

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MARTIN KAIN,

Appellant

v.

D-03-121

BOSTON ELECTION DEPARTMENT,

Respondent

Appellant's Attorney:

Galen Gilbert, Esq.
Law Office of Galen Gilbert
294 Washington Street: Suite 654
(Old South Building)
Boston, MA 02108
(617) 338-3177
ggilbert@ggilbertlawyer.com

Respondent's Attorney:

Elizabeth B. Valerio, Esq.
Brian Magner, Esq.
Deutsch Williams
99 Summer Street: 14th Floor
Boston, MA 02110-1213
(617) 951-2300
evalerio@dwbboston.com
bmagner@dwbboston.com

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Martin Kain (hereafter "Kain", or "Appellant"), is appealing the decision of the Boston Election Department (hereafter "City", "Election Department" or "Appointing Authority") suspending him for

thirty (30) days and demoting him from Senior Administrative Assistant to Assistant Registrar of Voters on January 24, 2003 for performance issues related to the September 17, 2002 election in the City of Boston, including not taking actions to ensure there was a sufficient contingent of temporary election workers to staff the polls. The appeal was timely filed. A hearing was held on July 28, 2006 and August 9, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Both parties declined the option of having witnesses sequestered. Six tapes were made of the hearing.

Prior to the hearing, the City filed a Motion to Dismiss for lack of jurisdiction. Specifically, the City argued that the Appellant, as a “Senior Administrative *Analyst*” in the Election Department, was an “election official” within the meaning of G.L. c. 31, §. 48, and, therefore, expressly exempt from civil service law and rules, including the right to file an appeal pursuant to G.L. c. 31, §43. The Appellant filed an opposition to the City’s motion, arguing that the Appellant was a “Senior Administrative *Assistant*” in the Election Department and not an “election official” within the meaning of G.L. c. 31, §48 and, therefore, not exempt from civil service laws. The City’s Motion to Dismiss was denied by the Commission on July 7, 2006 while reserving the right to reconsider its decision at the time of the full hearing on July 28, 2006. Information entered into evidence at the full hearing confirmed that the Appellant is indeed a tenured civil service employee within the Boston Election Department and has appeal rights under G.L. c. 31, §43. Appellant Exhibit 34 contains a signed “Form 14, Authorization of Employment” dated July 28, 1997 from what is now the State’s Human Resource Division (HRD) appointing the Appellant to the permanent civil service position of “Senior

Administrative Assistant”. The City’s Motion to Dismiss stresses that the Appellant’s position has been occasionally referred to as “Senior Administrative *Analyst*” as opposed to “Senior Administrative *Assistant*” since his appointment. Other than this occasional use of interchangeable terms, the City offers no evidence that the Appellant was ever transferred to a non-civil service position. In fact, during the many years prior to this incident, including 1997 through 2002, the Appellant’s job duties appear to have gone unchanged. The City’s Motion to Dismiss in this particular case is baseless and there was no information presented at the full hearing warranting a reconsideration of the Commission’s prior decision to deny this motion.

At the beginning of the full hearing on July 28, 2006, the City raised another procedural issue, arguing that the Appellant only has a right to be heard by the Commission on the 30-day suspension --and not the demotion. As grounds for this position, the City argues that the Appellant’s Civil Service Disciplinary Appeal Form only referenced the 30-day suspension – and not the demotion. On February 3, 2003, the Commission received six pages of correspondence from the Appellant’s then-counsel seeking an appeal of both the demotion and 30-day suspension. The first page of the correspondence is a cover letter stating in part, “Mr. Kain was issued a thirty (30) day suspension and a demotion in job level. I am attaching a copy of decision (sic) to this appeal as well as a completed Civil Service Disciplinary Appeal Form. Mr. Kain alleges that the Decision to suspend and demote him constitutes a violation of M.G.L. c. 31, ss. 41-45. The Decision, among other things, was not for just cause and was not based on a preponderance of the evidence.” Pages 2, 3 and 4 of the correspondence are the City’s Decision and Pages 5 and 6 are the appeal form. The City argues that the only box

checked on the appeal form related to the suspension and not the demotion – and the Appellant’s counsel did not also check the box marked “other”. The City’s argument is frivolous as the application was filed with a letter explaining the basis of the appeal. Coupled with the above-referenced Motion to Dismiss, this was simply an attempt by the City to prevent the “airing of dirty laundry” regarding the sometimes-messy just cause hearing that would follow. Then-counsel for the Appellant explicitly stated in correspondence that was filed timely with the Commission that he sought to appeal both the demotion and suspension – and the Commission proceeded accordingly with a full hearing on July 28, 2006 and August 9, 2006. Finally, on this issue, current counsel for the Appellant, seeking to eliminate any grounds for judicial review, sought, both at the hearing and subsequent to the hearing, to amend the actual appeal form filed with the Commission to indicate “demotion” within the field “other”. The request is unnecessary given the Commission’s ruling referenced above and the Appellant’s motion to amend the appeal form is denied.

EXHIBITS:

53 documents were entered into evidence (Appointing Authority Exhibits 1-16; 26; 42-53 and Appellant Exhibits 17-25; 27-41). Any objections related to the admissibility of these documents was overruled with this Commissioner deferring judgment on how much weight to give each document at the conclusion of the hearing. At the beginning of the second full day of hearing, counsel for the Appellant sought to strike Exhibit 11 (entered during the first day of hearing), a list of over a hundred names of people who did not appear for duty at the polls on September 17, 2002 -- along with typed notes taken from subsequent phone conversations regarding why they didn’t appear. Counsel for the

Appellant argued that no witnesses for the City could testify who made the telephone calls or verify they didn't show up. Further, the Appellant argued that the notes are incomplete and do not contain critical information such as when the poll workers realized that they could not work on Election Day and that some of the notes were blocked out. The motion to strike Exhibit 11 was denied at the hearing and, subsequent to the full hearing, counsel for the Appellant filed a Motion to Reconsider that decision. Counsel for the City filed an opposition to that motion and reiterated many of the arguments made at the hearing regarding the admissibility of Exhibit 11. In regard to whether a foundation had been laid for accepting Exhibit 11, the City argued that Nancy Lo, former Chairperson of the Boston Election Department, testified that she directed her subordinate, Maureen Cox (who is no longer employed by the City), to compile the information contained in Exhibit 11 after the September 17, 2002 election. Further, in regard to the Appellant's hearsay objection, the City pointed out that Exhibit 11 was created in 2002 as a business record and prior to the Appellant's discipline. Further, the City argues that a copy of Exhibit 11 was provided to the Appellant's union and private attorney years earlier during the City's disciplinary hearing and that the Appellant's current counsel was made aware of the document prior to the hearing before the Commission. The Appellant's argument on this issue is not persuasive and the Motion to Reconsider Striking Exhibit 11 is denied. Exhibit 11, along with all of the other above-referenced exhibits, will be included in the record with this Commissioner determining how much weight to give it.

Finally, in regard to exhibits, the City sought to introduce two unsigned documents relating to alleged prior discipline of the Appellant preceding Ms. Lo's tenure as

Chairperson of the Boston Election Department. This Commissioner ordered that the documents could be entered as exhibits if the City was able to produce signed copies. They have been unable to do so and the documents are not being entered as exhibits in this case.

WITNESSES:

The following witnesses testified before the Commission:

For the Appointing Authority:

- Nancy A. Lo, former Chairperson of the Boston Election Department;
- Michael Galvin, Chief of Basic City Services, City of Boston;

For the Appellant:

- Maureen Feeney, Boston City Councilor;
- George Cushman, former Executive Assistant, Boston Election Department;
- Abe Hantout, former Chairman, Boston Election Department;
- Dave Viera, former Commissioner, Boston Election Department;
- Maryann Marrero, Administrative Assistant, Boston Election Department;
- Martin Kain, Appellant;

FINDINGS OF FACT:

I make the following findings of fact:

Background Regarding the Boston Election Department and the Appointment of a New Chairperson in 1999

1. The Boston Election Department conducts all municipal, state, and federal elections within the City of Boston. The Department ensures that elections are properly managed and conducted in accordance with city, state, and federal laws. The Department also handles the registration of voters, proper maintenance of voters' status and manages the annual listing of Boston residents age 17 and over.
(Administrative Notice; City of Boston website)
2. There are approximately 220,000 to 240,000 registered voters in the City of Boston. The Election Department typically holds several elections each year, with two citywide elections occurring each Fall and perhaps some smaller special elections occurring in the Spring. The City is broken up into 22 Wards and 250 Precincts, each of which is staffed by temporary election workers that are hired by the Election Department prior to each election. State law in 2002 required each precinct be staffed by at least 1 Warden, 1 Clerk and 2 Inspectors. In addition, some polling locations required translators. In total, the Election Department typically hired slightly over 1,000 poll workers for citywide elections. (Testimony)
3. The Election Department is managed by a Chairperson, who is appointed by the Mayor of Boston. The Chairperson oversees a three-member Board of Election Commissioners and numerous other managers and employees of the Department.
(Testimony of Ms. Lo & Exhibit 46)
4. Nancy Lo was appointed as Chairperson of the Boston Election Department in 1999 and served in that role until 2004. She previously served as the City's Director of Consumer Affairs and Licensing from 1997 to 1999 and as a project manager in the

Mayor's Office from 1993 to 1997. She has a Bachelor of Arts in Political Science and a Masters Degree in Public Administration. Since 2004, she has been serving as an Executive Assistant working in the City's Inspectional Services Department.

(Testimony of Ms. Lo)

5. Appellant Martin Kain has worked for the Boston Election Department since 1983.

He was a tenured civil service employee in the position of Senior Administrative Assistant within the Boston Election Department when Ms. Lo became Chairperson.

(Testimony of Appellant)

6. As Senior Administrative Assistant, Mr. Kain's job duties and responsibilities included the recruitment, screening and training of the over 1,000 temporary election workers needed for each Election. (Exhibit 5 and Testimony of Appellant)

7. Mr. Kain has received 25 quarterly citations for perfect attendance at work and was regularly appointed to various city committees. Over the years, he built a strong network of individuals that were essential to carrying out his job functions. (Exhibit 27 and testimony of Councilor Feeney)

8. Prior to the appointment of Ms. Lo, the Election Department was Chaired by Abe Hantout, who was asked to resign in 1999 after a well-publicized state investigation regarding "no-show" employees at the Election Department, including employees that had been working at other businesses on city time. (Testimony of Ms. Lo & Mr. Galvin)

9. In the Fall of 1999, the City commissioned the management consulting firm of McKinsey and Company to conduct a review of the Election Department to analyze

how the Department could improve operations and be more cost effective. In January of 2002, McKinsey and Company issued a report which recommended that “deeper, more difficult reforms” were needed within the Department, including a reorganization of the Department to increase its efficiency and effectiveness. (Exhibit 46)

Testimony Regarding the Work Environment after Ms. Lo’s Appointment as Chairperson

10. Michael Galvin, Chief of Basic City Services, testified before the Commission that the Mayor asked Ms. Lo to become Chairperson of the Election Department because “there was no one that could revamp it like Ms. Lo could do.” According to Mr. Galvin, the Election Department did indeed need an overhaul when Ms. Lo was appointed as Chairperson due to the lax enforcement of various rules. (Testimony of Galvin)
11. Mr. Galvin testified that Ms. Lo, upon her appointment in 1999, began requiring doctors’ notes in certain cases when employees called in sick; stopped employees from leaving the office without permission and cracked down on excessive phone and Internet usage. (Testimony of Galvin)
12. Ms. Lo acknowledged during her testimony that she took a hard line with some employees “who were not used to working” and had no tolerance for such things as unexcused absences from the office, intoxicated employees or insubordination. She removed Internet access from Election Department employees and moved into an office with glass walls so she could better monitor the whereabouts and activities of

Election Department employees. Ms. Lo testified that several employees received discipline as a result of her enforcement of workplace rules. (Testimony of Ms. Lo)

13. Two former Election Commissioners, a current and former employee of the Election Department and a Boston City Councilor testified before the Commission on behalf of the Appellant in this case. Their dislike for Ms. Lo and her management style during her tenure as Chairperson was palpable. (Testimony)

14. David Vieira served as a Boston Election Commissioner from July 1999 until June 2001. He testified that he left prior to the expiration of his four-year term because of “issues with Ms. Lo and the Mayor”. Without much prompting, Vieira testified that Lo, “totally and irresponsibly took over” the Election Department and that she and the Mayor inappropriately tried to minimize the role of the three other commissioners by transitioning them to serve on a per-diem, as opposed to a full-time, basis. He complained that Lo restricted his activities and restricted him to duties that required him to stay in the office. In regard to Ms. Lo’s supervision of Martin Kain, Vieira testified that Ms. Lo gave Kain “less latitude” to perform his job duties; provided him with a long list of duties with unreasonably short deadlines and then disciplined him when he was unable to meet the deadlines. On cross examination, Vieira acknowledged that he was not Kain’s supervisor. Hence, he did not have the same first-hand knowledge that Ms. Lo would have. (Testimony of Vieira)

15. Maryann Marrero has been an administrative assistant in the Election Department since 1984. She testified before the Commission that she once saw Lo give Kain a “long, evil stare” and that she witnessed Lo go through Mr. Kain’s desk and comment

on personal information that was in one of the desk drawers. Under cross examination, Marrero acknowledged that she had been disciplined for tardiness by Ms. Lo; that she couldn't remember exactly what year the incident with the desk occurred and that desk drawers in the Election Department are not locked.

(Testimony of Marrero)

16. Maureen Feeney has served on the Boston City Council for 13 years and is Chair of the Committee on Government Operations. Councilor Feeney testified that she was first approached by a couple of Election Department employees who complained about being "physically ill" as a result of the "inhumane treatment" in the Election Department during Ms. Lo's tenure as Chairperson, including restrictions regarding the number of bathroom breaks employees were permitted. Councilor Feeney said she inquired with other Election Department employees, one of whom was suffering from cancer and, "what I saw was frightening". The Appellant, according to Councilor Feeney, was not one of the Election Department employees who approached her. During cross-examination, Councilor Feeney acknowledged that she does not work in the Election Department nor did she observe the daily activities of the Department, but that she would sometimes "meander down" to the Department during Lo's tenure and observed a chilling work environment in which employees were afraid to look up at you or speak with you. (Testimony of Feeney)

The Appellant's Interactions with Ms. Lo Prior to the Discipline which is the subject of this appeal.

17. Mr. Kain testified that he first met Ms. Lo approximately two years prior to her appointment as Chairperson of the Boston Election Department. Mr. Kain testified

that there was a special election (which included Democratic candidates Stephen Lynch and William Bulger, Jr. running for an open legislative seat) two years prior to Ms. Lo's appointment. The Election Department received a complaint from one of the campaigns that day alleging that poll workers were trying to influence voters at the Josiah Quincy School polling location. According to Kain, he drove to the Josiah Quincy School on the day of that special election and asked the five poll workers present to speak with him in a corner of the room. Kain told the poll workers about the complaint and warned them that any such behavior would not be tolerated. Kain testified that he was familiar with all five poll workers present, except one.

According to Kain, that one unfamiliar person was Nancy Lo, who Kain believes was serving as a translator at the request of another city official, Mr. Chin. According to Kain, Ms. Lo "gave me a pointed stare" that day at the Josiah Quincy School.

(Testimony of Kain)

18. Mr. Kain testified that during his first meeting with Ms. Lo after her appointment as Chairperson of the Boston Election Department, she reminded the Appellant that they first met two years ago at the Josiah Quincy School. (Testimony of Appellant)

19. George Cushman is the former executive assistant of the Boston Election Department and worked for the Department from 1982 through 2001. Mr. Cushman testified before the Commission that upon her appointment as Chairperson, Ms. Lo stated to him, "he (Mr. Kain) thinks he's a big shot; he embarrassed me when I worked for Chin." (Testimony of Mr. Cushman)

20. Appointing Authority Exhibit 42 is the “Official Record and Returns Book” for Ward 3, Precinct 8 (Josiah Quincy School) for the special election held on March 26, 1996 in which Stephen Lynch and William Bulger, Jr. were both on the ballot. The first page of the record lists the names of four individuals: one warden, two clerks and one inspector (none of whom are Nancy Lo). On page four of the record, handwritten comments reference a fifth individual with an Asian surname --which is not Lo. The handwritten comments state, “Theresa Choy has been helping Chinese voters inside the voting booth. She is from the Chinese Neighborhood Council. I asked her to be less aggressive...”. (emphasis added) (Exhibit 42)
21. Ms. Lo testified before the Commission that she was not at the Josiah Quincy School on March 26, 1996 and was working at her full-time job at City Hall. Further, she testified that she was seven or eight months pregnant on that date and that her pregnancy would be obvious to anyone who saw her at the time. (Testimony of Appellant)
22. Prior to the disciplinary action which is the subject of this appeal, Mr. Kain was suspended by Ms. Lo on five different occasions in 2000 and 2001, including on at least one occasion for alleged poor work performance related to seeking alternative polling locations. (Exhibit 5)
23. On July 18, 2001, the Appellant and the City reached a settlement agreement regarding the above-referenced suspensions in which the Appellant was not made whole for any days in which he was suspended, but his record was modified to reflect only a 3-day suspension. He also received a reduction in salary. (Exhibit 5)

24. Also prior to the disciplinary action which is the subject of this appeal, on October 4, 2001, the Appellant was issued a 5-day suspension for his failure to adequately staff the September 11, 2001 special election in the Ninth Congressional District. (Exhibit 47)
25. Also prior to the disciplinary action which is the subject of this appeal, on November 29, 2001, the Appellant was issued a 30-day suspension for failing to adequately staff the September 25, 2001 and November 6, 2001 elections, and for misrepresentations he allegedly made to the Department leading up to those elections. (Exhibit 48)
26. On August 6, 2002, the Appellant, his Union and the Election Department entered into a settlement agreement whereby the parties agreed that that the Appellant would accept a 10-day suspension for poor work performance, but would not be made whole for the 35 days of suspensions he had been issued on October 4, 2001 and November 29, 2001. (Exhibit 15)
27. During Ms. Lo's tenure, the Boston Election Department was the subject of inquiries or investigations by the Boston City Council, the Secretary of State's Elections Division and the Civil Rights Division of the U.S. Department of Justice. (Exhibits 20 – 25)

Facts Related to the Disciplinary Action which is the Subject of this Appeal

28. On January 24, 2003, the Appellant was suspended by Ms. Lo for thirty (30) days and demoted to Assistant Registrar of Voters for performance issues related to the September 17, 2002 election in the City of Boston. That is the subject of the appeal currently before the Commission. (Testimony of Appellant; Exhibit 34)

29. Approximately 1,000 temporary poll workers were needed to staff the polls during the September 17, 2002 Election. (Testimony of Ms. Lo and Appellant)
30. Prior to the September 17, 2002 election, Michael Galvin, Chief of Basic Services, anticipated problems with the election as he had heard “scuttle-butt” that “Nancy Lo was going down” as a result of the upcoming election. As a result, Galvin ensured that 20 or 30 employees from other departments received training to serve as back-ups. (Testimony of Galvin)
31. Abe Hantout, who preceded Ms. Lo as Chairman of the Election Department, testified that the typical number of temporary election workers who didn’t show up never exceeded 20 during his five-year tenure. (Testimony of Hantout)
32. On the day of the September 17, 2002 election, 107 temporary election workers failed to show up at the polling places, more than five times what could normally be expected. (Testimony of Ms. Lo; Exhibit 11)
33. As a result of the high number of temporary election workers that failed to show up to work the polls during the September 17, 2002 election, the City had to scramble to re-deploy other city workers, some polling places did not open on time, and many locations that did open on time had long lines and some frustrated voters left instead of waiting in line to vote. (Testimony of Ms. Lo)
34. Subsequent to the September 17, 2002 election, Ms. Lo directed Maureen Cox, then a Senior Administrative Assistant in the Election Department, to call each of the 107 confirmed temporary election workers who failed to show up at the polls shortly after the election and determine why they failed to show. (Testimony of Ms. Lo)

35. Exhibit 11 is a copy of a 4-page spreadsheet prepared by Ms. Cox, who no longer works for the City and did not testify at the Commission hearing. The last column on the spreadsheet contains any notes taken by Ms. Cox in regard to each of the 107 poll workers. 15 of the names have no notes next to them and 16 others indicate that Ms. Cox was unable to reach the temporary worker because their phone number was either disconnected, not in service or otherwise not available. Of the 76 remaining names, approximately 21 have notes indicating reasons that appear to indicate that the worker planned on showing up, but events occurred either on or shortly before election day which prevented them from appearing (i.e. – family and/or medical emergency). Although the notes next to the remaining 55 names are not detailed, some of them raise questions as to whether not they were ever confirmed to attend including:

- Name 2: “She was called and only ask (sic) to work for Nov. only”;
- Name 3: “Never received a call; called Election Day to work”;
- Name 9: “He didn’t know he was confirmed. He was vague, no training”;
- Name 24: “She didn’t know, no one called her. Yes for Nov.”;
- Name 29: “She didn’t know, no one called her. Yes for Nov.”;
- Name 30: “Someone called him in the summer and he said he won’t be able to work”;
- Name 42: “Someone called her and she said she was going to school”;
- Name 45: “Said no one called her”;
- Name 68: “She spoke to Marty and sent in a letter saying that she can’t work for awhile”;
- Name 80: “Election Department didn’t call her”;
- Name 82: “She said we called and she told us she didn’t want to work”;
- Name 83: “Talk (sic) to Marty, didn’t send back his app. because he couldn’t attend training session”;

- Name 97: “He couldn’t work so he didn’t send in his app.”;
- Name 99: “Never called”;
- Name 101: “Was not notified and so he thought that he was not hired.”

All of the above-referenced names were included on a list, prepared by Mr. Kain, and listed as individuals that would be serving as temporary election workers on September 17, 2002.

(Exhibit 11; Exhibits 51, 52 and 53; and Testimony of Ms. Lo)

36. In regard to the reasons – and who was ultimately responsibility for – the high number of temporary election workers who failed to show up at their polling location during the September 17, 2002 election, the Appellant and Ms. Lo offered wildly divergent testimony at the hearing before the Commission. Ms. Lo put the blame squarely on Mr. Kain, testifying that it was Kain’s responsibility to recruit temporary election workers and that he failed to do so. Kain put the blame on Ms. Lo, testifying that his authority to recruit certain Wardens and Clerks had been limited by Ms. Lo -- as he no longer had the final word on reappointment of Wardens and Clerks-- and that she had made the task of recruiting workers impossible by assigning him other tasks and establishing new, unrealistic rules and procedures regarding the recruitment and screening of temporary election workers. (Testimony of Ms. Lo and Mr. Kain)

37. Mr. Kain testified that he has been recruiting, deploying and training temporary election workers since 1985 and explained his normal routine leading up to each election. After the resident survey is completed, Kain would forward a letter to each Democratic and Republican Ward Committee chair in the City by April 15th. Each Ward Committee Chair would be given the opportunity to nominate 8 temporary election workers for each ward. Through August, Kain would also contact temporary

election workers who served most recently and inquire about their interest in serving again (including sending out letters in June or July); swear-in the temporary election workers for the upcoming election; identify vacancies among the 1,000 positions that needed to be filled for each election; and conduct a series of training sessions for Wardens and Clerks. (Testimony of Appellant)

38. Mr. Kain testified that several actions by Ms. Lo prevented him from performing his normal routine in preparation for the September 17, 2002 election including assigning him to find new polling places that were compliant with the Americans with Disabilities Act. Mr. Kain testified that he normally would have been recruiting temporary election workers during the time he was performing this task. He also testified that, while performing this task of identifying new polling locations, he was once followed by a man with a video camera. (Testimony of Mr. Kain)

39. Ms. Lo testified that she did indeed hire an investigator to follow Mr. Kain as she suspected that he was not working all hours reported. However, the assignment to find new polling places, and the related hiring of an investigator, occurred in 2001, not 2002. Hence, Ms. Lo testified, this assignment would be totally unrelated to Mr. Kain's ability to recruit temporary election workers in 2002. Kain later acknowledged during cross-examination that the assignment to find new polling locations was indeed in 2001. (Testimony of Mr. Kain and Ms. Lo)

40. Mr. Kain testified that Ms. Lo prevented him from sending out letters to temporary elections workers that he usually sent out during June or July preceding the upcoming election. Instead, Mr. Kain testified that, rather than automatically allowing these

temporary election workers with previous service to serve again, Ms. Lo required Mr. Kain to call over 200 of them on the phone and read a questionnaire to them which would be used to determine if they were qualified to serve. Mr. Kain testified that although such surveys had been composed before, they had never been used in practice. Mr. Kain testified that Ms. Lo rejected his hand-written notes regarding the surveys (which he was required to submit daily) and required them to be typed, even though Kain is not a proficient typist and used a “hunt and peck” method of typing. (Testimony of Appellant; Exhibit 30)

41. Mr. Kain also testified that Ms. Lo did not give him the final authority to determine if the respondents to the survey had met the minimum requirements to serve as Wardens and Clerks, but, rather, vested this final decision-making authority with Ms. Cox, another senior administrative assistant who was Kain’s supervisor. Kain testified that he was only authorized to recruit and approve Inspectors and vacant Warden and Clerk positions, but he was not authorized to re-hire pre-existing Wardens and Clerks. (Testimony of Appellant; Exhibit 41)

42. As a result of the new procedure regarding the recruitment of temporary election workers, Mr. Kain testified that letters that would have typically been sent out to them in June or July did not get sent until August 28, 2002, less than three weeks before the upcoming September 17, 2002 election. The mailing included an application to be completed and returned by the September 9, 2002 and a schedule of training sessions. (Testimony of Appellant; Exhibits 31 & 41)

43. Mr. Kain testified that the potential election workers had to respond by September 9, 2002 and that he had until September 12, 2002 to provide a full list of assigned temporary election workers to Ms. Lo for the September 17, 2002 election. Mr. Kain testified that he provided an assessment to Ms. Lo on September 12, 2002 telling her, “we’re very close” and “we have enough time” to ensure that any remaining vacancies are filled. (Testimony of Kain)
44. Mr. Kain testified that he, Ms. Lo and Ms. Cox all came into the Election Department on the weekend preceding the September 17, 2002 election to find recruits to fill any remaining vacancies and stated, “I did the clerks; She (Lo) did the wardens”. (Testimony of Kain)
45. Ms. Lo, during her testimony as a rebuttal witness, testified she never told Mr. Kain that he could not recruit Wardens and Clerks and testified that the telephone survey was supposed to be completed by Mr. Kain by June 2002. (Testimony of Ms. Lo)
46. Ms. Lo testified that the lists of Wardens, Clerks and Inspectors given to her by Mr. Kain on September 12, 2002, indicated that there 71 vacancies. (Testimony of Ms. Lo)
47. Neither Mr. Kain nor Ms. Lo were able to testify with any certainty as to whether or not they believed all of the vacancies were filled as of the close of business the day before the September 17, 2002 election. (Testimony of Mr. Kain and Ms. Lo)
48. On September 17, 2002, 107 temporary election workers failed to show up at the polling places. (Testimony of Ms. Lo, Exhibit 11, Exhibits 51-53)

49. In a letter to Mr. Kain shortly after the September 17, 2002 election, Ms. Lo stated, “From my review of the list you submitted, I found 71 vacancies. Prior to election day, I intervened and ensured that all the precincts that you reported had a warden, a clerk and at least one inspector. On election morning, there were numerous reports of election officers that you submitted as confirmed to work but did not work at the polls.” (Exhibit 13)
50. In a November 20, 2002 letter from Ms. Lo to Mr. Kain informing him of a disciplinary hearing, Ms. Lo stated in part, “You were given a deadline of September 12, 2002, to have all election officer positions confirmed and filled for the September 17, 2002 State Election. This assignment was not completed. There were 71 election officer vacancies. Furthermore, on September 17, 2002, Election Day, there were 105 election officers that did not report to work. These individuals were found on the list that you submitted as being confirmed to work.” (Exhibit 14)
51. On January 24, 2003, after a hearing, the Boston Election Department suspended Mr. Kain for 30 days and demoted him to the title of Assistant Registrar of Voters for: a) failing to recruit and confirm sufficient poll workers for the September 17, 2002 election, resulting in an unacceptably high number of staffing problems at the polls on election day; b) misrepresenting information to the Department regarding poll workers who had confirmed their availability for the September 17, 2002 election; and c) failing to adhere to instructions regarding his work. (January 24, 2003 Letter from Nancy Lo to Martin Kain)

52. Kain was subsequently returned to the position of Senior Administrative Assistant in 2005, after the departure of Ms. Lo. (Testimony of Appellant)

CONCLUSION

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 "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).

Prior to the appointment of Nancy Lo as Chairperson, the Boston Election Department was the subject of a well-publicized state investigation which revealed a problem of no-show employees working within the Department, including employees operating their own business on city time. The former Chairperson was forced out, the City secured the services of an outside consultant to examine the operations of the Department and Nancy Lo was appointed by the Mayor as Chairperson.

Michael Galvin, Chief of Basic City Services for the City of Boston, testified that reforms were indeed needed at the Election Department and Ms. Lo was charged with implementing them. Stung by the negative publicity regarding no-show employees, it is clear that the City wanted Ms. Lo to crack down on any employee that wasn't putting in a

full day's work for a full day's pay. Ms. Lo, a trusted member of the Mayor's team, did so – in earnest. She relocated her office to a room with glass walls that allowed her to see the entire Election Department; revoked Internet access from Election Department employees; hired investigators to follow those employees suspected of falsely reporting time worked in the field; and disciplined several employees for such offenses as lengthy lunch and other breaks. In doing so, she didn't win many friends among Election Department employees whose palpable dislike of Ms. Lo was on full display at the Commission hearing. Counsel for the Appellant, in his opening statement, went a step further and painted Ms. Lo as an incompetent steward of the Election Department who "crippled the elections for partisan, political and personal reasons".

Specifically, in regard to the Appellant, counsel for the Appellant stated during his opening that Ms. Lo, upon her arrival, had a "vendetta" and wanted to "cripple and humble" Marty Kain. As evidence of this, the Appellant testified that he first encountered Ms. Lo a few years prior to her appointment when she was serving as a translator at a polling place during a special election. Mr. Kain testified that Ms. Lo was among five election workers at the Josiah Quincy School whom he cautioned not to coach any voters coming in to vote. Kain testified that an "Asian woman", whom he did not know at the time, gave him a "pointed glare". According to Kain, Ms. Lo, upon introducing herself to Kain as the new Chairperson, reminded him that they first met at the Josiah Quincy School during the above-referenced special election. George Cushman, a former colleague of Kain's, also testified before the Commission that Ms. Lo told him about the incident at the Josiah Quincy School as well -- and that she had been embarrassed by Kain's remarks that day at the polling place.

The City produced irrefutable evidence to show that this story, as told by Mr. Kain and Mr. Cushman, is nothing but a fairy tale, calling into question the credibility of both men. Appointing Authority Exhibit 42 is the “Official Record and Returns Book” for Ward 3, Precinct 8 (Josiah Quincy School) for the special election in question. On page four of the record, handwritten comments reference an individual with an Asian surname --which is not Lo. The handwritten comments state, “Theresa Choy has been helping Chinese voters inside the voting booth. She is from the Chinese Neighborhood Council. I asked her to be less aggressive...”. Further, Ms. Lo testified before the Commission that she, seven or eight months pregnant at the time, was at work at City Hall that day and never served as a translator at any polling place.

Notwithstanding the Josiah Quincy School folklore, Ms. Lo, upon her appointment as Chairperson, clearly didn’t make any attempt to build goodwill among Election Department employees – and that was a contributing factor to the election debacle that occurred on September 17, 2002, which is central to this appeal. There is no evidence that Ms. Lo had any significant prior experience managing city-wide elections. Hence, in order to ensure well-run elections in the City, she needed to rely heavily on the institutional knowledge and support of the very group of employees who had quickly turned against her. Martin Kain, a well-respected veteran of the Department with close to 20 years of experience as the “go-to” person in the Department, was one of those employees. In sports terms, Ms. Lo was the untested coach taking over a professional football team known for its off-the-field misbehavior, with a directive to crack down on the antics of certain players. Mr. Kain was the well-liked, veteran quarterback who had not previously been associated with any off-the-field antics, but, nevertheless, resented

the new coach's crack-down. Their individual successes depended on each other. In the matter before us, Appellant Kain alleges that the team started losing games because the inexperienced coach ordered ill-conceived play patterns that could never be executed by even the best quarterback. Lo accuses the quarterback of mischief, deliberately failing to execute plays properly in an attempt to throw the game, hoping it would bring about the demise and early departure of the despised coach.

By a preponderance of the evidence, the City has shown that Mr. Kain failed to fulfill his core job responsibilities on two fronts. First, he failed to recruit, hire and confirm a sufficient number of temporary election workers to staff the polls by the given deadline of September 12, 2002, five days before the election, with over 70 vacancies reported, including 45 inspector positions. Second, an inordinate number of temporary election workers, which Kain asserted were confirmed to work, never showed up at the polls. Many of those temporary election workers, called after the Election, reported that they never agreed to work the polls and/or had told Kain that they would be unable to work on September 17, 2002.

Mr. Kain testified that he was only allowed to recruit "new" Wardens and Clerks up until August 28, 2002, at which point he was allowed to recruit those individuals he had used in past elections to work as Wardens and Clerks. Assuming arguendo that this is true, and that Kain only had full authority to recruit inspectors, both new and old, it does not explain why Kain had approximately 45 vacancies for inspectors on September 12, 2002, five days before the election.

Both Lo and Kain testified that both of them scrambled the weekend before the election to fill the above-referenced vacancies. When this Commissioner asked Kain whether or not they were able to fill the gaps, Kain's answer was telling. He said that he had no idea whether or not enough additional Wardens or Clerks had been recruited that day, as he was only focused on the Inspectors. Kain, who had built a well-earned reputation over the years for ensuring sufficiently-staffed polling places, was throwing in the towel and getting ready to place the blame squarely on Ms. Lo when he walked out the door that Sunday night -- unaware of, or unconcerned about, whether the polling places would be sufficiently staffed that coming Tuesday. In doing so, he failed himself, the Department and the voters of Boston.

Again assuming arguendo that Kain can only be held responsible regarding a full complement of inspectors that day, it does not explain why an inordinately high number (107) of temporary election workers who had allegedly been confirmed to work, *more than half of whom were inspectors*, failed to show up .

Martin Kain had the ability and know-how to ensure a full complement of temporary election workers during the city-wide election on September 17, 2002. His initial argument that he was too busy completing an assignment by Lo to find new polling places was simply not credible and he later recanted when shown evidence that this assignment was given to him in 2001, not 2002. Even if the Commission accepts that Kain was stymied by Lo's unreasonable request to complete hundreds of phone surveys over the Summer of 2002, there is no justification as to why over 100 temporary election workers who were confirmed to work, the majority of whom were inspectors, failed to

show on election day. The follow-up phone calls completed by the Election Department revealed that many of those individuals were never confirmed to work to begin with.

In regard to the allegation that it was Ms. Lo, allegedly stung by a prior rebuke by Kain at the Josiah Quincy School years earlier, who set out to sabotage Mr. Kain, there is no credible evidence in the record to support it. In fact, the evidence clearly shows that the alleged altercation never occurred.

On a final note, the high number of appeals pending before the Commission often results in appeals being heard years after the incident in question occurred. By the time the appeal is heard before the Commission, the cast of characters has usually changed and a new, positive chapter is sometimes being written. Such appears to be the case regarding the Boston Election Department, for which the voters of Boston should be grateful. Cognizant of these positive developments, this Commissioner took great care to exercise restraint when assessing the credibility and motivations of those involved at the time, including Mr. Kain. That restraint, however, should not diminish the serious nature of the wrong-doing that occurred at the time. The testimony of Michael Galvin, Chief of Basic City Services, and himself a long-time veteran of City Hall, puts the entire matter in perspective. Recalling what happened during the city-wide election four years ago, Galvin testified unequivocally before the Commission, that, at the time, he believed Kain, “should have been fired” for his misconduct. Years later, Galvin, intent on writing that new chapter for the Boston Election Department, assented to restoring Mr. Kain to his former position. His judgment was on the mark – on both occasions.

The Boston Election Department has established by a preponderance of the evidence that there was just cause for discipline against Mr. Kain and there is no evidence of inappropriate motivations or objectives that would warrant the Commission's modification of the 30-day suspension or demotion imposed upon him.

For all of the above reasons, the appeal under Docket No. D-03-121 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By a 4-1 vote of the Civil Service Commission (Goldblatt, Chairman-YES, Bowman – YES; Guerin – YES; Marquis - YES, Taylor-NO) on September 21, 2006.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Galen Gilbert, Esq.
Elizabeth Valerio, Esq.
Brian Magner, Esq.