

The Commonwealth of Massachusetts

Decision mailed: 5/7/10
Civil Service Commission *JB*

BRIAN GUY HURLEY,
Appellant

v.

CITY OF LYNN,
Respondent

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

Case No.: D-08-313

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on May 6, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated March 5, 2010. The Commission received the comments of the Respondent on April 2, 2010 and April 22, 2010. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein, but for different reasons as set forth below.

The DALA Magistrate arrived at his recommended decision based on a well-reasoned and thorough review of the Commission's rulings concerning the obligations of appellants to exhaust their remedies to an appointing authority hearing in cases, such as the present one, in which the discipline involved a suspension of less than five days. In ruling to deny the City of Lynn's Motion to Dismiss, the DALA recommended decision accurately reconciled the Commission's recent decisions in Burns v. Holyoke, 21 MCSR 627 (2008), Cokely v. Cambridge Public Schools, 20 MCSR 613 (2007), and Handy v. Lynn, CSC Docket No. D-09-46 (2009). The Commission's decisions had construed that civil service law prescribed a strong preference for pursuing the right to an administrative remedy, although the civil law did not require that a hearing be held at the appointing authority level in cases of discipline less than five days.

Based on the facts and arguments presented in this case, however, the Commission has revisited this issue and concludes that the City of Lynn has made a compelling argument that the present case differs from the Burns case in an important and material respect. Specifically, in the Burns case, the appellant had requested a disciplinary hearing but the appointing authority failed to conduct the hearing and render a decision within the statutorily prescribed period. The Commission was persuaded in those circumstances, and especially when the Appellant also contended that the Appointing Authority had delayed the scheduled hearing to a date knowingly inconvenient to the Appellant, that the Appellant was not obliged to suffer such further delay but could take an immediate Section 42 appeal to the Commission, together with a Section 43 appeal on the merits. The Commission will continue to permit such appeals which are limited to the circumstances such as those presented in the Burns case.

However, the Commission agrees with the City of Lynn that civil service law is best served by requiring, in future cases, that an appellant, prior to asserting an appeal to the Commission, should exhaust the statutory right to request a hearing before the appointing authority, and to allow the appointing authority a fair opportunity to conduct such a hearing and render a

decision within the statutorily prescribed time frame, in all disciplinary matters, including suspensions of five days or less,. Thus, in future cases, an appellant shall be expected to first request a hearing and afford the appointing authority the opportunity to conduct such a hearing and render a decision within the prescribed time periods, five days and seven days respectively, established by G.L.c.31,§41,¶2. This interpretation is best believed to accomplish the statutory intention that an appointing authority have the opportunity, in the first instance, to hear evidence in support of, and in opposition to discipline (including the testimony of the employee himself), while protecting the employee from undue delay in particular cases involving procedural irregularities (such as Burns) in seeking redress before the Commission. See generally, Falmouth v. Civil Service Comm'n, 447 Mass. 814 (2006) (appointing authority may draw adverse inference from failure of employee to testify on his or her own behalf in discharge case when hearing is required prior to imposing discipline).

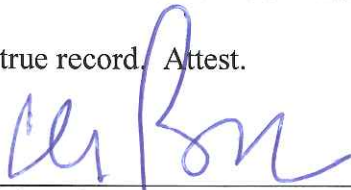
Since the Appellant, here, was clearly justified to rely on the Commission's express prior rulings in Burns and Handy, the Commission will apply the rule as it stood at the time of the Appellant's appeal, and as the DALA Magistrate correctly construed it to correctly deny the motion to dismiss in this case. The Commission's modification of its prior rulings in Burns and Handy will be applied prospectively only.

The Commission agrees with the DALA Magistrate's analysis on the merits of the Appellant's appeal.

A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby ***allowed.***

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on May 6, 2010.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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:
Michael J. Maccaro, Esq. (for Appellant)
David F. Grunebaum, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
ACTING CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
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March 3, 2010

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

Re: Brian Guy Hurley v. City of Lynn
DALA Docket No. CS-09-76

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CIVIL SERVICE COMMISSION

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
Acting Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Michael J. Maccaro, Esq.
David F. Grunebaum, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Brian Guy Hurley,
Petitioner

v.

Docket No. D-08-313
DALA No. CS-09-76

City of Lynn,
Respondent

Appearance for Petitioner:

Michael J. Maccaro, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

David F. Grunebaum, Esq.
Tobin, Sullivan, Fay & Grunebaum
60 William Street, Suite 330
Wellesley, MA 02481

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF RECOMMENDED DECISION

Appeal granted where the City of Lynn failed to prove by a preponderance of the evidence that there was just cause to suspend Appellant for one day where the credible evidence showed that the Appellant refused to acknowledge a written warning before speaking to his union representative and then putting the warning on the floor.

RECOMMENDED DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Brian Guy Hurley, appeals the decision of the Respondent, City of Lynn, to suspend him by written notice dated December 8, 2008, for one (1) working day without pay. The appeal was timely

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filed. A hearing was held on March 18, 2009 at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. Two cassette tapes of the hearing were made. As no notice was received from either party, the hearing was declared private.

Just before the hearing began, the City of Lynn filed a motion to dismiss Mr. Hurley's appeal for failing to request a hearing before the Appointing Authority prior to requesting a hearing at the Civil Service Commission. The City also made an oral motion during the hearing to preclude Mr. Hurley from testifying, citing *Town of Falmouth v. Civil Service Commission*, 447 Mass. 814 (2006). I denied the motion to preclude Mr. Hurley's testimony and invited the City to file a motion to strike his testimony after the hearing; the City did not file a motion to strike. I declined to rule on the motion to dismiss, but I invited the parties to more fully brief the issue and file legal memoranda along with their proposed decisions.

I admitted three (3) documents into evidence. (Exs. 1-3.) Thomas Kench, Assistant Supervisor of Maintenance and Custodians, and Michael Donovan, Inspectional Services Department Director, testified on behalf of the City of Lynn. Stanley Janiak, Craftsman, testified on behalf of the Petitioner, as did the Petitioner himself.

FINDINGS OF FACT

Based upon the documents entered into evidence and the testimony of the witnesses, I make the following findings of fact:

1. The Appellant, Brian Guy Hurley, is a tenured civil service employee who commenced employment with the City of Lynn in December 1986. (Testimony Hurley.)
2. Mr. Hurley is a member of AFSCME, Council 93. (Testimony Hurley.)

3. Mr. Hurley currently holds the title of Maintenance Craftsman-In Charge in the City of Lynn's Inspectional Services Department. His job duties require him to work in several school buildings throughout the City. He works from 2:00 p.m. to 10:00 p.m. with the Department's permission, though the operative collective bargaining agreement at the time listed his work hours as 3:00 p.m. to 11:00 p.m. (Testimony Hurley, Kench.)

4. Mr. Hurley reports to Thomas Kench, Assistant Supervisor of Maintenance and Custodians in the City's Inspectional Services Department. (Testimony Hurley, Kench.)

5. On December 2, 2008, Mr. Hurley was working at the Cobbett Elementary School with his coworker, Stanley Janiak. (Testimony Hurley, Janiak, Kench.)

6. Mr. Hurley was Mr. Janiak's supervisor, though Mr. Hurley's supervisory duties had been curtailed when Mr. Kench became Assistant Supervisor of Maintenance and Custodians in the Inspectional Services Department. (Testimony Hurley.)

7. Some time in the late afternoon or early evening, Mr. Hurley and Mr. Janiak were painting a stairwell at the Cobbett School when their supervisor, Mr. Kench, arrived to deliver to Mr. Hurley a written warning concerning events that occurred on November 26, 2008. (Testimony Hurley, Janiak, Kench.)

8. As Mr. Kench entered the stairwell, Mr. Hurley was using an angled brush to cut paint into tight spaces. He and Mr. Janiak were painting the stairwell a shade of blue that Mr. Kench had picked out. (Testimony Hurley.)

9. Mr. Kench approached Mr. Hurley and said that he needed to speak with Mr. Hurley. Mr. Kench then handed Mr. Hurley the written warning and asked him to

sign a copy of the warning to show that he had acknowledged receiving it. (Ex. 2; Testimony Hurley, Kench.)

10. When the warning was handed to him, Mr. Hurley was holding a paint brush in one hand and a paint bucket in the other. Mr. Hurley rearranged his painting tools, took the letter in his hand, and read the warning. (Testimony Hurley.)

11. Mr. Hurley refused to sign the acknowledgement and stated that he wanted to speak to his union representative before signing it. Mr. Hurley was agitated after he received the written warning. (Testimony Hurley.)

12. Mr. Hurley then put the letter on one of the steps of the staircase and resumed painting. (Testimony Hurley, Janiak.)

13. Mr. Kench left the building and put a copy of the unsigned written warning to Michael J. Donovan, Director of Inspectional Services. (Testimony Kench.)

14. On December 8, 2008, Mr. Hurley received a letter from Mr. Donovan. The letter included notice that Mr. Hurley would be suspended for one day because, on December 2, 2008, he threw the written warning Mr. Kench had handed him on the ground. The letter stated that the Appellant's behavior in this matter was "insubordinate, offensive and behavior unacceptable in a supervisor." The letter stated further: "Your misconduct in this matter is an extremely serious matter and cannot be tolerated. Such behavior is inherently incompatible with your continued service as an in-charge Maintenance Craftsman and is a threat to the effective operations of this department." (Ex. 1; Testimony Hurley.)

15. Mr. Hurley consulted with one of his union's attorneys, who filed an appeal directly to the Civil Service Commission on Mr. Hurley's behalf on December 15, 2008. (Testimony Hurley.)

16. The submitted Civil Service Commission appeal form also had a checkmark in a box called "Other (Specify)" in the section of the form used for alleging that the appointing authority has failed to follow the requirements of G.L. c. 31, § 41. The attorney listed no specifics after the checked box. Neither does the form specify how Mr. Hurley's rights were prejudiced. (Ex. 1.)

CONCLUSION

Ruling on Motion to Dismiss

The City of Lynn argues that Mr. Hurley's appeal should be dismissed because he failed to request a hearing with his appointing authority before he requested a hearing with the Civil Service Commission. The City cites *Cokely v. Cambridge Public Schools*, 20 MCSR 613 (2007), for the proposition that an appellant suspended for five days or less may only file an appeal with the Civil Service Commission after requesting a hearing before the appointing authority. Mr. Hurley argues that he is not required to request a hearing with the City before filing his Civil Service appeal, citing *Burns v. City of Holyoke*, 21 MCSR 627 (2008), and a margin ruling on a motion to dismiss in *Handy v. City of Lynn*, Civil Service Docket No. D-09-46 (2009), in which the Commission denies an appointing authority's motion to dismiss for failure to exhaust administrative remedies after stating that it has revisited the issue brought up in *Cokely* in the *Burns* decision.

The most recent Civil Service decisions on this issue favor Mr. Hurley's argument. The City properly points to *Cokely* to support its position, which on its face supports the City's motion. The City, however, does not address the more recent *Burns* case and the ruling in the *Handy* case, which, taken together and without expressly doing so, appear to overrule the approach followed in *Cokely*. In *Burns*, the Commission held that a tenured employee who is suspended for five days or less has two options: (1)

forego the appointing authority level hearing and take an immediate appeal from the discipline under G.L. c. 31, § 43 within ten days of the notice of discipline, which the Commission disfavours, or (2) request an appointing authority level hearing and appeal to the Commission no more than ten days after the appointing authority issues its decision. The Commission's March 24, 2009 margin ruling on the appointing authority's motion to dismiss for failure to exhaust administrative remedies in the *Handy* case appears to overrule *Cokely*, as there the appointing authority cited *Cokely* in support of its motion and the Commission denied the motion, writing: "The Commission revisited this issue in *Burns v. Holyoke*, D-08-155."

Thus, the Commission's most recent case addressing appeals pursuant to G.L. c. 31, §§ 41-45, does not require tenured employees who are suspended for five days or less to first appeal to their appointing authority before filing an appeal with the Commission. In *Burns*, the Commission expressed a strong preference for filing an appeal with the appointing authority first, but it did not require it. Mr. Hurley was, therefore, entitled to a hearing before the Commission without first filing an appeal of his discipline with the City of Lynn. Accordingly, the City's motion to dismiss for failure to exhaust administrative remedies must be denied.

Merits

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." *City of Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 304 (1997). See also *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-28 (2003); *Police Dep't of Boston v. Collins*, 48 Mass. App. Ct. 408, 411 n.5 (2000); *Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983).

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*, 43 Mass. App. Ct. at 304 (quoting *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928)); *Commissioners of Civil Service v. Municipal Ct. of the City of Boston*, 259 Mass. 211, 214 (1971).

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 the public service.” *School Committee of Brockton v. Civil Service Comm’n*, 43 Mass. App. Ct. 486, 488 (1997) (quoting *Murray v. Justices of Second Dist. Court of Eastern Middlesex*, 389 Mass. 508, 514-15 (1983)). If the Commission finds that the appointing authority has proven 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; otherwise it shall reverse such action and the person concerned 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. *Town of Falmouth v. Civil Service Comm’n*, 61 Mass. App. Ct. 796, 800 (2004); *Town of Watertown*, 16 Mass. App. Ct. at 334.

“[T]he question before 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.” *Town of Watertown*, 16 Mass. App. Ct. at 334.

In this case, the Appointing Authority, the City of Lynn, suspended the Appellant, Brian Guy Hurley, for allegedly throwing a written warning he had received from his supervisor, Thomas Kench, on the ground in front of Mr. Kench and Stanley Janiak, an employee who Mr. Hurley supervised. The Director of Lynn's Inspectional Services Department, Michael J. Donovan, suspended Mr. Hurley because it was his view that throwing the paper to the ground was an act of insubordination, which is especially unacceptable because Mr. Hurley was acting as a supervisor at the time he allegedly threw the written warning to the ground.

After reviewing the testimony and documentary evidence in this matter, I conclude that the appointing authority has not proven by a preponderance of the evidence that there was just cause to suspend Brian Guy Hurley for one day as a result of the events of December 2, 2008.

On December 2, 2008, Mr. Hurley and Mr. Janiak were busy painting a hallway in the Cobbett School, when Mr. Kench arrived to deliver a written warning to Mr. Hurley. The warning concerned Mr. Hurley's being away from an assigned work site during his scheduled shift. Mr. Kench asked Mr. Hurley to sign a copy of the written warning to acknowledge that he had received it. Mr. Hurley testified that he refused to sign the warning because he wanted to seek the counsel of his union representative before signing anything. Mr. Janiak also testified that Mr. Hurley told Mr. Kench that he wanted to speak to a union representative before signing the warning. Mr. Kench, on the other hand, testified that Mr. Hurley said something but couldn't remember what it was. I credit the testimony of Mr. Hurley and Mr. Janiak on the matter of what Mr. Hurley said because both Mr. Hurley and Mr. Janiak presented a clear recollection of the event, while Mr. Kench's memory was foggier.

The parties clearly disagree about what happened next. Mr. Kench testified that Mr. Hurley read the letter with both hands and threw the written warning down the stairwell in which they were painting. Mr. Hurley says that he read the letter in one hand, then put the letter on the ground and resumed painting. Mr. Janiak corroborated Mr. Hurley's story when he testified that Mr. Hurley put the letter on one of the steps in the stairwell and then resumed painting in the stairwell. I conclude from the testimony that Mr. Hurley put the letter on a step and resumed painting.

My conclusion is primarily based on Mr. Hurley's testimony, which was more detailed than Mr. Kench's. Mr. Hurley detailed more clearly what he was doing when Mr. Kench arrived—cutting in blue paint with an angled brush in one hand and a paint bucket in the other. Mr. Kench's recollection was hazier and lacked details. Mr. Janiak's testimony was a little less detailed but corroborates Mr. Hurley's story. In addition, both Mr. Hurley and Mr. Janiak were more relaxed and calm during their testimony, while Mr. Kench seemed ill at ease. Moreover, Mr. Janiak had no incentive to lie, as the City suggests, as he reported to both Mr. Hurley and Mr. Kench. From the preponderance of credible testimony I conclude that Mr. Hurley transferred the brush to his bucket hand to read the written warning. After refusing to sign a copy of the warning, Mr. Hurley placed it on a step and continued painting.

It cannot be said that refusing to acknowledge receipt of a written warning before speaking with union representation and then placing the letter on the ground is “substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” *School Committee of Brockton*, 43 Mass. App. Ct. at 488. It is fairly standard practice for union members to consult with their representatives on matters of formal discipline. It was not misconduct for Mr. Hurley to seek the advice

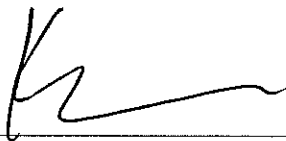
of his union before he acknowledged the warning with his signature. Nor was it misconduct, without any other objectionable behavior, to put the letter on the floor in the presence of Mr. Kench and Mr. Janiak. Even if Mr. Hurley had thrown the letter on the ground it is hard to say that throwing the letter, without some accompanying substantial misconduct, would be enough to impair the efficiency of the public service. *See id.* *See also, e.g., Brown v. Agawam Fire Department*, 14 MCSR 143 (2001) (two-day suspension upheld where firefighter called supervisor "asshole"); *Lampi v. Dep't of Corrections*, 11 MCSR 347 (1998) (one-day suspension upheld where corrections officer swore at his superior); *Cullen v. Dep't of Corrections*, 11 MCSR 345 (1998) (two-day suspension upheld where corrections officer swore at superior after being told not to park in reserved parking area).

Conclusion

The City of Lynn has not proven by a preponderance of the credible evidence that there was just cause to suspend Brian Guy Hurley for one (1) day. The appeal is therefore granted. The suspension is hereby reversed and the Appellant shall be returned to his position without loss of compensation or other rights.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton, Esq.
Administrative Magistrate

DATED:

MAR 3 - 2010