

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

GLENN HELLEY,
Appellant

v.

CASE NO: D1-10-93

FALL RIVER PUBLIC SCHOOLS,
Respondent

Appellant's Attorney:

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8 Beacon Street
Boston, MA 02108

Appointing Authority's Attorney:

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417 Rock Street
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Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Glenn Helley, acting pursuant to G.L.c.31, §43 duly appealed a decision of the Fall River Public Schools ("Fall River"), the Appointing Authority, to discharge him from employment as a Senior Custodian for submitting overtime hours for work that was not completed. A full hearing was held by the Civil Service Commission (the "Commission") on January 14, 2011. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered. Fall River called six witnesses and the Appellant testified on his own behalf. Nineteen (19) exhibits were received into evidence. The hearing was digitally recorded. Both parties submitted post-hearing proposed decisions.

¹ The Commission acknowledges the assistance of Law Clerk Michael Chin in the drafting of this decision.

FINDINGS OF FACT

Giving appropriate weight to the exhibits, the testimony of the witnesses [Joseph Correia, Director, Administrative and Environmental Services; James Medeiros, Assistant Director, Administrative and Environmental Services; Sandra St. Martin, Senior Custodian; Michael Thompson, Custodian; Richard Golen, Custodian; Rick Harrop, Custodian; Philip Charette, Senior Safety Officer and the Appellant], and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Background of Witnesses

1. The Appellant, Glenn Helley, was hired by the Fall River School Department as a Junior Custodian in January of 1989. Mr. Helley took and passed the Senior Custodian civil service examination and was promoted to the position of permanent Senior Custodian in approximately 1996. The Appellant served as second-shift Supervisor at Durfee High School before being transferred to the Morton Middle School in 2009. (*Testimony of Helley*)

2. Joseph Correia has been the Administrative and Environmental Services Director since 2003. (*Testimony of Correia*)

3. James Medeiros has been the Administrative and Environmental Services Assistant Director for seven years. (*Testimony of Medeiros*)

4. Sandra St. Martin has been a custodian for Fall River Public Schools for seven years. On March 23, 2010 she was the second-shift Senior Custodian for Durfee High School. (*Testimony of St. Martin*)

5. Michael Thompson has been a custodian for Fall River Public Schools for three years. On March 23, 2010 he was assigned to Durfee High School. (*Testimony of Thompson*)

6. Richard Golen has been a custodian for Fall River Public Schools for five years. On March 23, 2010 he was assigned to Durfee High School for the first time. (*Testimony of Golen*)

7. Philip Charette has been the Senior Safety Officer for Durfee High School for nine years. (*Testimony of Charette*)

8. Rick Harrop, uncle of the Appellant, worked the second-shift at Durfee High School as a custodian on March, 23, 2010. (*Testimony of Harrop*)

Discipline History

9. On July 9, 1991, Mr. Helley was issued a written warning regarding overtime. Mr. Helley put in for overtime pay for incomplete work. (*Exhibit 17*)

10. On June 23, 1992, Mr. Helley was issued a written warning regarding unauthorized vacation leave. Mr. Helley failed to turn in his vacation request. (*Exhibit 16*)

11. On May 19, 1994, Mr. Helley was issued a written warning regarding excessive sick leave abuse. Mr. Helley took sick leave above his allotted allowance and excessively asked office staff to look up his remaining sick leave hours. (*Exhibit 15*)

12. On May 1, 1995, Mr. Helley was issued a written warning for insubordination. Mr. Helley refused to assist on general work detail assigned to all custodians. (*Exhibit 14*)

13. On October 17, 1997, Mr. Helley was issued a one-day suspension for insubordination. Mr. Helley refused to perform duties assigned by immediate supervisors. (*Exhibit 13*)

14. On January 22, 1998, Mr. Helley was issued a written warning for dirty area. (*Exhibit 7*)

15. On February 12, 1998, Mr. Helley was issued a one-day suspension, later reduced to a written warning for insubordination and dirty area. Mr. Helley repeatedly complained, without merit, that his area was larger and required more time to maintain than the area of others. (*Exhibit 10*)

16. On January 25, 1999, Mr. Helley was issued a one-day suspension for insubordination. Mr. Helley made insubordinate remarks to Mr. Joseph Travers, Assistant Supervisor of Custodians, in front of Mr. Fred Rapoza, Head Custodian, when Mr. Travers approached Mr. Helley to discuss his dirty area. (*Exhibit 12*)

17. On November 16, 1999, Mr. Helley was issued a three-day suspension for insubordination. Mr. Helley refused to comply with a direct order by Mr. Joseph Travers, Assistant Supervisor of Custodian, to report to the Head Custodians Office at the end of his shift. (*Exhibit 5*)

18. On September 27, 2007, Mr. Helley was issued a three-day suspension for insubordination. Mr. Helley verbally assaulted Dr. Debra Lawrence, Principal of the Watson School, in a school hallway. (*Exhibit 11*)

19. On April 2, 2008, Mr. Helley was issued a written warning for an unauthorized leave. Mr. Helley was absent on March 17, 2008 without accrued sick time. (*Exhibit 9*)

The Overtime Shift

20. On the morning of March 23, 2010, Mr. Helley was contacted by James Medeiros. Mr. Medeiros asked Mr. Helley if he wanted to work an overtime assignment at Durfee High School in the afternoon. Mr. Helley agreed to work the overtime assignment. (*Testimony of Helley*)

21. The duty of the overtime assignment was to clean the bathrooms, classrooms, and corridors of the areas commonly known as the 350s, 360s, and 370s. (*Testimony of Helley*)

22. Mr. Helley worked his regular schedule from 6:30 AM to 3:00 PM at Morton Middle School. Mr. Helley arrived at Durfee High School through the West Main entrance at approximately 3:20 PM to begin his overtime assignment. (*Testimony of Helley*)

23. Mr. Helley testified that he attempted to retrieve keys for his assigned area upon his arrival at 3:20 PM from the school custodial office on the second floor of the building. However, the door to the custodial office was locked. Mr. Helley then proceeded to the custodial room on the third floor and picked the lock with a pocketknife. Mr. Helley retrieved cleaning supplies and proceeded to clean the area. *(Testimony of Helley)*

24. At approximately 5:20 PM, Mr. Helley received a phone call from his girlfriend. The couple shares a home and has two children together. *(Testimony of Helley)*

25. Mr. Helley's girlfriend had received medical news and asked Mr. Helley to return home. *(Testimony of Helley)*

26. Mr. Helley testified that he complied and left the school through the West Main entrance, returned to work within an hour, and resumed his overtime shift. *(Testimony of Helley)*

27. Mr. Helley testified that when he returned, it looked like his area had been cleaned. *(Testimony of Helley)*

28. The Fall River School Department allowed custodians to complete overtime shifts at their discretion in some instances and allowed custodians to return to his/her home during overtime shifts. *(Testimony of Helley, Harrop)*

29. Custodians would notify their supervisor of his/her intent to complete an overtime shift at another time or ask for permission to leave the premises during a shift. *(Testimony of St. Martin, Thompson)*

30. Mr. Helley testified that while he was at home, Rick Harrop called his house and told him that something was going on at Durfee High School regarding his cleaning. *(Testimony of Helley)*

31. Senior Custodian Sandra St. Martin, custodian Michael Thompson, and custodian Richard Golen each testified that at approximately 7:50 PM they observed Mr. Helley's assigned area had not been fully cleaned. The emptying the trash was the only task that looked completed to St. Martin. *(Testimony of St. Martin, Thompson, and Golen)*

32. St. Martin called Mr. Medeiros fifteen minutes later to see if Mr. Helley was going to be coming back to finish his area. Mr. Medeiros instructed St. Martin to finish the area. St. Martin took pictures of the bathrooms in Mr. Helley's area and left the pictures with a letter on Mr. Medeiros's desk. *(Testimony of Medeiros and St. Martin)*

33. St. Martin, Thompson, and Golen cleaned Mr. Helley's area including cleaning the bathrooms, classrooms, and hallways. The work was completed at approximately 9:05 PM with each person cleaning their area for approximately fifteen minutes. *(Testimony of St. Martin, Thompson, and Golen)*

34. St. Martin testified to having some previous personal problems with Mr. Helley while Thompson and Golen made no reference to personal problems. *(Testimony of St. Martin, Thompson, and Golen)*

35. Custodian Rick Harrop testified that the only telephone conversation he had with Mr. Helley that day was at approximately 10:00 PM. Mr. Harrop testified that during the conversation Mr. Helley stated that he believed someone had cleaned his area while he was at home. *(Testimony of Harrop)*

The Discipline Action

36. On March 23, 2010, Joseph Correia, James Medeiros, and Philip Charette viewed the security cameras in an attempt to verify when Mr. Helley entered and exited the building. The three viewed the West Main entrance, Auditorium entrance, and Custodial Office camera footage from 2:30 PM to 9:30 PM. (*Testimony of Correia, Medeiros, Charette*)

37. Mr. Correia, Mr. Medeiros, and Mr. Charette each testified that they saw Mr. Helley enter from the West Main entrance at approximately 3:20 PM, but he never appeared on any camera throughout the building again that night. (*Testimony of Correia, Medeiros, Charette*)

38. The surveillance footage was not saved by Mr. Charette, even though it was possible to do such. (*Testimony of Charette*)

39. On April 9, 2010, the Fall River School Department placed Mr. Helley on paid administrative leave and informed him of its intent to terminate his employment. The stated reason for the action was Mr. Helley submitted overtime hours for work that was not completed. (*Exhibit 2*)

40. On May 3, 2010 Fall River terminated Mr. Helley pursuant to the stated reason. (*Exhibit 1 & Exhibit 3*)

41. Mr. Helley duly filed his appeal with the Commission on May 10, 2010. (*Claim of Appeal*)

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, §43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The Commission must determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken.

G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App Ct. 331, 334, rev.den., 390 Mass. 1102 (1983).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). It is a basic tenet of the "merit principle" of civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31, §1.

An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Serv. v. Municipal Ct., 359 Mass. 211, 214 (1971); Cambridge v. Civil Serv. Comm'n, 43 Mass. App Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). An appointing authority's burden of proof is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the record, including whatever may fairly detract from the weight of any particular evidence. See, Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine the credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony, decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

In performing its appellate function,

[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “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.”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003) (emphasis added) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)). See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 303-05, rev.den., 428 Mass. 1102 (1997). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by “disinterested” Commissioner in context of procedural due process).

G.L.c.31, section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with

“considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. Police Comm’r v. Civil Serv. Comm’n, 39 Mass. App. Ct. 594, 600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass. App. Ct. 985, 987 (1982) (remanded for findings to support modification).

In deciding whether to exercise discretion to modify a penalty, the Commission’s task “is not to be accomplished on a wholly blank slate.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)). Unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or the Commission interprets the relevant law in a substantially different way, the Commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” E.g., Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180-day suspension to 60 days). cf. School Comm. v. Civil Serv. Comm’n, 43 Mass. App. Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Serv. Comm’n 21 Mass. App. Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Serv. Comm’n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld).

Just Cause for Disciplining Mr. Helley

Applying these principles to the facts of this appeal, the Commission finds that the Appointing Authority has met its burden – by a preponderance of the evidence – to establish just

cause for the discipline imposed on Mr. Helley. Mr. Helley admitted that he left Durfee High School during his overtime shift and when he returned he noticed his work had been completed. Despite this, Mr. Helley submitted overtime hours for work that was not completed.

It is undisputed that Mr. Helley left Durfee High School during his overtime shift on March 23, 2010. Both Mr. Harrop and Mr. Helley testified that they spoke on the telephone that evening. While there is conflicting testimony regarding the time of the telephone conversation, it was clear that Mr. Helley knew that someone had cleaned his area that night. I find credible the testimony of custodians St. Martin, Thompson, and Golen. While St. Martin testified to having some previous personal problems with Mr. Helley, any potential bias is ameliorated by the fact two other witnesses were present with her and testified to substantially the same facts. Richard Golen was assigned to Durfee High for the first time on March 23, 2010 and is therefore likely not to hold any bias against Mr. Helley. All three testified that they observed Mr. Helley's area had not been cleaned at approximately 7:50 PM. All three testified that the group cleaned up Mr. Helley's assigned area that night, including the bathrooms, classrooms, and hallways. The amount of time each person spent cleaning was approximately ten to fifteen minutes, but each person testified that they were in the area from 7:50 PM to 9:05 PM.

For the aforementioned reasons, I do not assign weight to the self-serving testimony of Mr. Helley. By Mr. Helley's own admission, he returned to Durfee High School at approximately 6:30 PM to find that his area had been partially cleaned and continued to clean for another hour. If Mr. Helley cleaned for two hours then returned to work to clean for another hour three separate custodians would not have testified that it looked as if only the trash had been emptied in the Mr. Helley's assigned area. There was no reasonable explanation offered by Mr. Helley that explained why three other custodians had to complete his assigned overtime area.

The lack of video evidence does not weigh heavily for either side; the crux at the issue at hand is whether Mr. Helley completed his overtime duties. As noted above, three custodians testified to completing Mr. Helley's assigned work. It is also clear that Mr. Helley had knowledge of the fact that someone else completed at least a portion of his assigned work. Despite knowing that he did not fully complete his assigned overtime shift, Mr. Helley submitted overtime hours for work that was not completed. By submitting overtime hours for work that was not completed, Mr. Helley is "guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

Rejection of Modification of Discipline

The Commission may not "modify a penalty on the basis of essentially similar fact finding without an adequate explanation." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Fall River was justified in terminating Mr. Helley because he failed to complete his overtime duties, yet still put in for the hours. This clearly impaired the efficiency of public service (three other custodians had to complete Mr. Helley's work in addition to their own) even if Mr. Helley did not get paid for the overtime shift.

The decision to reject modification of discipline is based on Mr. Helley's long, progressive discipline history. Mr. Helley has been disciplined eleven times in his employment as a custodian for Fall River, including four suspensions, four warnings regarding his use of time and leave, and six instances of insubordination (including verbally assaulting a Principal). With such a long-standing discipline history it is clear that the remedial goal of discipline, which is a basic tenet of civil service law, has not worked for Mr. Helley. Fall River should not have to bear the risk that another suspension will correct Mr. Helley's long-standing discipline problem.

After carefully considering all of the circumstances, given the prior long-standing history of misconduct, the Commission concludes that the termination of Mr. Helley was justified, and the result of progressive discipline. Therefore it is not appropriate in this case for the Commission to exercise its discretion to modify that penalty.

For the reasons stated above, the appeal of the Appellant, Glenn Helley, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on June 28, 2012.

A true record. Attest:

Commissioner

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:

Bruce A. Assad, Esq. (for Appellant)

Jaime DiPaola-Kenny, Esq. (for Fall River)