Decision mailed: 9/12/08 CMD
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

JAMES IMPERIAL,
Appellant

v. D1-07-118

CITY OF LYNN,
Respondent

Appellant's Attorney: Joseph DeLorey
A.F.S.C.M.E. Council 93
8 Beacon Street, Boston MA 02108

Respondent's Attorney: David F. Grunebaum
60 William Street, Ste. 330
Wellesley, MA 02481

Commissioner: Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, James Imperial, (hereinafter "Imperial" or "Appellant"), appeals the February 14, 2007 decision of the City of Lynn (hereinafter "Appointing Authority") to terminate the Appellant's employment due to the fact that the Appellant, while on total disability workers' compensation, engaged in plumbing activities, in violation of G.L. c. 152, § 48. The appeal was timely filed at the Civil Service Commission (hereinafter "Commission") and a full hearing was held on October 22, 2007.

FINDINGS OF FACT:

A stenographer, William E. Beaupre, was present and made a verbatim record of the full hearing. The stenographer produced a transcript of the hearing in the amount of 168 pages. This transcript is the official Commission record of the full hearing, as agreed to by the parties. The hearing was declared private and the witnesses were sequestered. Based on the eleven (11) Exhibits entered into evidence, and based on the testimony of Donald E. Hamill, Jr.; Richard C. Connick; Michael J. Donovan; Timothy Oliver; Lee Oliver; Fredrick Dupuis; the Appellant; and the Disciplinary Hearing record (Exhibit 9), I make the following findings of facts:

1. James Imperial was hired as a plumber by the Lynn School Department on or about January 3, 2000. (Testimony of Appellant).
2. On or about May 19, 2004, the Appellant fell at work and injured his right knee. From that date forward the Appellant was out of work due to the industrial accident and eventually applied for and received workers' compensation. (Testimony of Appellant).
3. Subsequent to his injury, the Appellant received total disability worker's compensation by signing an "Agreement for Redeeming Liability by Lump Sum under G.L. Ch. 152". This settlement agreement was signed by the Appellant and the Insurer for the City of Lynn, on March 13, 2007. The settlement agreement was approved by the Department of Industrial Accidents on June 27, 2007. The agreement stated a settlement payment to the Appellant in the amount of $30,000.00 gross ($22,400.00 net). (Exhibit 1; Exhibit 2; Testimony of Appellant).
4. On August 19, 2004, the Appellant took out a permit for plumbing work at 12 Allerton Street, owned by Gerald Hall. The Appellant's name and business (Imperial Plumbing and Heating) appeared on the permit application. (Exhibit 7).

5. The Appellant advised and consulted with workers but did not perform manual labor at the Allerton Street job site. The laborers at this site were Tim Oliver, Lee Oliver, and Fred Dupuis. (Testimony of Appellant, Testimony of Tim Oliver; Testimony of Lee Oliver; Testimony of Dupuis, Exhibit 9).
6. On March 21, 2005, the Appellant pulled a permit for plumbing work to be performed at 36 Pennybrook Road, owned by Tim Oliver. The Appellant was present at the job site for inspection but did not advise or give instructions to the individuals performing the work. (Exhibit 6).
7. The individuals who labored the Pennybrook Road project were the owner, his brother Lee Oliver and friend Fred Dupuis. (Testimony of Appellant, Exhibit 9).
8. On June 2, 2006, the Appellant took out a permit for gas and plumbing work at 44 Trevett Avenue for an owner Barbara Parker. (Exhibit 4).
9. The Appellant was present for the inspection and conclusion of the Trevett Avenue project. The Appellant supervised, directed, and instructed other parties to perform the work. The Appellant was not observed engaging in any physical work or duties. (Testimonies of Appellant, Exhibit 9).
10. The Appellant did not receive pay or other financial compensation for his services of pulling the permit, giving plumbing advice, or observing laborers for any of the three locations in this matter. The Appellant either knew the owners or someone related to the owners of these three properties and that relationship was the basis of him providing the counseling, advice and oversight. (Testimony of Appellant and other witnesses, Exhibit 9).

11. On December 13, 2006, Joseph Driscoll (hereafter "Driscoll"), Municipal Personnel Director, sent a hearing notice to James Imperial. (Exhibit 9).
12. A hearing was held on January 22, 2007. The hearing was conducted by Howard L. Greenspan, Esq (hereafter "Greenspan"). (Exhibit 9).
13. On February 1, 2007, Mr. Greenspan sent his disciplinary hearing recommendation to Mr. Driscoll. This document was eight (8) pages in length and included findings and a recommendation to terminate the Appellant. (Exhibit 9).
14. A summary of the findings of operative facts, made by Mr. Greenspan supported his recommendation to terminate the Appellant's employment. Those findings included the following: the Appellant had "...pulled a permit", "...assisted in planning and gave advice and consultation", "was present at... during inspection..." "...present on multiple occasions to review and advise...". (Exhibit 9)
15. On February 14, 2007, Edward J. Clancey, Jr., Mayor of the City of Lynn, adopted the recommendation of Mr. Greenspan that the Appellant be terminated from his position as a plumber for the City of Lynn. (Exhibit 10).
16. On June 27, 2007, the Administrative Judge, Department of Industrial Accidents, approved the lump sum agreement. (Exhibit 1).
17. All of the witnesses who testified at this hearing appeared to be testifying with candor and forthrightness. I found no indication that any of the witnesses were less than truthful or honest. (Exhibits, testimony and demeanor)

CONCLUSIONS AND FINDINGS

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 Commission, 43 Mass. App. Ct. 300, 304 (1997). *See* Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); *Police* Department of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The 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 Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton *v.* Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). 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. Town of Falmouth *v.* Civil Service Commission, 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). *See* Commissioners of Civil Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). Furthermore, it is the function of the Commission to determine the credibility of testimony presented before it and what degree of credibility should be attached to a witnesses testimony. See School Committee of Wellesley *v.* Labor Relations Commission, 376 Mass. 112, 120 (1978); Embers of Salisbury, Inc. *v.* Alcoholic Beverages Control Commission, 401 Mass. 526 529 (1988); Doherty *v.* Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is apportioned amongst witnesses. Herridge *v.* Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

'Total and permanent disability' is intended to mean total and permanent disability to earn wages. Frennier's Case, 318 Mass. 635 (1945). This is evidenced by the provision in §43A that if 'an employee who has been agreed or found to be totally and permanently disabled earns wages at any time thereafter, payments of compensation may be suspended in the manner provided by section twenty-nine.' Id. The total and permanent disability therefore is to be construed to be such as to prevent the employee from engaging in any occupation and performing any work for compensation or profit, that is, from obtaining and retaining remunerative employment of any kind within his ability to perform. Id. "Complete physical or mental incapacity of the employee is not essential to proof of total and permanent disability within the meaning of the statute. It is sufficient if the evidence shows that the employee's

disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character, and regard must be had to the age, experience, training and capabilities of the employee." Adamaitis v. Metropolitan Life Ins. Co., 295 Mass. 215, 219, 220 (1936); Boss v. Travelers Ins. Co., 296 Mass. 18, 22, 23 (1936).

In the appeal at hand, the Appointing Authority has failed to reasonably justify its termination of the Appellant. G.L. c. 152, § 48(4) provides:

> Notwithstanding any provision of this section or of sections seventy-five A or seventy-five B, the acceptance of any amount in return for the right to claim future weekly benefits shall create a *presumption that the employee is physically incapable of returning to work with the employer where the alleged injury occurred.* Such presumption shall continue for a period of one month for each fifteen hundred dollar amount included in the settlement for future weekly benefits. No re-employment rights shall inure to such employee under this chapter during any period of presumption of incapacity as herein provided. (Emphasis supplied).

The Appellant was presumed to be *incapable of returning to work with the employer* for twenty months. The facts in evidence, however, fail to establish that the activities in question could reasonably constitute a violation of G.L. c.152, § 48. The Appointing Authority's job specifications for a Plumber include manual labor and related physical activities. The Appellant suffers a permanently injured knee, to which he received a workers' compensation settlement. Based on the Appointing Authority's exhibits and testimonies, it is not evident that the Appellant engaged in substantial misconduct or physical activities that would demonstrate a fitness or ability to return to work for the Appointing Authority. The activities carried out by the Appellant while on workers' compensation, (i.e. pulling permits, inspecting, planning, etc.), may be performed without physical labor, and while the Appellant was still injured. The Appellant was not in a position, however, to be capable of returning to work as a plumber with the

Appointing Authority. The duties of a plumber in the City of Lynn are difficult; a plumber must be able to lift, bend, stoop, and climb: "its heavy work. It's something that requires manual labor, hard manual labor." (Testimony of Connick). The Appellant denies, and indeed was never observed, performing any physical work at any job site (Testimony of Appellant; Exhibit 9). These witnesses provided by the Appellant were credible and their memories were consistent with the claims of the Appellant. It is more probable than not that the Appellant remained incapable of returning to work for the Appointing Authority, while simultaneously remaining capable to provide non-labor services gratuitously. Absent supportive evidence of conduct in violation of G.L. c.152, §48, the Appointing Authority's decision to terminate the Appellant cannot be reasonably justified.

The Appellant's workers' compensation settlement does not preclude him from engaging in volunteer or otherwise non-compensated work. Under G.L. c.152, §48, total and permanent disability is to be construed "to prevent the employee from engaging in any occupation and performing any work for compensation or profit, that is, from obtaining and retaining remunerative employment of any kind within his ability to perform." Frennier's Case, 318 Mass. 635, 639 (1945). The record at hand is void of evidence indicating that the Appellant received and retained compensation or profit from the Attelton, Pennybrook, or Trevett plumbing projects. The Appellant could *instruct*, but not *perform*, plumbing duties; and he did so without expected or actual receipt of compensation. Unless the Appellant receives "a continuing earning capacity upon which one can rely to a substantial degree for a livelihood;" he remains entitled to his workers' compensation agreement. The evidence before us does not establish that the Appellant's pulling of plumbing permits constituted a violation of the workers' compensation settlement. While it may be true that such actions are in violation of the Appellant's licensure,

the correct forum for such violations is with the appropriate licensing agency, not this Commission. Pulling permits and advising workers on job sites does not constitute "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service" to which the Appellant may be terminated. *See* Murray *v.* Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton *v.* Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). Absent such evidence, the Appellant's activities do not rise to the level of violating G.L. c.152, §48 because he remained incapable of returning to the Appointing Authority and assuming the physical responsibilities that job entailed.

The Appointing Authority asserts in error that the lump sum agreement extinguished the Appellant's employment rights. G.L. c. 152, § 48(4) provides that "No re-employment rights shall inure to such employee under this chapter during any period of presumption of incapacity." In the event that the Appellant's conditions improved to a sufficient degree to not be permanently disabled, he would have to re-apply and be re-hired by the Appointing Authority. The Appellant has not attempted to exercise any re-employment rights within this statutory period. Rather, the Appellant seeks to preserve his civil service rights should his condition improve after the expiration of the statutory period. The Appointing Authority may not unilaterally terminate or abridge the Appellant's future civil service rights, without cause, during this period of re-employment ineligibility. See Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

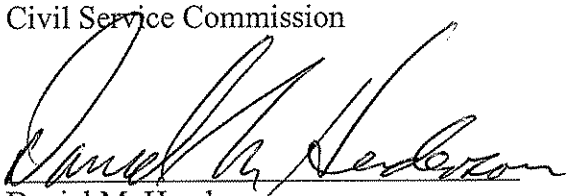
The Appointing Authority's decision to terminate the Appellant also fails on procedural grounds. In dealing with an interest as fundamental and important as an employee's work

tenure, an Appointing Authority has the responsibility, when challenged before the Commission, to present evidence specifically and rationally justifying the action. School Committee of Brockton v. Civil Service Commission, 43 Mass.App.Ct. 486, 492 (1997). In the absence of a relevant regulation or explicit job standards, a rubric describing conduct as "inappropriate and unbecoming," even if generally accurate and applied in good faith, is insufficient to justify discharge. McIssac v. Civil Service Commission, 38 Mass.App.Ct. 473 (1995); City of Cambridge *v.* Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997) Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983).

The Appointing Authority introduced into evidence the Disciplinary Hearing officer's findings and recommendations (Exhibit 9) and the Mayor's adoption of said findings (Exhibit 10); however it failed to provide a more detailed notice to the Appellant. At the Full Hearing before this Commission, the Appointing Authority pointed to four lines in the Disciplinary Hearing Officers' Procedural Background Statement (Record 69:8-13; Exhibit 9). The Appointing Authority stated: "I would represent to my brother that...the employee was notified of the charge against him, working at or in a manner inconsistent with receiving benefits for total disability under the worker's compensation act." (Record 69:8-13; Exhibit 9). The Commission Record is void of additional forms of notice provided to the Appellant which specified a just cause. The Disciplinary Hearing Officer's findings only conclude that the Appellant "assisted in the planning and gave advice and consultation about the work to be performed," visited worksites, reviewed and advised performances, and pulled permits to assist in planning and projects. (Exhibit 9). In the absence of a more definite notice to the Appellant, the Appointing Authority is unable to meet its procedural burden.

WHEREFORE, the Respondent's Motion to Dismiss filed under Docket No. D1-07-118 is hereby ***denied***, and the Appellant's appeal is ***allowed***. He shall be reinstated or returned to the status he held at the time of his termination without loss of benefits.

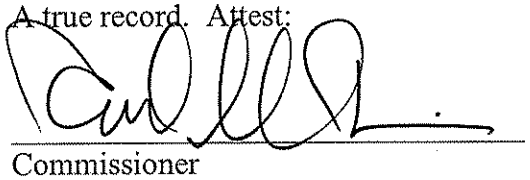
Civil Service Commission



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor, Commissioners); Bowman absent on September 11, 2008.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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 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 sent to:

Joseph DeLorey
A.F.S.C.M.E. Council 93
8 Beacon Street, Boston MA 02108

David F. Grunebaum
60 William Street, Ste. 330
Wellesley, MA 02481

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 9/26/08 MD
Civil Service Commission

SUFFOLK, ss.

JAMES IMPERIAL,
Appellant

v. D1-07-118

CITY OF LYNN,
Respondent

Appellant's Attorney: Joseph DeLorey
A.F.S.C.M.E. Council 93
8 Beacon Street, Boston MA 02108

Respondent's Attorney: David F. Grunebaum
60 William Street, Ste. 330
Wellesley, MA 02481

Commissioner: Daniel M. Henderson

DECISION ON MOTION TO DISMISS

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, James Imperial, (hereinafter "Imperial" or "Appellant"), appeals the February 14, 2007 decision of the City of Lynn (hereinafter "Appointing Authority") to terminate the Appellant's employment due to the fact that the Appellant, while on total disability workers' compensation, engaged in plumbing activities, in violation of G.L. c. 152, § 48. The appeal was timely filed at the Civil Service Commission (hereinafter "Commission") and a full hearing was held on October 22, 2007. Also on October 22, 2007 the Appointing Authority filed a Motion to Dismiss on the ground that by

executing an "Agreement for Redeeming Liability by Lump Sum under G.L. c. 152" he had in effect submitted his resignation and by the agreement rendered himself ineligible for employment with the Department of Lynn for twenty (20) months. The Appointing Authority asserted that these circumstances caused the Commission to lose jurisdiction to hear the Appellant's appeal.

FINDINGS OF FACT:

A stenographer, William E. Beaupre, was present and made a verbatim record of the full hearing. The stenographer produced a transcript of the hearing in the amount of 168 pages. This transcript is the official Commission record of the full hearing, as agreed to by the parties. The hearing was declared private and the witnesses were sequestered. Based on the eleven (11) Exhibits entered into evidence, and based on the testimony of Donald E. Hamill, Jr.; Richard C. Connick; Michael J. Donovan; Timothy Oliver; Lee Oliver; Fredrick Dupuis; the Appellant; and the Disciplinary Hearing record (Exhibit 9), I make the following findings of facts:

1. James Imperial was hired as a plumber by the Lynn School Department on or about January 3, 2000. (Testimony of Appellant).
2. On or about May 19, 2004, the Appellant fell at work and injured his right knee. From that date forward the Appellant was out of work due to the industrial accident and eventually applied for and received workers' compensation. (Testimony of Appellant).
3. Subsequent to his injury, the Appellant received total disability worker's compensation by signing an "Agreement for Redeeming Liability by Lump Sum under G.L. Ch. 152". This settlement agreement was signed by the Appellant and the Insurer for the City of Lynn, on March 13, 2007. The settlement agreement was approved by the Department

of Industrial Accidents on June 27, 2007. The agreement stated a settlement payment to the Appellant in the amount of $30,000.00 gross ($22,400.00 net). (Exhibit 1; Exhibit 2; Testimony of Appellant).

4. On August 19, 2004, the Appellant took out a permit for plumbing work at 12 Allerton Street, owned by Gerald Hall. The Appellant's name and business (Imperial Plumbing and Heating) appeared on the permit application. (Exhibit 7).
5. The Appellant advised and consulted with workers but did not perform manual labor at the Allerton Street job site. The laborers at this site were Tim Oliver, Lee Oliver, and Fred Dupuis. (Testimony of Appellant, Testimony of Tim Oliver; Testimony of Lee Oliver; Testimony of Dupuis, Exhibit 9).
6. On March 21, 2005, the Appellant pulled a permit for plumbing work to be performed at 36 Pennybrook Road, owned by Tim Oliver. The Appellant was present at the job site for inspection but did not advise or give instructions to the individuals performing the work. (Exhibit 6).
7. The individuals who labored the Pennybrook Road project were the owner, his brother Lee Oliver and friend Fred Dupuis. (Testimony of Appellant, Exhibit 9).
8. On June 2, 2006, the Appellant took out a permit for gas and plumbing work at 44 Trevett Avenue for an owner Barbara Parker. (Exhibit 4).
9. The Appellant was present for the inspection and conclusion of the Trevett Avenue project. The Appellant supervised, directed, and instructed other parties to perform the work. The Appellant was not observed engaging in any physical work or duties. (Testimonies of Appellant, Exhibit 9).

10. The Appellant did not receive pay or other financial compensation for his services of pulling the permit, giving plumbing advice, or observing laborers for any of the three locations in this matter. The Appellant either knew the owners or someone related to the owners of these three properties and that relationship was the basis of him providing the counseling, advice and oversight. (Testimony of Appellant and other witnesses, Exhibit 9).
11. On December 13, 2006, Joseph Driscoll (hereafter "Driscoll"), Municipal Personnel Director, sent a hearing notice to James Imperial. (Exhibit 9).
12. A hearing was held on January 22, 2007. The hearing was conducted by Howard L. Greenspan, Esq (hereafter "Greenspan"). (Exhibit 9).
13. On February 1, 2007, Mr. Greenspan sent his disciplinary hearing recommendation to Mr. Driscoll. This document was eight (8) pages in length and included findings and a recommendation to terminate the Appellant. (Exhibit 9).
14. A summary of the findings of operative facts, made by Mr. Greenspan supported his recommendation to terminate the Appellant's employment. Those findings included the following: the Appellant had "...pulled a permit", "...assisted in planning and gave advice and consultation", "was present at... during inspection..." "...present on multiple occasions to review and advise..." (Exhibit 9)
15. On February 14, 2007, Edward J. Clancey, Jr., Mayor of the City of Lynn, adopted the recommendation of Mr. Greenspan that the Appellant be terminated from his position as a plumber for the City of Lynn. (Exhibit 10).
16. On June 27, 2007, the Administrative Judge, Department of Industrial Accidents, approved the lump sum agreement. (Exhibit 1).

17. All of the witnesses who testified at this hearing appeared to be testifying with candor and forthrightness. I found no indication that any of the witnesses were less than truthful or honest. (Exhibits, testimony and demeanor)

CONCLUSIONS AND FINDINGS

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 Commission, 43 Mass. App. Ct. 300, 304 (1997). *See* Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); *Police* Department of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Id. at 304, quoting Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The 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 Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton *v.* Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). 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. Town of Falmouth *v.* Civil Service Commission, 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). *See* Commissioners of Civil Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 727-728 (2003). Furthermore, it is the function of the Commission to determine the credibility of testimony presented before it and what degree of credibility should be attached to a witness's testimony. See School Committee of Wellesley *v.* Labor Relations Commission, 376 Mass. 112, 120 (1978); Embers of Salisbury, Inc. *v.* Alcoholic Beverages Control Commission, 401 Mass. 526 529 (1988); Doherty *v.* Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is apportioned amongst witnesses. Herridge *v.* Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

'Total and permanent disability' is intended to mean total and permanent disability to earn wages. Frennier's Case, 318 Mass. 635 (1945). This is evidenced by the provision in §43A that if 'an employee who has been agreed or found to be totally and permanently disabled earns wages at any time thereafter, payments of compensation may be suspended in the manner

provided by section twenty-nine.' Id. The total and permanent disability therefore is to be construed to be such as to prevent the employee from engaging in any occupation and performing any work for compensation or profit, that is, from obtaining and retaining remunerative employment of any kind within his ability to perform. Id. "Complete physical or mental incapacity of the employee is not essential to proof of total and permanent disability within the meaning of the statute. It is sufficient if the evidence shows that the employee's disability is such that it prevents him from performing remunerative work of a substantial and not merely trifling character, and regard must be had to the age, experience, training and capabilities of the employee." Adamaitis v. Metropolitan Life Ins. Co., 295 Mass. 215, 219, 220 (1936); Boss v. Travelers Ins. Co., 296 Mass. 18, 22, 23 (1936).

In the appeal at hand, the Appointing Authority has failed to reasonably justify its termination of the Appellant. G.L. c. 152, § 48(4) provides:

> Notwithstanding any provision of this section or of sections seventy-five A or seventy-five B, the acceptance of any amount in return for the right to claim future weekly benefits shall create a *presumption that the employee is physically incapable of returning to work with the employer where the alleged injury occurred*. Such presumption shall continue for a period of one month for each fifteen hundred dollar amount included in the settlement for future weekly benefits. No re-employment rights shall inure to such employee under this chapter during any period of presumption of incapacity as herein provided. (Emphasis supplied).

The Appellant was presumed to be *incapable of returning to work with the employer* for twenty months. The facts in evidence, however, fail to establish that the activities in question could reasonably constitute a violation of G.L. c.152, § 48. The Appointing Authority's job specifications for a Plumber include manual labor and related physical activities. The Appellant suffers a permanently injured knee, to which he received a workers' compensation settlement.

Based on the Appointing Authority's exhibits and testimonies, it is not evident that the Appellant engaged in substantial misconduct or physical activities that would demonstrate a fitness or ability to return to work for the Appointing Authority. The activities carried out by the Appellant while on workers' compensation, (i.e. pulling permits, inspecting, planning, etc.), may be performed without physical labor, and while the Appellant was still injured. The Appellant was not in a position, however, to be capable of returning to work as a plumber with the Appointing Authority. The duties of a plumber in the City of Lynn are difficult; a plumber must be able to lift, bend, stoop, and climb: "its heavy work. It's something that requires manual labor, hard manual labor." (Testimony of Connick). The Appellant denies, and indeed was never observed, performing any physical work at any job site (Testimony of Appellant; Exhibit 9). These witnesses provided by the Appellant were credible and their memories were consistent with the claims of the Appellant. It is more probable than not that the Appellant remained incapable of returning to work for the Appointing Authority, while simultaneously remaining capable to provide non-labor services gratuitously. Absent supportive evidence of conduct in violation of G.L. c.152, §48, the Appointing Authority's decision to terminate the Appellant cannot be reasonably justified.

The Appellant's workers' compensation settlement does not preclude him from engaging in volunteer or otherwise non-compensated work. Under G.L. c.152, §48, total and permanent disability is to be construed "to prevent the employee from engaging in any occupation and performing any work for compensation or profit, that is, from obtaining and retaining remunerative employment of any kind within his ability to perform." Frennier's Case, 318 Mass. 635, 639 (1945). The record at hand is void of evidence indicating that the Appellant received and retained compensation or profit from the Allerton, Pennybrook, or Trevett plumbing

projects. The Appellant could *instruct*, but not *perform*, plumbing duties; and he did so without expected or actual receipt of compensation. Unless the Appellant receives "a continuing earning capacity upon which one can rely to a substantial degree for a livelihood;" he remains entitled to his workers' compensation agreement. The evidence before us does not establish that the Appellant's pulling of plumbing permits constituted a violation of the workers' compensation settlement. While it may be true that such actions are in violation of the Appellant's licensure, the correct forum for such violations is with the appropriate licensing agency, not this Commission. Pulling permits and advising workers on job sites does not constitute "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service" to which the Appellant may be terminated. *See* Murray *v.* Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton *v.* Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). Absent such evidence, the Appellant's activities do not rise to the level of violating G.L. c.152, §48 because he remained incapable of returning to the Appointing Authority and assuming the physical responsibilities that job entailed.

The Appointing Authority asserts in error that the lump sum agreement extinguished the Appellant's employment rights. G.L. c. 152, § 48(4) provides that "No re-employment rights shall inure to such employee under this chapter during any period of presumption of incapacity." In the event that the Appellant's conditions improved to a sufficient degree to not be permanently disabled, he would have to re-apply and be re-hired by the Appointing Authority. The Appellant has not attempted to exercise any re-employment rights within this statutory period. Rather, the Appellant seeks to preserve his civil service rights should his condition improve after the expiration of the statutory period. The Appointing Authority may not

unilaterally terminate or abridge the Appellant's future civil service rights, without cause, during this period of re-employment ineligibility. See Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

The Appointing Authority's decision to terminate the Appellant also fails on procedural grounds. In dealing with an interest as fundamental and important as an employee's work tenure, an Appointing Authority has the responsibility, when challenged before the Commission, to present evidence specifically and rationally justifying the action. School Committee of Brockton v. Civil Service Commission, 43 Mass.App.Ct. 486, 492 (1997). In the absence of a relevant regulation or explicit job standards, a rubric describing conduct as "inappropriate and unbecoming," even if generally accurate and applied in good faith, is insufficient to justify discharge. McIssac v. Civil Service Commission, 38 Mass.App.Ct. 473 (1995); City of Cambridge *v.* Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997) Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983).

The Appointing Authority introduced into evidence the Disciplinary Hearing officer's findings and recommendations (Exhibit 9) and the Mayor's adoption of said findings (Exhibit 10); however it failed to provide a more detailed notice to the Appellant. At the Full Hearing before this Commission, the Appointing Authority pointed to four lines in the Disciplinary Hearing Officers' Procedural Background Statement (Record 69:8-13; Exhibit 9). The Appointing Authority stated: "I would represent to my brother that…the employee was notified of the charge against him, working at or in a manner inconsistent with receiving benefits for total disability under the worker's compensation act." (Record 69:8-13; Exhibit 9). The Commission Record is void of additional forms of notice provided to the Appellant which specified a just

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 sent to:

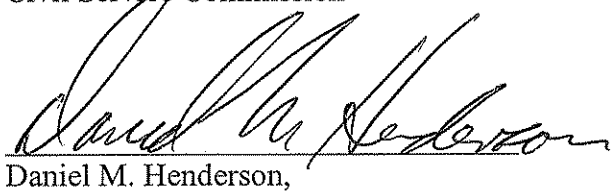
Joseph DeLorey
A.F.S.C.M.E. Council 93
8 Beacon Street, Boston MA 02108

David F. Grunebaum
60 William Street, Ste. 330
Wellesley, MA 02481

cause. The Disciplinary Hearing Officer's findings only conclude that the Appellant "assisted in the planning and gave advice and consultation about the work to be performed," visited worksites, reviewed and advised performances, and pulled permits to assist in planning and projects. (Exhibit 9). In the absence of a more definite notice to the Appellant, the Appointing Authority is unable to meet its procedural burden.

WHEREFORE, the Respondent's Motion to Dismiss filed under Docket No. D1-07-118 is hereby ***denied***, and the Appellant's appeal is ***allowed***. He shall be reinstated or returned to the status he held at the time of his termination without loss of benefits.

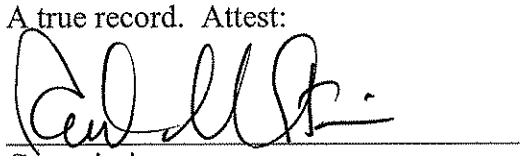
Civil Service Commission



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor, Commissioners); Bowman absent on September 11, 2008.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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 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