

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

Decision mailed: 12/16/11  
Civil Service Commission 03

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

STEPHEN KOZLOWSKI,  
*Appellant*

v.

CITY OF QUINCY,  
*Respondent*

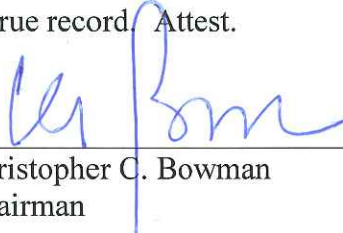
Case No.: D-11-250

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on December 15, 2011 to acknowledge receipt of the report of the Administrative Law Magistrate dated November 10, 2011. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein [Marquis, absent], Commissioners) on December 15, 2011.

A true record. Attest.

  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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.

Notice to:

S. L. Romano (for Appellant)  
Deirdre J. Hall, Esq. (for Appointing Authority)  
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

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November 10, 2011

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

**Re: Stephen Kozlowski v. City of Quincy**  
**DALA Docket No. CS-11-665**  
**CSC Docket No. D-11-250**

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

  
Richard C. Heidlage  
Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Deirdre J. Hall, Esq.  
S.L. Romano

**COMMONWEALTH OF MASSACHUSETTS**

Suffolk, ss.

Division of Administrative Law Appeals

**Stephen Kozlowski,**  
Appellant

v.

Docket Nos. CS-11-665 (D-11-250, CSC)

**City of Quincy,**  
Appointing Authority

**Appearance for Appellant:**

**S.L. Romano,**  
Regional Coordinator  
Mass. Labor District  
7 Laborers Way  
Hopkinton, MA 01748

**Appearance for Appointing Authority:**

**Deirdre J. Hall, Esq.**  
City of Quincy – Solicitor's Office  
1305 Hancock Street  
Quincy, MA 02169

**Administrative Magistrate:**

**Sarah H. Luick, Esq.**

**Summary of Recommended Decision**

The Appellant's appeal to the Civil Service Commission is timely filed based on the particular facts leading up to his filing the appeal, including receiving no information from the Appointing Authority about his rights under civil service law to contest his suspension. The Appellant was denied a union grievance proceeding on the merits of his suspension. On the merits, the Appointing Authority had just cause for imposing a one day suspension without pay on the Appellant for leaving unattended on a city street, an idling street sweeper with the door unlocked and the key in the ignition. A one day suspension is justified even without consideration of the Appellant's prior discipline.

### **RECOMMENDED DECISION**

Pursuant to G. L. c. 31, § 43, the Appellant, Stephen Kozlowski, appealed the decision of his Appointing Authority, the City of Quincy, suspending him for one day without pay on May 20, 2011, for leaving unattended on a city street the street sweeper he was using that day. He left the street sweeper running with the door unlocked and key in the ignition. (Exs. 1 – 6.) A hearing was held for the Civil Service Commission on November 7, 2011, at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, 4th Floor, Boston, MA 02114. The hearing was declared public as the parties filed a joint written request at the hearing for a public hearing. (Ex. B.)

Various documents are in evidence. (Exs. 1 – 10.) A Google earth map of a section of Quincy was used during testimony. (Chalk 1.) Two (2) tapes were used. The Appointing Authority presented the testimony of: Joseph Newton, Operations Manager within the Quincy Department of Public Works (“DPW”); and, Edward Leary, General Foreman in the DPW Highway Division. The Appellant testified on his own behalf. The Appointing Authority filed a pre-hearing memorandum, and the parties entered into stipulations of fact (most of them found in the Appointing Authority’s memorandum). (Ex. A.) Both parties made arguments on the record.

### **FINDINGS OF FACT**

Based on the stipulations of the parties, the testimony and documentary evidence presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. Stephen Kozlowski was appointed to the Quincy DPW on May 22, 2000. He worked in the Highway Division. (Ex. A. Testimony.)
2. While working in the Highway Division, Mr. Kozlowski performed street

cleaning work in the fall and spring each year using a street sweeper vehicle. He has the necessary licenses to be able to operate a street sweeper. (Testimony.)

3. Mr. Kozlowski has held the position of Working Foreman Special Heavy Motor Equipment Operator from September 1, 2010. He is a tenured civil service employee. (Ex. A. Testimony.)

4. Although from 2010, Mr. Kozlowski has been working within the DPW's Water Division, he has continued to do the street cleaning work for the Highway Division during the spring and fall. (Testimony.)

5. During the morning of May 17, 2011, Mr. Kozlowski was at work doing street cleaning using a street sweeper vehicle in the Germantown area of Quincy. He was operating the vehicle alone. This area is a peninsula with one road to enter the area. It is largely a densely populated residential area. Off this main road there is a school and a community center. (Chalk 1. Testimony.)

6. Mr. Kozlowski radioed for a dump truck in the area to come and take the debris he had collected using the street sweeper. This is the normal course to follow. He parked his street sweeper along the side of a rotary located within the peninsula that the main street, Palmer Street, feeds into as do two other streets. The right side of the sweeper was against a curb at a small triangle patch of land on the side of the rotary. (Chalk 1. Testimony.)

7. The dump truck came and took the debris. Fred Donahue was operating the dump truck. Mr. Kozlowski had to use the restroom, so he went with Mr. Donahue in the dump truck to reach the rest room location which was near where Mr. Donahue was bringing the debris, about a mile to one and one-half miles away. To do this was not an out of the ordinary work practice. (Testimony.)

8. When Mr. Kozlowski left the rotary area to go with Mr. Donahue, he left the street sweeper running with the key in the ignition, and the door unlocked. The bristles of the street sweeper were not on. He put on the flashing lights that operated on a top light and on the front and back lights of the street sweeper. Mr. Kozlowski had a radio with him but he did not radio anyone to report he was leaving the street sweeper running, unlocked and unattended at the rotary location. (Chalk 1. Testimony.)

9. While on his way with Mr. Donahue in the dump truck on Palmer Street to leave the Germantown peninsula, he and Mr. Donahue passed Joe Newton and Ed Leary who were driving in the opposite direction down Palmer Street. They were on the peninsula to check on the street cleaning work being done. Mr. Newton saw both Mr. Donahue and Mr. Kozlowski driving in the dump truck away from the peninsula. Mr. Newton is a DPW Operations Manager with supervisory authority over the street cleaning workers. He reports directly to the Superintendent and to the Commissioner. Mr. Leary is a General Foreman in the Highway Division. On May 17, 2011, both men were aware that Mr. Kozlowski was assigned to work at street cleaning in the Germantown peninsula area using a street sweeper vehicle. Once they passed Mr. Donahue and Mr. Kozlowski, it took them under two minutes to reach the rotary. They saw the street sweeper vehicle and pulled over near it to investigate. Mr. Leary recognized it as the vehicle assigned to Mr. Kozlowski. (Chalk 1. Testimony.)

10. Mr. Newton thought the street sweeper was running. He lacks a license to operate the street sweeper. Mr. Leary is licensed to operate the street sweeper. Mr. Leary exited his vehicle to check on the street sweeper. No one was inside it. He observed that it was running. He opened the door, got inside and shut off the engine. He took the key. Both men saw the flashing lights and that the sweeper bristles were not operating. There was no notice left at the



vehicle to explain the situation. Neither of them radioed in an effort to learn why the street sweeper was left unattended in this condition. To make the street sweeper move is not hard for a driver lacking the special license issued to operate this street sweeper, although it would be a potentially dangerous thing to do. (Testimony.)

11. There is no written policy or rule that permitted Mr. Kozlowski while at work as the operator of a street sweeper to leave it unattended, to leave the surrounding area, and to keep it running or idling with the door unlocked, even if flashing lights are on and the bristles are not rotating. To do this is creating a potentially dangerous situation. It was of particular concern when he did this during daylight hours in light of a school approximately 450 feet away. (Chalk 1. Testimony.)

12. At the time Mr. Newton and Mr. Leary discovered the street sweeper unattended near the rotary, they had no information and did not learn that anyone had been hurt by the vehicle, and the street sweeper was not damaged in any way as a result of Mr. Kozlowski leaving it in the state he did. (Testimony.)

13. Mr. Newton and Mr. Leary left the street sweeper turned off and locked where they found it along the side of the rotary. They brought the street sweeper key to Mr. Kozlowski's Working Foreman that day, Mr. Delmonico, who they knew was at the intersection of Sea Street and Palmer Street at the entrance to the peninsula. Mr. Newton told Mr. Delmonico what he and Mr. Leary observed, and that they knew it was Mr. Kozlowski's street sweeper. They noted they had seen Mr. Kozlowski driving with Mr. Donahue in a dump truck on Palmer Street in a direction away from the peninsula. Mr. Newton decided to write up Mr. Kozlowski for discipline and told this to Mr. Delmonico and to Mr. Leary. Mr. Newton did not produce an incident report before imposing the discipline. (Testimony.)

14. Mr. Newton did not ask Mr. Delmonico if Mr. Kozlowski had permission to leave his street sweeper vehicle in the condition he left it in at the rotary. Mr. Delmonico did not offer any information to Mr. Newton about why the street sweeper was left in the condition it was by Mr. Kozlowski. Neither of them radioed Mr. Kozlowski to ask him why he had left the street sweeper in the condition he had. (Testimony.)

15. There is some kind of policy, whether or not in writing, that permits a city vehicle to be left idling for about five minutes. This was a reduction in time from the prior such policy permitting a fifteen minute idling time. This policy does not fit the circumstances of how Mr. Kozlowski had left the street sweeper vehicle at the rotary. (Testimony.)

16. Both Mr. Newton and Mr. Leary had known Mr. Kozlowski for a number of years leading up to this incident on May 17, 2011. (Testimony.)

17. Mr. Newton wrote a letter of suspension to Mr. Kozlowski on May 20, 2011. He copied it to the DPW Commissioner as well as to Quincy Human Resources and to Mr. Kozlowski's union. He wrote without more:

This is to inform you that you are being given a (1) day suspension without pay regarding an incident on Tuesday, May 17th, 2011. On this day, you left the street sweeper that you were operating unattended, unlocked and running in the rotary of the Germantown section of Quincy. Please note that this suspension is for Monday, May 23rd, 2011.

(Ex. 1.)

18. This letter of suspension did not include copies of the pertinent civil service laws, a requirement for the Appointing Authority found in M.G.L. c. 31, § 41, which include a timetable for the Appointing Authority to follow if the tenured civil service employee wants a hearing before the Appointing Authority to challenge the suspension. (Ex. 1. Testimony.)

19. On May 23, 2011, Mr. Kozlowski filed a "Grievance Form" with the DPW over



the one day suspension. He wrote that he had been,

suspended for something we have been doing for the past 11 years. I did not leave the sweeper running. The suspension is unjust. If anything I should have been written up first.

(Ex. 2.)

20. No hearing or meeting had been held where the Appointing Authority and Mr. Kozlowski presented their positions on the one day suspension before Mr. Kozlowski received a letter of June 10, 2011 from Mr. Newton stating without more: "Your grievance dated May 23<sup>rd</sup>, 2011 has been denied." This letter was copied to the DPW Commissioner, to Quincy Human Resources, and to Mr. Kozlowski's union. (Ex. 3. Stipulation.)

21. Someone for Mr. Kozlowski or Mr. Kozlowski himself, on June 13, 2011 wrote to Quincy Human Resources that he was seeking "a hearing to appeal denial of grievance taken against me. Kindly contact my Union Representative with date and time." (Ex. 4.)

22. An Appointing Authority hearing was held July 7, 2011. No decision issued before Mr. Kozlowski filed an appeal with the Civil Service Commission for a M.G.L. c. 31, § 43 hearing on the merits of the one day suspension. He filed his appeal on August 15, 2011, and the Civil Service Commission acknowledged the filing of his appeal on that date. He received an an acknowledgement form from the Civil Service Commission with docket number, D-11-250. (Exs. 5 & 6. Stipulation. Testimony.)

23. The Appointing Authority, through the Quincy Human Resources Director, issued a letter to Mr. Kozlowski on October 4, 2011, informing him, without further explanation: "The appeal of your one day suspension for leaving the motor running on an unattended street sweeper is denied." (Ex. 6.)

24. Mr. Kozlowski is subject to a collective bargaining agreement ("CBA"). The one

in place from July 1, 2007 – June 30, 2010, contained a provision at Article XXVIII, Derogatory Material, that read as follows:

Each employee at his/her request, may have any derogatory or negative material which has remained in his/her file for more than thirty (30) months removed from his/her file, inclusive of reprimands, warnings and other disciplinary actions, if there have been no reprimands, warnings or disciplinary actions in the interim.

(Ex. 7.)

25. In Mr. Kozlowski's file prior to the May 17, 2011 incident, were three disciplines. He received a verbal warning issued by Mr. Newton on February 27, 2009 for a February 18, 2009 incident for not being at his assigned area. He was found to have parked his truck across from Quincy City Hall without informing his supervisors he was going to City Hall during a time period when he was expected to be on the job. (Ex. 8.) On March 17, 2009, Mr. Kozlowski received a written warning from Mr. Newton for not being in his assigned truck. He was found to be in some other worker's street sweeper having a conversation as observed by the DPW Commissioner and Mr. Newton. (Ex. 9.) On March 19, 2009, Mr. Kozlowski received a one day suspension from Mr. Newton due to his conduct on March 17, 2009 when he was found to have parked his assigned street sweeper at a lunch spot earlier than he was supposed to be taking his lunch break. Mr. Newton decided on a one day suspension due to Mr. Kozlowski's prior verbal and written warnings. (Ex. 10.)

### **Conclusion and Recommendation**

#### *Appeal Properly before the Civil Service Commission and Timely Filed*

What the findings show is that Mr. Kozlowski was never provided with what M.G.L. c. 31, § 41 calls for him to receive once Mr. Newton imposed a one day suspension on May 20, 2011. (Ex. 1.) This section states in pertinent part:

Within twenty-four hours after imposing a suspension ... the person authorized to

impose the suspension shall provide the person suspended with a copy of ... [M.G.L. c. 31, §§41-45] 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 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 ... within five days after receipt by the appointing authority of such request. Whenever the hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing.

Mr. Kozlowski never received the civil service statutes. He did receive the reason for the suspension. He was not informed that he could seek a hearing on the merits of the suspension by making a written request for a hearing within the next forty-eight hours, although he filed the "Grievance Form" the day he served the suspension. His hearing on the merits before his Appointing Authority did not take place until July 7, 20011, and the Appointing Authority decision did not issue until October 4, 2011. The filing of the "Grievance Form" appears to have been an effort to trigger a right to a grievance proceeding as set forth in the CBA. But, before any union grievance process occurred, Mr. Newton denied his grievance on June 10, 2011. Mr. Kozlowski filed a form, dated June 13, 2011, seeking to appeal that determination. The next event was the July 7, 2011 Appointing Authority hearing.

From this course of events, I find Mr. Kozlowski never received a union grievance process and that he is able to pursue a Civil Service Commission review of his one day suspension. The union grievance process never occurred because of Mr. Newton's decision denying the grievance before any grievance proceeding commenced. M.G.L. c. 31, § 43 explains that a tenured civil service employee who receives discipline such as a one day suspension, is able to appeal the suspension to the Civil Service Commission and receive a hearing on the merits, with the following exception:

If the commission determines that such appeal has been previously resolved or

litigated with respect to such person, in accordance with the provisions of ... [M.G.L. c. 150E, § 8], or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal.

Because the union grievance process was halted, I conclude whatever that "Grievance Form" may have meant, because there was no subsequent grievance procedure, this Section 43 criteria has not been met to prevent a Civil Service Commission review of the suspension.

The July 7, 2011 hearing on the one day suspension is the M.G.L. c. 31, § 41 Appointing Authority hearing Mr. Kozlowski wanted. That hearing should have occurred closer in time to the imposition of the one day suspension as called for under Section 41. Mr. Kozlowski, when he filed his appeal to the Civil Service Commission, did not seek a M.G.L.

c. 31, § 42 hearing to challenge the Appointing Authority's failures to satisfy the requirements of Section 41. This is why only a M.G.L. c. 31, § 43 hearing on the merits has been held.

No decision of the Appointing Authority following the July 7, 2011 hearing occurred until October 4, 2011. Mr. Kozlowski filed his appeal with the Civil Service Commission on August 15, 2011. The issue is whether or not his appeal was timely made. M.G.L. c. 31, § 43 calls for the filing of an appeal within ten days of receipt of the Appointing Authority's decision following its hearing on the merits. M.G.L. c. 31, § 41 calls for the decision following the Appointing Authority hearing to issue by seven days following the hearing. Much time passed after that hearing, so that in light of the odd course of events involved for Mr. Kozlowski to assert his civil service law appeal rights, his filing of an appeal with the Civil Service Commission on August 15, 2011 should be allowed as timely filed.

#### *Merits*

Mr. Kozlowski testified that he did not leave the street sweeper running when he left it at the rotary on May 17, 2011. He also claimed that he did not leave it running in his "Grievance

Form" filed May 23, 2011. Despite that evidence, I am strongly persuaded to the contrary by the credible and well explained accounts of Mr. Newton and Mr. Leary who found the street sweeper not very long after Mr. Kozlowski left it. I found Mr. Kozlowski's explanation without merit, that the running street sweeper would not be so loud as to be obviously experienced as running versus needing go over to it as Mr. Leary did to determine if it was running. I do not believe Mr. Newton and Mr. Leary lied that they found the street sweeper running. I also do not find Mr. Kozlowski inadvertently forgot to turn off the running sweeper, but all along intended to leave it running. Mr. Leary's account of entering the street sweeper and turning it off from running and then removing the key from the ignition, corroborated by Mr. Newton's observations that the street sweeper was found running is sufficient proof that Mr. Kozlowski left the sweeper running.

Mr. Kozlowski, as corroborated by Mr. Leary's testimony, acknowledged that the rest room he traveled to with Mr. Donahue was about one to one and one-half miles away from where the street sweeper was left running. That is not such a short distance to in any way excuse or minimize the significance of Mr. Kozlowski leaving the street sweeper unlocked and running.

The circumstances of the street sweeper left unattended, running, and with the door unlocked, support a conclusion that this was misconduct by Mr. Kozlowski even without any clear policy or practice to never leave a street sweeper idling. Mr. Newton noted a policy about leaving city vehicles idling no longer than about five minutes. No evidence was presented that this meant an ability to leave an idling street sweeper or other city vehicle out of sight of any city employee for any length of time. If that was the idling policy, Mr. Kozlowski knew he would be away from the street sleeper to use the rest room longer than five minutes. Mr. Newton and Mr.

Leary gave convincing testimony that this area is primarily filled with residences not all that far apart, with a school about 450 feet from the rotary location where the street sweeper was left, and with only one main road through the peninsula, Palmer Street, that feeds into the rotary. Bolstering their accounts is Chalk 1, the Google earth map of the Germantown peninsula area. I found Mr. Newton's account understandable when he explained how he found leaving the running unlocked street sweeper, even with the flashing lights on and the bristles not operating to be a hazard and a danger if anyone approached it such as a child from the school or anyone unfamiliar with such a vehicle. Given the prime location it was left in for that Germantown peninsula, his concern is even more understandable and not at all contrived or exaggerated.

Mr. Kozlowski claims that he did just what other workers have always done in leaving the street sweeper where he did to drive off with a coworker to use the rest room even though the restroom was some distance away. The problem is, that claimed practice does not fit the circumstances the findings show. This is because Mr. Kozlowski contends very unconvincingly that he left the street sweeper not running. Mr. Kozlowski acknowledges he left the key in the ignition with the vehicle door unlocked. He testified that this is also what the practice in place involves even when leaving a city vehicle unattended to take a rest room break. No corroborative evidence was presented about this practice to make his testimony enough to show the policy as he explained it exists.

Finally, Mr. Kozlowski contends that through his CBA at Article XXVIII, he is able to avoid having consideration of his prior discipline from 2009. (Ex. 7.) Clearly, that contention has no impact on consideration of the February 2009 matter. This is because in March 2009 he again faced discipline. Thirty months had not passed from February 2009 to have removal of that discipline from his file possible under this provision calling for the passage of thirty months

free of any discipline as a threshold matter. In terms of the March 2009 discipline, the first of the two disciplines that month cannot be removed because it was followed by a one day suspension also in March 2009. That leaves the last discipline in March 2009. Jumping ahead thirty months reaches September 2011. The one day suspension for leaving the street sweeper running unattended occurred with the next thirty months in May 2011. As a threshold matter it is hard to see how this CBA provision has any impact on Mr. Kozlowski's situation regarding this appeal. He testified that he made a request that his prior discipline be removed according to his rights under Article XXVIII, but he did not produce any corroborative evidence that he made such a request, including when he made the request. Was it within the term of this collective bargaining agreement that concluded June 30, 2010? Did this same provision appear in the subsequent or current collective bargaining agreement? He made no argument why even if he still had this right when he made the request, that thirty months had passed since his March 2009 discipline before he was again disciplined by the one day suspension.

I conclude the Appointing Authority had just cause to impose the one day suspension without pay as there is ample evidence to support discipline at that level because Mr. Kozlowski's May 17, 2011 conduct was misconduct and was inappropriate. *Gloucester v. Civil Service Commission*, 408 Mass. 292, 297 (1990). I do not find a need to determine the merits of Mr. Kozlowski's CBA claim because even if he had never had any prior discipline, the one day suspension is justified. Moreover, Mr. Newton never testified that he only gave a one day suspension because of progressive discipline principles as he had when he gave out the prior one day suspension in March 2009. (Ex. 10.) The Appointing Authority has presented sufficient proof that Mr. Kozlowski engaged in substantial misconduct that adversely impacted the public interest by impairing the efficiency of the public service. *Boston Police Dep't v. Collins*, 48



Mass. App. Ct. 408, 411 (2000); *School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct. 486, 488 (1997).

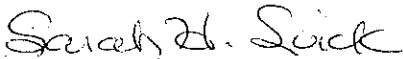
Recommendation

I recommend that the Civil Service Commission find Mr. Kozlowski did not have a union grievance process to challenge the one day suspension to prevent a Civil Service Commission appeal process.

I recommend that the Commission find Mr. Kozlowski's August 15, 2011 appeal to be timely. I conclude he should not have his appeal dismissed because it was not filed within ten days of his receipt of the October 4, 2011 Appointing Authority decision in light of the course of events pursued in this matter by the Appointing Authority.

I recommend that the Civil Service Commission affirm the one day suspension without pay.

**DIVISION OF ADMINISTRATIVE  
LAW APPEALS**



**Sarah H. Luick, Esq.**  
Administrative Magistrate

DATED: **NOV 10 2011**