

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

THOMAS JOHNSON JR.,
Appellant

v.

Docket No.: D1-15-158

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

Scott D. Bradley, Esq.
Law Offices of Scott D. Bradley, P.C.
700 West Center Street, Suite 4
West Bridgewater, MA 02379

Appearance for Respondent:

Katherine M. Feodoroff, Esq.
Senior Assistant City Solicitor
City of Brockton
45 School Street
Brockton, MA 02301

Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to G.L. c. 31, § 43, Thomas Johnson, Jr. (“Appellant” or “Mr. Johnson”) filed a timely appeal with the Civil Service Commission (“Commission”) from the decision of the City of Brockton (“Respondent” or “Brockton”) to terminate his employment with the Brockton Department of Public Works (“DPW”). A pre-hearing conference was held on August 25, 2015 and a full hearing was held on October 8, 2015; both were held at the offices of the Commission.² At the hearing, witnesses were sequestered, with the exception of the Appellant.

¹ The Commission acknowledges the assistance of Law Clerk Brendan Rimetz in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

The hearing was digitally recorded, with copies provided to the parties.³ For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Based on Exhibits one (1) through twenty-eight (28)⁴, and the testimony of:

Called by Brockton:

- Larry Rowley, Commissioner, DPW (“Commissioner Rowley”)
- Patrick Hill, General Foreman of Sewers, DPW (“Mr. Hill”)
- Alisa Hambley, Head Administrative Clerk, DPW (“Ms. Hambley”)
- Tim Green, Construction Foremen in Sewer Department, DPW (“Mr. Green”)

Called by the Appellant:

- Mr. A, Former Maintenance Man, DPW
- Thomas Johnson Jr., Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, case law and policies, and reasonable inferences from the evidence⁵, a preponderance of credible evidence establishes the following findings of fact:

1. Thomas Johnson Jr., is a 43-year-old male who lives in Brockton, MA. He has a minor child who does not reside with Mr. Johnson. (Testimony of Mr. Johnson) Effective October 2014, Mr. Johnson had child visitation on alternating weekends. (Ex. 22)

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

⁴ Items that were admitted de bene at the hearing were subsequently entered in full.

⁵ Each exhibit is given the weight that it is due; as indicated at the full hearing, Ex. 17 is given little weight because its origin and date of origin are unclear. In addition, the notations in Ex. 17 pertain to events on May 4, 2015, which are not at issue here.

2. Mr. Johnson was employed at the Brockton DPW for 11 years and served in the position Junior Working Foreman in the DPW's Sewer Division from November 2014 until he was terminated. (Testimony of Mr. Johnson)

Appellant's History of Leaving Work Without Permission

3. On March 9, 2011, Mr. Johnson had his overtime pay docked by one-half hour as a result of an incident that occurred at 110 Liberty Street in Brockton. During the incident in question, a concerned citizen observed Mr. Johnson and Mr. Green, a fellow employee, sitting idle and taking care of personal business while on City time using a City vehicle. The citizen observed the City truck parked, with an occupant in the passenger seat, in front of a medical building at which the citizen had an appointment. The citizen later saw the truck still parked out front almost an hour later when another City employee exited the medical building, got into the truck and drove away. The citizen's complaint did not identify which City employee was leaving the building and which was the passenger in the truck but provided sufficient information to discern that Mr. Johnson and another employee had been driving the City vehicle at that time. (Exhibit 18)
4. On September 1, 2011, Mr. Johnson had his pay docked again by one-half (½) hour after it was discovered that Mr. Johnson left work early without permission. (Exhibit 19)
5. On October 28, 2011, Mr. Johnson left work without permission and had his pay docked by one and one-half (1½) hours. (Exhibit 20)
6. Mr. Johnson again left work early on September 21, 2012 without permission and had his pay docked one (1) hour. (Exhibit 21)

Appellant Left Work Without Permission in May 2015

7. In May 2015, one of three working foremen in the Sewer Department at the DPW decided to retire. The retiring foreman worked the 4 p.m. to midnight shift, also known as the “emergency shift.” Calls to the DPW during this shift are forwarded to the phone of the person assigned to the shift. The position was temporarily filled by the least senior Working Foreman, which was Mr. Johnson. (Testimony of Mr. Rowley; Exhibit 9)
8. When he was assigned to the emergency shift, Mr. Johnson communicated to Mr. Rowley that he did not want to work the shift. Since Mr. Johnson had the least seniority, the shift was still assigned to him. (Testimony of Mr. Rowley)
9. This assignment was effective May 4, 2015 through May 17, 2015 from 4 p.m. to midnight. Mr. Johnson was to work every day except Tuesdays and Wednesdays. (Exhibits 5 and 7)
10. On May 4, 2015, Mr. Johnson was out sick. (Testimony of Rowley)
11. On May 7, 2015, Mr. Johnson arrived for his shift at 4:42 p.m. and left at 11:30 p.m. (Exhibits 5, 7, 11; Stipulation)
12. On May 8, 2015, Mr. Johnson arrived for his shift at 6:37 p.m. and left at 11:30 p.m. (Exhibits 5, 7, 11; Stipulation)
13. On May 9, 2015, Mr. Johnson arrived for his shift at 4:25 p.m. and left at 11:25 p.m. (Exhibits 5, 7, 11; Stipulation)
14. On May 10, 2015, Mr. Johnson arrived for his shift at 9:27 p.m. and left at 9:43 p.m. (Exhibits 5, 7, 11; Stipulation)
15. On May 15, 2015, Mr. Johnson arrived for his shift at 4:23 p.m. and left at 7:01 p.m. (Exhibits 5, 7, 11; Stipulation)

16. In all, Mr. Johnson missed a total of eighteen (18) hours and forty-one (41) minutes during his time working the emergency shift. (Exhibit 5)
17. During the May 4 to 17, 2015 4pm to 12am shift to which Mr. Johnson was assigned, his alternating weekend child visitation would have occurred only on the weekend of May 8 – 10 (assuming child visitation began Friday night and ended Sunday during the day) or the weekend of May 15 – 17. However, Mr. Johnson worked the least amount of time of the 4pm to 12am shift on Sunday night May 10 (9:27pm – 9:43pm), when he did not have scheduled visitation, and on Friday night May 15 (4:23pm – 7:01pm), when he may have had scheduled visitation but since he worked the full shift Saturday night, May 16, either he did not have scheduled visitation that weekend or there was no conflict with scheduled visitation that day. On Friday night, May 8, and Saturday night May 9, 2015, when Mr. Johnson may have had scheduled visitation, he worked most of the night shift (on May 8th, 6:37pm - 11:30pm; on May 9, 4:25pm-11:25pm), indicating that there was no visitation conflict and yet he failed to work the entire shift. (Exhibits 5, 7 and 11; Administrative Notice (calendar of May 2015))

May 8, 2015 Incident Involving Vehicle Batteries

18. As Working Foreman on the emergency shift at the Sewer Department, Mr. Johnson also served as the supervisor for the shift and oversaw other workers assigned to the shift, including Mr. A. (Testimony of Mr. Rowley; Exhibit 5)
19. During the shift, Mr. A, who has certain limited abilities because of a prior injury and, as a result, occasionally has a hard time distinguishing right from wrong, admits that he decided to scrap the batteries left in the Sewer Department garage at the DPW for cash. (Testimony of Mr. A)

20. On or about May 8, 2015, Mr. Johnson saw Mr. A load the batteries into the bed of his pickup (Mr. A's) truck. Mr. Johnson then backed Mr. A's truck out of the garage for him. (Exhibit 11; Testimony of Mr. Johnson and Mr. A)
21. Mr. A admits that he loaded approximately twenty-six (26) batteries into the bed of his truck. The batteries had accumulated in the garage over the course of about twelve (12) months. (Testimony of Mr. Rowley)
22. Mr. A made approximately \$220 from scrapping the batteries and did not intend to give that money to the City. (Testimony of Mr. A)
23. The "scrapping" of used batteries is the duty of the DPW mechanic. (Testimony of Mr. Rowley and Mr. Hill) While this rule is not in writing, no other employees have duties related to the scrapping of used batteries in the DPW garage. (Testimony of Mr. Rowley)
24. For having wrongfully taken the batteries, but in view of his certain limited abilities related to a prior injury, Mr. A was given a last chance agreement but violated it and was terminated. (Testimony of Mr. Rowley and Mr. A)

May 22, 2015 Suspension

25. In a letter dated May 22, 2015, Mr. Johnson was informed by letter from Commissioner Rowley that he would have to serve a five (5) day suspension. The dates for the suspension were May 26, 2015, May 27, 2015, May 28, 2015, May 29, 2015, and June 1, 2015. The letter stated the following, in part:

...The reasons for the suspension:

- 1.) In accordance with the current collective bargaining agreement between the City of Brockton and the Public Employees' Local 1162, Water/Sewer, as the junior Working Foreman Sewer Systems Maintenance Craftsman, Sewer Section, Utilities Division, [DPW], you were assigned temporarily to the **Monday through Sunday (off Tuesday through Wednesday)**, 4:00 [p.m.] to Midnight shift, effective **May 4, 2015 through May 17, 2015**. You failed

to report and failed to remain on your shift assignment on the following dates and times:

- a.) Thursday, May 7, 2015[,] arrived at work in personal vehicle at 4:42 [p.m.], wearing shorts and flip flops[.]
- b.) Thursday, May 7, 2015[,] left work in personal vehicle at 11:30 [p.m.]
- c.) Friday, May 8, 2015[,] arrived at work in personal vehicle at 6:37 [p.m.], wearing shorts and flip flops[.]
- d.) Friday, May 8, 2015[,] left work in personal vehicle at 11:30 [p.m.]
- e.) Saturday, May 9, 2015[,] arrived at work in personal vehicle at 4:25 [p.m.], wearing shorts and flip flops[.]
- f.) Saturday, May 9, 2015[,] left in work clothes in city vehicle with Dana Mallory, Water/Sewer Maintenance Man.
- g.) Saturday, May 9, 2015[,] left work in personal vehicle at 11:25 [p.m.]
- h.) Sunday, May 10, 2015[,] arrived at work in personal vehicle at 9:27 [p.m.], wearing shorts and flip flops[.]
- i.) Sunday, May 10, 2015[,] 9:34 [p.m.] went to dispatch office[.]
- j.) Sunday, May 10, 2015[,] 9:36 [p.m.] left dispatch office[.]
- k.) Sunday, May 10, 2015[,] left work in personal vehicle at 9:43 [p.m.]
- l.) Friday, May 15, 2015[,] arrive at work in personal vehicle at 4:23 [p.m.]
- m.) Friday, May 15, 2015[,] left work in personal vehicle at 7:01 [p.m.]

All of these dates and times have been verified by the video camera system within the Department of Public Works, 39 Montauk Road, Brockton, MA.

- 2.) On all of the above referenced dates you never contacted any supervisors to inform them of your tardiness or the fact that you were leaving your job assignment. For each of the dates your shift assignment was an eight hour day, you were paid for eight hour days, although you failed to report or remain at work for your entire shift and were absent for a total of eighteen hours and forty one minutes.
- 3.) On May 8, 2015, while on duty as the Working Foreman Sewer Maintenance Craftsman, the supervisor of the shift, you were seen on video camera watching a co-worker place twenty six city batteries into his own personal vehicle. This is considered theft of city property, you failed to stop him or report the incident to any superiors. ...

(Exhibits 1 and 11)

26. In another letter from Commissioner Rowley also dated May 22, 2015, Mr. Johnson was informed that he was being placed on administrative leave with pay beginning on June 2, 2015. The letter read, in full:

Effective June 2, 2015, and until further notice, you will be carried “Administrative Leave With Pay”. You are not to report to work and are not to enter the premises of City of Brockton, Department of Public Works, Utilities Division, 39 Montauk Road, Brockton, MA 02301.

(Exhibit 2)

27. In a letter dated June 5, 2015, Commissioner Rowley informed Mr. Johnson that a hearing on the matter of his five (5) day suspension was scheduled for June 11, 2015. The letter read, in full:

In accordance with the Massachusetts General Laws, Chapter 31, Section 41, as the appointing authority of the Department of Public Works, I have designated Maureen Cruise, Director of Personnel[,] as the hearing officer for your hearing on the matter of your five (5) day suspension. The hearing has been scheduled for Thursday, June 11, 2015 at 3:00 P.M. in the G.A.R. Room, City Hall.

(Exhibit 3)

28. In a letter dated June 24, 2015 from Commissioner Rowley to Mr. Johnson, the hearing regarding Mr. Johnson’s five (5)-day suspension was re-scheduled to July 1, 2015⁶. (Exhibit 4)
29. In another letter from Commissioner Rowley to Mr. Johnson dated June 24, 2015, Commissioner Rowley informed Mr. Johnson that “on [July 1, 2015] at 7:00 [p.m.] a hearing will be held [at Brockton City Hall] to consider whether you should be discharged, removed or suspended from your position of Permanent Working Foreman, Sewer Maintenance Craftsman, Sewer Section, Utilities Division, Department of Public Works.” The letter contained the same list of violations as in the May 22, 2015 letter from Commissioner Rowley to Mr. Johnson informing Mr. Johnson of his five (5)-day suspension. The hearing was combined with the hearing regarding the five (5)-day suspension. (Exhibit 5)

⁶ At the Commission hearing, the parties advised that around that time they were in negotiations which, ultimately, were unsuccessful.

30. Mr. Johnson was served with the Notice of Civil Service Hearing [regarding his] five (5) Day Suspension and Notice of Civil Service Hearing Regarding Discharge, Removal or Suspension on June 24, 2015. (Exhibit 6)
31. On July 10, 2015, Maureen Cruise, the designated hearing officer, issued a report on the July 1, 2015 local hearing. The report reads, in part:

According to the testimony of [Commissioner Rowley], Mr. Johnson was temporarily scheduled to work the Emergency Shift, Monday through Sunday, with Tuesday and Wednesday's off, 4:00 [p.m.] to midnight as the most junior Working Foreman Sewer Maintenance Craftsman, per collective bargaining agreement, Section 15-01, Seniority, which includes shift assignment. Mr. Johnson failed to report to work and failed to remain on the shift assignment on the dates as stipulated in the May 22, 2015 five day suspension letter and June 24, 2015 letter of contemplated disciplinary action. Defense Attorney Scott Bradley stipulated for the record that items 1 a-m in [the May 22, 2015 and June 24, 2015 disciplinary letters] are accurate relative to Mr. Johnson's attendance at work on said dates.

According to [Commissioner Rowley], when Mr. Johnson was notified of the temporary assignment, [Commissioner Rowley] understood that Mr. Johnson voiced his frustration relative to the assignment; however, he never informed his supervisor or the DPW Commissioner that he had any personal issues with the assignment. Patrick Hill testified that when he as the Sewer General Foreman notified Johnson of the assignment, Johnson stated that he would take zeroes. As a union member, Mr. Johnson was well aware that he was the junior Working Foreman Sewer Maintenance Craftsman and that as the junior employee he would be responsible for covering the emergency shift until such time as the shift was filled with a permanent employee. The testimony of Tim Green revealed that Johnson was made aware of the fact that the assignment was governed by seniority per the collective bargaining agreement and the assignment to Johnson was appropriate as he was the junior man.

According to both Commissioner Rowley's and Patrick Hill's testimony with respect to Johnson's failure to report to and remain at work, Johnson never followed the collective bargaining agreement relative to requesting vacation time, personal days or calling in sick for said shift(s). Johnson failed to notify the appropriate supervisor(s) relative to his absence or tardiness on said shifts until after he was issued the five-day suspension; Johnson also failed to inform the DPW Commissioner, or any other appropriate supervisor, that he had personal issues with the temporary work assignment until he had been issued the five-day suspension. Furthermore, at no time, including at the hearing, did Johnson provide

any proof to the City that he had a conflict with the temporary work assignment, specifically resulting from child visitation orders as claimed.

In addition to his attendance issues, while on duty as the Working Foreman Sewer Maintenance Craftsman, the supervisor of the shift, Johnson can be observed on city video footage watching a co-worker place twenty six batteries into his own personal vehicle. Johnson was also witnessed moving said vehicle out of the City garage. Although this is considered theft of city property—as Commissioner Rowley testified that these batteries are collected and sold by the city for scrap, which money is returned to the City’s coffers—Johnson makes no attempt to stop the employee. According to Commissioner Rowley, Johnson also failed to report the incident to any superiors.

... although the instant actions were sufficiently serious in and of themselves, over the course of Mr. Johnson’s employment, Johnson’s actions demonstrate a pattern of misrepresenting time worked. Specifically, Johnson was docked several hours for leaving work without approval Mr. Johnson never elected to grieve that he was docked time for these instances. ...

...The defense argued that while Mr. Johnson was absent from work during his assignment to the emergency shift, his absence was due to the fact that he was upset over his family issues which relate to one of his two children including that his girlfriend has custody of the child, that the child resides in Berkley, MA and that the girlfriend places demands on Mr. Johnson regarding his child ... The defense offered no testimony or documents to support this position, relying on argument of counsel alone. The defense claimed that the City was aware that there would be a need to fill the emergency shift because the City knew a working foreman intended on retiring six (6) weeks prior thereto. The defense claimed that despite this knowledge, the City did not inform Mr. Johnson of his assignment until a week prior to the filling of said shift, not allowing him time to file a complaint with the court system regarding his child care issues. The defense also claimed that no emergency calls went unanswered by Mr. Johnson while Mr. Johnson was assigned to the emergency shift. ...

... Johnson: failed to report and to remain at work on May 7, 2015, May 8, 2015, May 9, 2015, May 10, 2015, and May 15, 2015, failed to contact a supervisor(s) to inform him on his tardiness or that he was leaving his job assignment, observed a co-worker, which he supervised, remove city batteries from city property, and failed to stop or report said employee to his superiors. ...

I further find that the defense’s argument that no emergency calls were missed despite Johnson’s absence to be unpersuasive and invalid. Unless employees have requested and been granted time off, all employees are required to be present for the duration of their shifts irrespective of whether the shift is a regular or an emergency shift. ...

I also find unpersuasive, the defense's arguments that (1) Johnson's actions were not malicious and (2) minimal discipline is warranted due to the city's failure to determine if Johnson received a reasonable explanation regarding the battery incident. Johnson is in a supervisory position which responsibilities include oversight of other employees; however these responsibilities do not include the authority to determine whether stealing city property can be reasonably explained. ...

In accordance with M.G.L. c.31, sec 41, an employee may be discharge[d], removed or suspended for "just cause". This phrase is defined by courts as "substantial misconduct with adversely affects the public interest by impairing the efficiency of the public service." I find, based on this law, the evidence and testimony before me, that Working Foreman Sewer Maintenance Craftsman, Thomas Johnson, Jr.'s failure to perform report (sic) and remain at work during his assigned shift, his failure to notify a supervisor of his tardiness or the fact that he was leaving his job assignment and his failure to stop or report the theft incident was improper and detrimental to the Department and to the City and that these failures adversely affect the public interest by impairing the efficiency of service to the public. As such, I find that the five day suspension was supported by "just cause" and I further recommend termination of Mr. Johnson...

(Exhibit 7)(emphasis added)

32. Mr. Johnson did not testify at the local hearing. (Testimony of Mr. Johnson)

33. Mr. Johnson received a letter from Commissioner Rowley, dated July 31, 2015, stating that

Mr. Johnson was being terminated. The letter read, in full:

Attached find a copy of the Hearing Officer's Decision in the matter of your Civil Service Hearing Pursuant to Massachusetts General Laws, Chapter 31, Section 41 on whether there was just cause for your five day suspension from your position of Permanent Sewer Maintenance Craftsman, Sewer Section, Utilities Division, Department of Public Works, City of Brockton and whether additional disciplinary action should be handed down to you as an employee.

I have carefully reviewed the Hearing Officer's Report and the exhibits submitted into evidence at the hearing. I hereby accept and incorporate the attached Hearing Officer's report and findings.

Based on the foregoing, I uphold your five day suspension and hereby immediately terminate you from your position of Permanent Sewer Systems Maintenance Craftsman, Sewer Section, Utilities Division, Department of Public Works.

(Exhibit 8)

34. On August 3, 2015, Mr. Johnson filed an appeal of his termination with the Civil Service Commission.

Applicable Law

G.L. c. 31, § 1 provides that “basic merit principles”:

“ ... shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; ... (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions. ...”

(Id.)

Under G.L. c. 31, § 41, a civil service employee may be suspended for just cause five (5) days or less and for more than five (5) days, as follows, in part,

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof... If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. ...

A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions ... Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. Whenever such hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. A person whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended, and he shall be entitled to compensation for the period for which he was suspended. A person suspended under this paragraph shall automatically be reinstated at the end of such suspension. An appointing authority shall not be barred from taking action pursuant to the first paragraph of this section for the same specific reason or reasons for which a suspension was made under this paragraph.

... If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs of this section, such person may appeal to the commission as provided in section forty-three. ...

An employee aggrieved by a disciplinary decision by an appointing authority may appeal to the Commission under G.L. c. 31, § 43, which provides, in part,

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

(Id.)

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814,

823 (2006) and cases cited. The role of the 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, *rev. den.*, 426 Mass. 1102 (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. den.*, 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev. den.*, 390 Mass. 1102 (1983).

An action is “justified” if 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.” Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service 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, 160 N.E. 427 (1928). 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 Service Comm’n, 43 Mass.App.Ct. 486, 488, *rev. den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern 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.

The Appointing Authority's burden of proof by a preponderance of the evidence 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). *See also* 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 entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g.*, Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay evidence that would be inadmissible in a court of law. *See, e.g.*, Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009).

It is the purview of the hearing officer to determine 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.” 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. 9 130, 141 (1997). *See also* Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003)(where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

G.L. c.31, section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an 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. *See Police Comm’r v. Civil Service 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)(no findings to support modification).

In deciding to exercise discretion to modify a penalty, the commission’s task “is not to be accomplished on a wholly blank slate.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006), quoting *Watertown v. Arria*, 16 Mass.App.Ct. 331, 334 (1983).

After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L. c. 31, §43. . . . Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision.’

Id. *See also Town of Falmouth v. Civil Service Comm’n*, 61 Mass.App.Ct. 796, 800 (2004) quoting *Police Comm’r v. Civil Service Comm’n*, 39 Mass.App.Ct. 594, 600 (1996)(“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties *ab initio*, which is a power accorded to the appointing authority.”). Thus, when it comes to the review of the penalty, unless the Commission’s findings of fact differ material and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgement” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” *Town of Falmouth v. Civil Service Comm’n*, 447 Mass. 814, 823 (2006) and cases cited. *Cf. School Committee v. Civil Service Comm’n*, 43 Mass.App.Ct. 486, *rev. den.*

426 Mass. 1104 (1985)(modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975)(modification of discharge to 4-month suspension upheld).

The Commission may take an adverse inference when an Appellant fails or refuses to testify at the local hearing or a Commission hearing. *See, e.g., Noble v. MBTA*, 25 MCSR 391 (2012); Estrela v. Town of Randolph, 21 MCSR 339 (2008).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to terminate Mr. Johnson's employment. The testimony of the Respondent's witnesses was generally consistent and credible. Mr. A admitted taking the batteries but asserted that he did not know or was not told that taking the batteries was wrong and that he occasionally has a hard time distinguishing right from wrong. Therefore, his testimony is given limited weight. I address Mr. Johnson's testimony below.

The evidence adduced at the Commission hearing leads me to reach a conclusion that is essentially consistent with the findings of the Respondent's hearing officer. That is, Mr. Johnson repeatedly showed up late and left work early during the week of May 5, 2015 and on prior occasions. As a Working Foreman, Mr. Johnson was well aware that his job required him to be at the DPW garage during his shifts, including the temporary shift in early May 2015 from 4pm to 12am. Indeed, he stipulated to the times he failed to work during his temporary night shift assignment. At the Commission hearing, the Appellant averred that no calls had been missed while he was absent and that it was not possible for him to miss any calls because all calls to the DPW during the emergency shift were forwarded to his phone. Regardless of whether any calls were missed, Mr. Johnson knew where and when he was obliged to be during

his shift and yet he chose not to be there. In addition, Mr. Johnson admitting at the Commission that what he did was wrong in that regard. Further, Mr. Johnson also knew that he had the least seniority as a Working Foreman and he was well aware that he would have to fill the open position for the retiring emergency shift Working Foreman temporarily. Mr. Johnson even admitted at the Commission to anticipating that he would be asked to work the emergency shift.

Mr. Johnson's assertion that he faced sudden or recent child visitation changes, which precluded him from fully working the 4pm to midnight shift, is undermined by a preponderance of the evidence to the contrary. At the pertinent time, Mr. Johnson had child visitation alternating weekends. However, one of the dates he worked the least was a Sunday night when Mr. Johnson would not have had scheduled visitation. If, instead, Mr. Johnson had child visitation on the weekend of Friday May 15, Mr. Johnson worked two or three hours but on Saturday night, May 16, he worked most of the shift. While the Commission is certainly sympathetic to every parent's child custody and visitation concerns, Mr. Johnson had an obligation to make any appropriate visitation arrangements needed for his temporary assignment to the night shift and inform the Respondent of specific conflicts, which he did not do. In fact, Mr. Johnson had taken numerous days off previously because of issues involving his family and Commissioner Rowley often gave him the necessary time off, even when Mr. Johnson had no more vacation or sick time available.⁷

Further, the videos in evidence clearly show Mr. Johnson coming and going after his shift begins and before it ends. There is also video footage of Mr. Johnson standing next to Mr. A's truck when Mr. A was taking the batteries, as well as footage of Mr. Johnson getting into Mr. A's truck and backing it out of the garage after Mr. A had put the batteries into it. The Appellant argues that he should not be disciplined for permitting, and not reporting Mr. A's removal of the

⁷ Presumably this reflects the Respondent's conformity with the Family and Medical Leave Act where appropriate.

batteries because, at a prior unspecified time, an employee in the DPW Water Division obtained permission to scrap DPW Water Division copper and used the funds from the sale of the copper to at least partially fund a barbecue attended by employees on one occasion, including Mr. Rowley (although this was prior to his appointment as Commissioner and it is was not established that Mr. Rowley was then aware that the social occasion was funded, at least in part, by sale of the scrap). In addition, Mr. Johnson, deflecting his supervisory responsibilities, argues that no one told them that employees were not allowed to scrap the batteries and keep the resulting monies and that the Respondent even allows employees to use the garage to fix and/or wash their vehicles. The Appellant's assertions undermine his credibility. As Mr. Johnson testified, the DPW Water Division employee who scrapped copper to assist in funding a barbecue for employees obtained permission to do so. In addition, it appears to have occurred only once. In any event, such actions do not authorize employees to take other City property, keep the money they receive for recycling it, and for their supervisors to take no action upon observing the taking. Further, there is no evidence that Mr. A obtained permission to scrap the batteries he took and keep the money for himself. The events relating to the batteries, combined with the Appellant's stipulated failure to work the 4pm to 12am shift as assigned, constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of public service and establishes just cause for the Respondent to discipline Mr. Johnson.

Another factor here is that Mr. Johnson failed or refused to testify at the appointing authority's hearing, alleging that the deck was stacked against him, that the hearing officer works for the City, that the City's witnesses at the local hearing were referred to by their first names and that the hearing officer gave little weight to the testimony of Mr. Green, whose testimony

supposedly supported Mr. Johnson's defense.⁸ The Commission draws an adverse inference from Mr. Johnson's failure to testify at the local hearing. Further, G.L. c. 31, § 41 does not require the local hearing to be conducted by an impartial officer. The parties could have considered requesting that the Commission conduct the hearing under G.L. c. 31, § 41A, although that is not required. In any event, the Appellant was afforded a de novo, impartial hearing at the Commission.

The Appellant also avers that the Respondent inappropriately disciplined him twice for the same matter citing Worcester v. Civil Service Comm'n. & Dykas, 87 Mass.App.Ct. 120 (2015). The Appellant's reliance on the Dykas decision is misplaced. In Dykas, the Appeals Court affirmed the Superior Court decision (which affirmed the Commission decision), stating that an employee may not be terminated for failing to testify at the appointing authority hearing when ordered to do so, in addition to other reasons given by the appointing authority to terminate the employee. Such is not the case here. In addition, as noted above, G.L. c. 31, § 41 provides, with regard to discipline for five (5) or fewer days, in the first paragraph therein, and with regard to discipline for more than five (5) days in the second paragraph, that "[a]n appointing authority shall not be barred from taking action pursuant to the first paragraph of this section for the same specific reason or reasons for which a suspension was made under this paragraph." Id.

Consequently, the Appellant's assertions are unpersuasive.

Having determined that Mr. Johnson's conduct warranted discipline, I address the Respondent's decision to discipline Mr. Johnson by terminating his employment and whether modification of the discipline is appropriate. First, since the findings here are substantially the same as those found by the hearing officer at the local hearing, modification is not warranted. Secondly, I find no disparate treatment of the Appellant in the discipline issue. At the

⁸ Mr. Green was a witness for the Respondent at the Commission hearing.

Commission hearing, I requested that the Respondent provide information about the manner in which other employees have been disciplined in similar situations. In response, the Respondent provided eight (8) examples. While the information provided by the Respondent does not indicate the disciplinary history of the eight (8) employees, the information provided is sufficient to fairly assess whether the Respondent's termination of the Appellant's employment constitutes disparate treatment. Two (2) of the eight (8) employees were terminated: one (1) of the two (2) was receiving worker's compensation and failed to report a prior similar injury; one (1) involved a probationary employee whose job required him to possess a driver's license but his license was revoked. Mr. A signed a last chance agreement after taking the batteries, as noted herein, but he violated the agreement and his employment was terminated. An employee who exhausted his leave time yet continued to take time off signed a last chance agreement suspending him for thirty (30) days and requiring him to successfully complete a drug/alcohol rehabilitation program and be subjected to drug testing for two (2) years. An employee who provided insufficient documentation for sick leave was placed on sick leave probation for ninety (90) days. The Respondent docked the pay of two (2) employees who were late, one-half hour and fifteen (15) minutes one day, respectively, and failed to inform the DPW that they would be late and docked their pay accordingly. An employee who twice went home for lunch then called in sick was reprimanded twice. (Exhibit 23). The Respondent docked the pay of Mr. Johnson a number of times for leaving work without permission prior to the most recent events and such punishment did not deter Mr. Johnson. (Exhibits 18-21) In light of this information, I find that the Appellant's termination for repeatedly failing to work all the hours of his temporary night shift and his failure to prevent and report Mr. A's scrapping of the DPW batteries was not disparate treatment. Further, I find no evidence of bias or other inappropriate motive on the part of the

Respondent in this matter. Under the circumstances, modification of the Appellant's termination is not warranted.

Conclusion

For all of the above stated reasons, the termination appeal of Thomas Johnson, Jr., under Docket No. D1-15-158 is *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – No; Ittleman, Commissioner – Yes; Camuso, Commissioner – Yes; Tivnan, Commissioner – Yes; and Stein, Commissioner - No) on September 1, 2016.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Scott D. Bradley, Esq. (for Appellant)
Katherine McNamara Feodoroff, Esq. (for Respondent)

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place – Room 503
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THOMAS JOHNSON JR.,
Appellant

v.

Docket No.: D1-15-158

CITY OF BROCKTON,
Respondent

OPINION OF COMMISSIONERS BOWMAN AND STEIN

We concur with the well-reasoned decision of Commissioner Ittleman, including her conclusion that there is just cause to discipline Mr. Johnson. Mr. Johnson's failure, on multiple occasions over a two (2)-week period, to work his full shift, and then receive compensation for hours not worked, warrants harsh discipline.

In our opinion, however, the City did not show, by a preponderance of the evidence, that Mr. Johnson witnessed the theft of City property and failed to report it. Put simply, there is too much ambiguity regarding what the City has permitted in regard to the removal of scrap or junk to support the City's stark conclusion regarding this charge. For example, it is undisputed that employees, in the past, have been allowed to remove scrap, sell it, and use the funds to, at least in part, fund a barbecue.

Since, to us, it is clear that the City relied heavily on this charge to justify the termination, and because we have reached a different conclusion regarding this charge, we believe that a modification in the penalty is permissible – and warranted.

Recognizing the serious nature of the time and attendance violations, and even after considering his disciplinary record from years past, we do not believe the penalty here is consistent with that imposed on other similarly situated individuals referenced in the decision.

For these reasons, we would have modified the penalty imposed from a termination to a 6-month suspension and/or demotion.

/s/ Christopher Bowman

/s/ Paul Stein