility assessments regarding various witnesses, including the Appellant, do not differ significantly from the findings of the Respondent. Further, the Magistrate has found that the decision here was not the result of any bias or favoritism. Finally, the Commission considered the severity of the misconduct that occurred here, which resulted in burns on several parts of a fellow employee’s body, requiring medical attention. For these reasons, the Commission concluded that a modification of the penalty imposed (termination) was not warranted.

The decision of the City of Boston to terminate the Appellant’s employment is affirmed and the Appellant’s appeal under Docket No. D1-21-212 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on October 20, 2022.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

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)(1), 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:
Matthew K. Barison, Esq. (for Appellant)
Tanya E. Dennis, Esq. (for Respondent)
Edward B. McGrath, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Civil Service Commission

Pablo Guerrero,
Appellant

v.

DALA Docket No. CS-22-0123
CSC Docket No. D1-21-212

City of Boston,
Respondent

Appearance for Appellant:

Matthew Barison, Esq.
100 Cambridge St., 14th Floor
Boston, MA 02114

Appearance for Respondent:

Tanya E. Dennis, Esq.
City of Boston Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

Administrative Magistrate:

Kenneth J. Forton

SUMMARY OF RECOMMENDED DECISION

The appointing authority’s decision to terminate Appellant from his Motor Equipment Repairperson position under the City of Boston’s “Zero Tolerance for Violence” policy for throwing a hot tray of scrambled eggs in a co-worker’s face after an argument over a car, causing him first degree burns, was reasonably justified.

RECOMMENDED DECISION

Pursuant to the provisions of G.L. c. 31, § 43, Appellant Pablo Guerrero filed this appeal with the Civil Service Commission claiming that Respondent City of Boston did not have

reasonable justification to discharge him under the City’s “Zero Tolerance for Violence” policy. The appeal was timely filed on November 14, 2021.

I held a hearing on June 9, 2022 at the Civil Service Commission, One Ashburton Place, Boston. As no written notice was received from either party, the hearing was declared private. I admitted 19 exhibits into evidence. (Appellant Exs. 1-10; Respondent Exs. 1-9.) Both parties submitted pre-hearing memoranda. William Coughlin, Director of Central Fleet; Alejandro Gonzales, auto technician; Victor Monteiro, mechanic; and Ednel Horace, on-site manager for NAPA auto parts, along with Guerrero himself, testified on behalf of the Appellant. Patricia Casey, Director of Human Resources for the Public Works Department; Employee A, auto technician; and Steve Schmidt, owner of Steve’s Canteen truck, testified on behalf of the Respondent. After the hearing I entered the relevant collective bargaining agreement into evidence as Appellant Exhibit 11. On August 15, 2022, the parties filed closing briefs and the administrative record closed.

FINDINGS OF FACT

Based on the evidence provided by the parties, I make the following findings of fact:

1. Appellant Pablo Guerrero worked at Boston Public Works in the Central Fleet Maintenance Division from 2013 to 2021 in the main garage. He was hired as a full-time Motor Equipment Repairperson Class III. He was later promoted to Heavy Motor Repairperson Class II. (Casey Testimony; Coughlin Testimony; Guerrero Testimony; Appellant Ex. 1.)
2. Guerrero worked hard and maintained good relationships with his colleagues and superiors. (Coughlin Testimony; Employee A Testimony; Gonzales Testimony; Guerrero Testimony; Appellant Exs. 2, 3, 6.)
3. Since 2015, the City has maintained a “Zero Tolerance for Violence” policy with the objective to “demonstrate to its employees, citizens and the business community of Boston,

that violence of any kind cannot and will not be tolerated.” It defines violence as including physically assaultive behavior, actions that a reasonable person would perceive as menacing, or throwing objects in a manner reasonably perceived to be threatening. An employee engaging in such behavior is subject to severe discipline, including termination. Employees must review and sign the policy when they are hired, and then annually. (Casey Testimony; Respondent Ex. 1.)

4. The relevant collective bargaining agreement, effective beginning July 1, 2016, between the City of Boston and Guerrero’s union required progressive discipline in “all but the most serious cases.” (Appellant Ex. 11.)

5. On March 9, 2016, Guerrero reviewed and signed the “Zero Tolerance for Violence” policy. (Appellant Ex. 5.)

6. On March 31, 2021, Guerrero reviewed and signed the “Zero Tolerance for Violence” policy. (Respondent Ex. 8.)

7. Despite its title, not all employees who violate the Zero Tolerance for Violence policy are disciplined the same way. Discipline under the policy also takes into account the severity of the violence, whether police are involved, and the perpetrator’s past history of violence and on-the-job discipline, among other possible factors. (Casey Testimony.)

8. Approximately June 30, 2021, Employee A, another employee at the main garage, approached Guerrero about buying a car for a friend of his. Guerrero arranged for the sale of the car to Employee A’s friend. (Employee A Testimony; Guerrero Testimony.)

9. On July 7, 2021, after the sale was completed, Guerrero received multiple calls from Employee A’s friend, the buyer. The car had problems that she wanted Guerrero to fix. Guerrero replied that it was not his responsibility, as he was not the seller. (Guerrero Testimony.)

10. After this, the buyer called Employee A, who instructed her to examine the bill of sale for the words “as is.” If she purchased the car “as is,” he explained, she would be responsible for fixing the car herself. Later, she messaged Employee A a picture of the bill of sale. The words “as is” did not appear on it. (Employee A Testimony.)

11. Every morning from approximately 6:40 a.m. to 7:00 a.m., a food canteen truck operated by Steve Schmidt served breakfast at the main garage. Among other standard breakfast food, each day the canteen served scrambled eggs from a 10-inch by 12-inch aluminum tray that was required to be kept heated to 160 degrees in a warming oven located at the tailgate of the truck. On July 8, 2021, a few minutes before 7:00 a.m., Guerrero helped himself to some eggs from the tray. (Guerrero Testimony; Schmidt Testimony.)

12. Around that time, Employee A aggressively approached Guerrero. He stopped approximately four feet away. Employee A confronted Guerrero over the problems with the car. Employee A told Guerrero he was required to fix the car. Guerrero maintained it was not his responsibility. (Employee A Testimony; Guerrero Testimony; Schmidt Testimony.)

13. A fellow auto tech, Alejandro Gonzales, was walking to the bathroom in the garage when he heard yelling from the two men. He did not see them. He did not find the raised voices in the garage out of the ordinary. (Gonzales Testimony.)

14. What some described as a “firm discussion” quickly became more heated. In frustration, after telling Employee A to “back the fuck up” several times, Guerrero threw the tray of eggs in Employee A’s direction. Hot eggs splattered on Employee A’s face, neck, ears, and clothing. (Employee A Testimony; Gonzales Testimony; Schmidt Testimony; Respondent Ex. 2.)

15. After Schmidt tried to calm things down between the men, Employee A called the police. (Employee A Testimony; Guerrero Testimony; Schmidt Testimony.)

16. At 7:01 a.m., Boston Police arrived. They requested EMS to the scene. Employee A had minor injuries. He was transported to Tufts Medical Center for treatment for first degree burns. (Employee A Testimony; Appellant Ex. 8; Respondent Ex. 4.)

17. Next, police questioned Guerrero. He said he “grabbed the tray of eggs and threw it on the ground with the eggs striking Employee A.” (Appellant Ex. 8; Respondent Ex. 4.)

18. After the police were through questioning him, Guerrero returned to work, but later that day he was sent home by his supervisor. He was put on leave pending investigation of the incident. (Casey Testimony; Employee A Testimony; Guerrero Testimony.)

19. On July 21, 2021, the City Office of Labor Relations held an investigatory interview regarding Guerrero’s conduct. (Casey Testimony; Respondent Exhibit 5.)

20. On August 13, 2021, the City Office of Labor Relations held a follow-up investigatory interview regarding his conduct. (Casey Testimony; Respondent Ex. 5.)

21. On September 15, 2021, Guerrero appeared at the City Office of Labor Relations for a pre-disciplinary hearing for violation of the City’s Zero Tolerance for Violence policy. (Casey Testimony; Respondent Ex. 6.)

22. During these three proceedings, Guerrero’s story changed from when he spoke to the police on July 8, 2021. Now, he claimed that while he threw the eggs on the ground, no eggs struck Employee A. He said if there were any eggs on Employee A, it was because Employee A smeared eggs on his own face. (Casey Testimony.)

23. Guerrero was represented by union counsel for these proceedings, but he was unhappy with his representation. He later found new counsel. (Guerrero Testimony; Appellant Ex. 9.)

24. On September 21, 2021, the Roxbury Division of the Boston Municipal Court held a Clerk Magistrate's hearing regarding the alleged assault. The matter was dismissed. (Appellant Ex. 9; Guerrero Testimony.)

25. On November 10, 2021, Guerrero was terminated for violating the City's Zero Tolerance for Violence policy. Guerrero had no history of discipline. (Casey Testimony; Guerrero Testimony; Appellant Exs. 10, 11.)

26. On November 14, 2021, Guerrero filed a timely appeal with the Civil Service Commission. (Stipulation.)

CONCLUSION AND RECOMMENDATION

A party aggrieved by the decision of an appointing authority shall be given a hearing before the Civil Service Commission or a person designated by its chairman. G.L. c. 31, § 43. The Commission is charged with finding whether "the appointing authority has sustained its burden of proving there was reasonable justification for the action taken by the appointing authority." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997); *see, e.g., Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

The Commission does not determine whether it would have acted in the same way as the appointing authority, but whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." *Arria*, 16 Mass. App. Ct. at 334. An appointing authority's actions are justified when they are supported by a preponderance of the "credible

evidence, when weighted by an unprejudiced mind, guided by common sense and by correct rules of law.” G.L. c. 31, § 43; *Selectmen of Wakefield v. Judge of First Dist. Court*, 262 Mass. 477, 482 (1928). The commission does not have the authority to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority. *City of Cambridge*, 43 Mass. App. Ct. at 304.

The Commission examines evidence of “the application of the appointing authority’s procedure,” “an error of law,” or “any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position.” G.L. c. 31, § 32; *see City of Springfield v. Civil Serv. Comm’n*, 469 Mass. 370, 375 n.11 (2014). As the Commission looks at evidence it must “focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control.” *City of Cambridge*, 43 Mass. App. Ct. at 304.

Before it can be determined whether what occurred on July 8, 2021 was a violation of the City’s Zero Tolerance for Violence policy, it is necessary to establish what most likely occurred. Several versions of events were presented in the evidence. To assess them, I must determine the credibility of the relevant witnesses. *See Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) (As the finder of fact, assessing the credibility of witnesses is within the purview of the Commission’s hearing officer); *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 729 (2003) (same); *Green v. Town of Brookline*, 53 Mass. App. Ct. 120, 127 (2001) (same); *Springgate v. School Comm. of Mattapoisett*, 11 Mass. App. Ct. 304, 309-10 (1981) (same).

Mr. Guerrero has given too many widely varying versions of events to be considered credible. On the date of the incident, Mr. Guerrero told police he threw the eggs on the ground

and they splattered up onto Employee A's face. At his investigatory interviews and preliminary hearing in July, August, and September 2021, Guerrero said he threw eggs on the ground, but no eggs got onto Employee A. He stated that if there were eggs on Employee A's face, it was because Employee A put them there. At the Civil Service Commission's hearing in this matter, in June 2022, he claimed he "dropped" the eggs and there were no eggs on Employee A's face when he returned to work. Guerrero's recollection lacked consistency.

By contrast, Employee A and Mr. Schmidt explained consistently what happened. Differences between their testimony were minor. Both men claimed Employee A stopped at least three feet from Guerrero as the confrontation began. Both men denied that Guerrero requested Employee A to step back even once. Most importantly, they both testified that Mr. Guerrero intentionally threw the tray of hot scrambled eggs directly at Employee A and not onto the ground. The testimony was consistent, constant, and unhesitant under examination. *See generally Lavellee v. Boston Fire Dep't*, 32 MCSR 396, at 400 (Dec. 5, 2019) (finding that a corroborating witness's testimony was credible not because minor details were consistent with the victim's testimony but because she testified to only what she recalled, and her testimony was not "perfectly sync[ed]" to the victim's testimony).

Mr. Guerrero asserts that Mr. Schmidt's testimony is not credible because he was not standing in a place where he could have seen Mr. Guerrero throw the eggs. He also contends that Mr. Schmidt was friends with Mr. Employee A and is therefore lying to help Mr. Employee A. The record indicates that Mr. Schmidt knew Mr. Employee A longer than Mr. Guerrero and that they talked to each other more regularly at the food truck. However, Mr. Schmidt did not socialize with either man outside of work except to ask them both for help with his food truck. Moreover, there would be no apparent advantage to Mr. Schmidt if he lied on Mr. Employee A's

behalf. In fact, Mr. Schmidt credibly testified that he advised Mr. Employee A not to call the police over the incident and settle it with Mr. Guerrero himself.

Near the conclusion of his testimony, Mr. Guerrero intimated that Mr. Employee A had reason to seek revenge against him because Mr. Guerrero completed some work on a truck in the main garage that Mr. Employee A refused to do because he thought it was not covered by his job description. Mr. Guerrero suggested that Mr. Employee A was probably angry and embarrassed as a result. Mr. Guerrero's bare assertions are not enough to conclude that he is correct, especially when he could have cross-examined Employee A on that topic at the hearing and failed to do so.

Now, it must be determined whether throwing hot scrambled eggs in Employee A's direction, causing him minor burns, was a violation of the City's Zero Tolerance for Violence policy. The policy defines violence as including physically assaultive behavior, actions that a reasonable person would perceive as menacing, or throwing objects in a manner reasonably perceived to be threatening, and an employee engaging in such behavior is subject to severe discipline including termination. Guerrero's CBA likewise requires progressive discipline but does condone termination in "the most serious cases." Intentionally throwing hot eggs in a coworker's face because he is raising his voice over a car transaction is throwing objects in a manner reasonably perceived to be threatening. Guerrero's conduct therefore was a violation of the Zero Tolerance for Violence policy and warrants termination.

However, there was also evidence that not every instance of workplace violence at the City of Boston since the adoption of the Zero Tolerance of Violence policy has ended in the termination of a City employee. It is hard to say from the testimony of Ms. Casey what factors the City considers when choosing how to mete out discipline for violations of the policy. Police

involvement was one factor that Ms. Casey confirmed, but she could not explain why that factor is or should be determinative. It would have been just as reasonable for the City to give Mr. Guerrero a long suspension or a last chance agreement, since he has not been disciplined before.

That being said, the City has shown reasonable justification for terminating Mr. Guerrero. The City has adopted a stringent policy against workplace violence, and it is not up to the Commission to question the City's reasonable policy choices. While I have concluded that there are other possible disciplinary choices that would have been just as reasonable as Mr. Guerrero's termination, it is not the function of the Commission to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority. *See City of Cambridge*, 43 Mass. App. Ct. at 304.

Therefore, I recommend that the Appellant's appeal be dismissed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Kenneth J. Forton
Administrative Magistrate

Dated: