

Decision mailed: 11/5/10
Civil Service Commission CB

SUFFOLK, ss.

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

JOHN INACIO,
Appellant

v.

TOWN OF WINTRHOP,
Respondent

D1-09-63

Attorney for the Appellant:

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Representative of the Respondent:

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Commissioner:

Daniel M. Henderson

DECISION

Pursuant to M.G.L.c. 31, s.43, the Appellant, John Inacio (hereinafter the "Appellant") filed a timely appeal with the Civil Service Commission (hereinafter "the Commission") on February 27, 2009, claiming that the Town of Winthrop (hereinafter "the Town" or "Winthrop"), did not have just cause to terminate his employment with the Department of Public Works (hereinafter "DPW") for leaving his assignment without permission before the end of his shift.

A hearing was held on June 16, 2009 at the offices of the Commission. One (1) audiotape was made of the hearing and is retained by the Commission. The hearing was declared private.

FINDINGS OF FACT

Two (2) exhibits, with sub-parts and a stipulation were entered into evidence at the hearing. Exhibit 3 was filed post hearing, on June 16, 2009, as directed. Based on these exhibits and the testimony of :

For the Appointing Authority:

- DPW Director David Hickey (hereinafter “Hickey”)
- DPW Operations Manager Steven Calla (hereinafter “Calla”)

For the Appellant:

- John Inacio, the Appellant

I make the following findings of fact:

1. The Appellant worked for the DPW. He had been a tenured civil service employee since December 14, 1987. (Testimony of Appellant.)

Appellant's Disciplinary Record:

2. The Appellant was suspended for one and a half (1 ½) days for tardiness and absence in 1988. (Exhibit 2A)
3. The Appellant was suspended for three (3) days on February 14th, 1990 after using abusive language and making threats to a supervisor. (Exhibit 2B)
4. The Appellant was suspended on June 2, 1997 for insubordinate and harassing behavior. (Exhibit 2C)
5. The Appellant received a warning on August 19, 1999 for taking an unauthorized break. (Exhibit 2D)
6. The Appellant received a warning on May 15, 2000 for insubordinate and harassing behavior. (Exhibit 2E)

7. The Appellant was suspended for three (3) days on May 15, 2000 for violating department policy and refusing to do his job. (Exhibit 2F)
8. The Appellant received a warning on August 14, 2000 for taking an unauthorized break. (Exhibit 2G)
9. The Appellant was given a warning on April 12, 2001 for taking an unauthorized break. (Exhibit 2H)
10. The Appellant was suspended for five (5) days on May 5, 2001 for sleeping during work hours. (Exhibit 2I)
11. The Appellant received a warning on December 11, 2001 for being absent without notifying his supervisors.
12. The Appellant was suspended for six (6) months on January 16, 2007 for engaging in a physical altercation with a coworker. (Exhibit 2K)
13. The Appellant's union won an arbitration award on his behalf, dated January 10, 2009, AAA #11 390 02630 07. The Appellant was awarded, pursuant to the CBA; a longevity payment for fifteen years of service as of July 1, 2007, despite not being on the payroll or being paid as of July 1, 2007, due to his six (6) months suspension. (Exhibit 3)
14. The Appellant received a warning on November 19, 2008, for using a Town vehicle during a break. (Exhibit 2L)

February 1, 2009 Incident:

15. In January 2009, Pleasant Street, a main street in the town of Winthrop, partially collapsed due to a water main break, leaving a hole of 35 feet by 35 feet. A number of other problems resulted from this water main break as well, including an exposed gas main that went under

the sidewalk, a broken tide fence and a damaged storm culvert. This dangerous situation required this section of the street to be closed. (Testimony of Calla)

16. This large hole was left uncovered by plates due to its size. Additionally, this dangerous situation needed to be monitored since at each “tide change” there could be more undermining of the area. (Testimony of Calla)
17. There was initially a police detail guarding this area 24 hours a day because it was a danger to public safety. In fact, a vehicle had already fallen into the hole that resulted when the road first collapsed. However, due to budgetary concerns, it was decided to have the DPW take over the assignment. (Testimony of Calla)
18. On January 29, 2009, the DPW took over this detail from the Police Department. The duties of the DPW workers were primarily safety concerns, to secure the work zone and ensure that the lighted “Road Closed” signs were functioning properly, so that vehicles or pedestrians would not be endangered by the large hole. A detour was set up for two blocks. Their secondary duties were to clear snow away from the barricades and to refuel the gas pumps which were pumping out the water. The DPW employee at the site was to observe or to act as the “eyes and ears” for problems. (Testimony of Calla)
19. The Appellant first worked a full shift at this site without a problem on Thursday, January 29, 2009. (Testimony of Calla, Testimony of Appellant)
20. The specifics of the assignment were explained to the Appellant by the Water Dept. General Foreman Roger McAvoy, personally, on January 29th. In fact McAvoy took the first shift of this assignment for the DPW. The assignment was further explained to the Appellant by Calla, over the telephone on January 29th. (Testimony of Calla)

21. The Appellant voluntarily accepted a second overtime shift of 11:30 PM, Sunday, February 1, 2009 to 7:00 AM on Monday February 2, 2009. (Testimony of Calla)
22. Sunday, February 1, 2009 was Super bowl Sunday and the game was televised on TV from Tampa Fla., beginning at 6:00 PM. (Testimony of Appellant, administrative notice)
23. When the Appellant arrived at the work site, no one was there. However, it is not expected that anyone be present during shift changes. Robert Ford, Sr. who preceded the Appellant for that detail had driven a vehicle (probably a back-hoe) from the DPW yard for this detail. He returned the vehicle to the yard at the end of his shift. It was expected that the Appellant would also drive a vehicle to and from the yard for his shift. (Testimony of Calla)
24. The Appellant did drive a truck from the yard to the site for this detail shift arriving at approximately 11:30 PM. He did have a cell phone with him at that time. He did have Calla's cell phone number and knew that numbers of the other foremen were posted at the DPW garage. He had previously called Calla many times on his cell number. The Appellant did not seek permission from any supervisor to leave the work site. He left the work site at approximately 11:45 PM. (Testimony of Appellant)
25. The Appellant claimed as an excuse for leaving the work site that he thought the detail or assignment had been cancelled. He claimed that he thought the assignment was just running the bypass pumps and there were no pumps at the site. He found no one at the site; He also claimed that: "I was under the impression that I was to relieve someone". He also testified that "I kind of thought the job was completed and they forgot to tell me". He admitted on cross-examination that on Thursday he was instructed that he could leave the site during the shift, if he needed gasoline. Although he had called Calla and others many times previously on his cell phone; he felt it was "no emergency", so he did not call Calla or another foreman

that night. Ironically, the Appellant claimed that he had spoken with another DPW worker, Frank Clifford, earlier in the evening before his shift and Clifford told him that he Clifford had not seen any worker at the site at 7:00 PM. The Appellant proposed this information to bolster his claim of reasonably believing that the detail had been cancelled for his shift.

However, I find that if true, this information from Clifford should have prompted the Appellant to make an immediate call to confirm the suspected cancellation. The Appellant had not made any reference to this alleged conversation with Clifford, previously to the Town Manager and had not attempted to secure a statement or testimony from Clifford regarding it, since it “slipped my mind”. (Testimony of Appellant)

26. The Appellant left the site and went home at 11:45 pm. He did not notify his supervisor or seek permission to leave and did not attempt to find out if the assignment had been cancelled and did not attempt to find a replacement for this assignment. He did not expect anyone to answer the phone at the main DPW number when he called in at approximately 11:45 PM. (Testimony of Appellant)

27. He left a message on the DPW answering machine, knowing that this phone would be unattended and unmonitored at that hour of the night. (Testimony of Calla, Testimony of Appellant)

28. The routine practice for an employee to reach Calla by telephone is to call his cell phone number. All employees have his cell number and also the other foremen’s cell numbers. Additionally, Calla’s and many of the foremen’s home and cell phone numbers were posted in the break room of the DPW building. The Appellant could have called any of the foremen if he was leaving the work site for any reason. Calla and none of the foremen received a call from the Appellant, that night. (Testimony of Calla, Testimony of Appellant)

29. The Appellant had previous to this incident, called Calla numerous times on Calla's cell phone. (Testimony of Calla, Testimony of Appellant)

30. The Appellant called in sick the following Monday, February 2nd. Sometime before 7:00AM start of the shift. (Testimony of Calla)

31. DPW Director David Hickey has held this position for five years for the Town of Winthrop.

This particular water-main break was the worst of many breaks during his tenure. Repairing this break and corollary problems extended over several weeks. Conducting the repair process in an efficient and effective manner was paramount for both budgetary and public safety reasons. The inconvenience to the neighborhood due to the detour also was factor considered. Dealing with the Appellant was difficult given his long history of discipline. He has a reputation as a bully to co-workers and an adversary to management. The Appellant's attitude and behavior has become harmful to the morale and order in the DPW. Steve Calla came in to his office that Monday morning very upset over this incident and the frustration of having to deal with the Appellant about it. Calla asked him to deal with the Appellant on the discipline. The Appellant could easily have contacted Calla or a foreman by cell phone or used the radio in the DPW truck to contact the Police or Fire Department, if he really wanted to. Any claimed confusion over the assignment or its cancellation could have been quickly resolved, if the appellant really wanted to resolve it. He believes that the Appellant was just trying to "cover his tracks" by calling the DPW main number that night. He confirmed that no DPW supervisor was called directly by the Appellant that night. He also confirmed that there were no metal steel plates covering the hole that week-end and into Monday.

(Testimony of Hickey)

32. On February 17, 2009, the Town held a disciplinary hearing on this incident pursuant to Chapter 31 § 41. The charge, in sum, was that he had voluntarily accepted a specific overtime detail assignment for February 1, 2009; He had been advised of the primary and secondary functions of that assignment; He abandoned his assignment without permission from anyone holding supervisory status; His actions constitute insubordination, inefficiency and conduct unbecoming a member of the DPW; his discharge from employment took into his prior work performance and long history of warnings and suspensions. (Exhibit 1)
33. Winthrop Town Manager, Lawrence S. Holmes, sent a letter to the Appellant Inacio on February 18, 2009 advising him that as a result of a disciplinary hearing, he would be terminated from his position with the DPW due to his “insubordination, inefficiency, and conduct unbecoming to a member of the Public Works Department” stemming from this incident. (Exhibit 1)
34. Both DPW Director David Hickey and DPW Operations Manager Steven Calla presented themselves as professional witnesses. Their dress, demeanor and responses were appropriate. They made good eye contact while testifying. They answered promptly and without hesitation and showed a good memory of the relevant facts and detail. They did not volunteer extraneous or advantageous material to their answers. They affirmed the usual practice, routine and responsibilities at the DPW, in a way of easy familiarity. Their answers were corroborated by or in conformity with other evidence. Their answers were sincere and rang true. I find them both to be credible and reliable witnesses. (Testimony and demeanor of Hickey and Calla)
35. The Appellant was his own worst witness. None of his explanations or excuses rang true. He did not appear to be convinced by his own testimony. He admitted to having a cell phone

with him but chose not to follow his usual practice and use it to call Calla or someone else because he “was under the impression [he] was to relieve someone” and he “kind of thought the job was completed and they forgot to call [me]” and further, that he “felt it was no emergency, so [he] didn’t call”. The Appellant spoke slowly, weighing the question well, before answering; yet still offered only improbable and unpersuasive answers. His actions on the night in question and his demeanor at this hearing conveyed a cavalier or indifferent attitude; especially considering his long history of prior discipline. He offered extraneous or uncorroborated facts, such as the condition of the work site, (steel plates over the hole) to justify his decision to leave the site without seeking permission. His testimony of a conversation earlier in the evening with DPW employee Frank Clifford relaying that no one was at the site at 7:00 PM is not believable. He offered this testimony so as to support his decision to leave the site, as being reasonable. However, I find that if this earlier conversation actually occurred, it is even more reason for the Appellant to have immediately telephoned Calla or a foreman, for clarification of the cancellation of the detail. He claimed to have forgotten this conversation until this hearing, as his explanation for not calling Clifford as a witness. Finally he called the DPW main number at that late hour, knowing that no one was likely to answer the phone. His answers did not ring true or reliable. He is found not to be a credible or reliable witness. (Testimony and demeanor of Appellant John Inacio)

CONCLUSION:

The responsibility of the Commission is to determine, by a preponderance of the evidence, that disciplinary action taken by the Appointing Authority was reasonably justified at the time when the decision was made. Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997); see also Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). McIsaac v. Civil Serv.

Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003).

An action is considered justified when it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and correct rules of law." Id. at 304, quoting Selectman of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civil Serv. v. Municipal Ct. of the City of Boston, 359, Mass. 211, 214 (1971)

The Commission determines if a disciplinary action is justified by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public's interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civil Serv. Comm'n 486, 488 (1986).

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. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The Appointing Authority has met its burden. The evidence supports a finding to the preponderance of the evidence that the Appointing Authority had just cause to terminate the employment of the Appellant. There were sound and sufficient reasons shown by the Town given the specific assignment, the public safety nature of the circumstances and the potential for

serious consequences to the public and corresponding liability for the Town. The Appellant seemed to act in deliberate disregard to the public interest, his supervisors' authority and his own fundamental job responsibilities. His actions appear especially egregious in consideration of his long history of job related prior discipline. His job termination under these circumstances is justified and in keeping with the principle of progressive discipline. His testimonial attempts to excuse or justify his actions after the fact, lacked credibility or persuasion.

The Appellant was terminated because the abandonment of his post constituted "insubordination, inefficiency, and conduct unbecoming a member of the Public Works Department."

The Commission had previously held in Aponte v. Holyoke that the Appointing Authority need not show that the "substantial misconduct" of the employee resulted in actual damage. Aponte v. City of Holyoke, 21 MCSR 357 (2008) In this case, the Commission dismissed the appeal of the Appellant after he was suspended for three days due to an ongoing pattern of tardiness and absenteeism, even though this behavior had not necessarily resulted in tangible damage to the function of the department. "It is hardly necessary to engage in argument describing the potential consequence to public service if public employees were not required to communicate regarding whether they intend to show-up for work. To suggest that absent damage to public service, there shall be no consequence, is absurd." Id. at 359

Here, the Appellant abandoned a voluntary overtime assignment. It is clear that this work site was a potential danger to public safety because the Town had required the Police Dept. and then the DPW to monitor it. Any resulting injury to a person or to property would have resulted in liability for the Town. Taking into account the the Appellant's lengthy record of prior discipline

and the seriousness of leaving a dangerous work site unattended, the Town was justified in terminating the Appellant's employment.

For all the above stated reasons, the Appellant's appeal filed under Docket Number D1-09-62 is hereby *dismissed*.

Civil Service Commission,



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on November 4, 2010.

A true record, Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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:

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