

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

STEVEN KOZLOWSKI,
Appellant

v.

CITY OF QUINCY,
Respondent

CASE NO: D-13-271

Appearance for Appellant:

Joseph McCardle, President/Field Representative
MA Public Employee Council
7 Laborers' Way
Hopkinton, MA 01748

Appearance for Respondent:

Diedre J. Hall, Esq.
Assistant City Solicitor
City of Quincy
55 Sea Street
Quincy MA 02169

Commissioner:

Paul M. Stein

DECISION

Pursuant to the provisions of G.L.c.31, §§41-45 the Appellant, Steven Kozlowski, appealed to the Civil Service Commission (Commission) from a three (3) day suspension imposed by the City of Quincy (Quincy) from his position as working foreman/special heavy MEO in the Sewer/Water/Drain Department (SWD) of the Quincy Department of Public Works (DPW). Following a pre-hearing conference on January 14, 2014, upon order of the Commission, Quincy held an appointing authority hearing which resulted in a decision by the Mayor of Quincy to uphold the three (3) day suspension. A full hearing of the appeal was held on March 7, 2014 at the offices of the Commission. No request for public hearing was received and the hearing was declared private. All witnesses, except the Appellant, were sequestered. Twenty-seven (27) exhibits were introduced into evidence. The hearing was digitally recorded and a copy of the CD was provided to the parties. The parties submitted post-hearing briefs.

FINDING OF FACT

Giving appropriate weight to the Exhibits; to testimony of the Appellant, Quincy WSD Water Distribution Supervisor Anthony DiStaci, Quincy Highway Dep't General Foreman Ed Leary, Quincy SWD General Foreman Mark Valpondo, Quincy SWD Laborer MEO David Parsons and Quincy DPW Business Manager Michael Coffey; and taking administrative notice of all matters filed in the case; as well as pertinent statutes, case law, regulations and policies; and drawing reasonable inferences from the credible evidence, a preponderance of the credible evidence establishes the following facts:

1. The Appellant, Stephen Kozlowski, is a tenured civil service employee, with approximately ten (10) years of service in Quincy, who held the position of Working Foreman/Special Heavy MEO in the Quincy SWD Division of the DPW at the time of the discipline involved.

(Undisputed Facts)

2. Mr. Kozlowski has received three prior disciplines including a one (1) day suspension in 2009 for leaving his assigned work location without a supervisor's approval, a written warning in 2009 for not being in his assigned vehicle, and a one (1) day suspension in 2011 for leaving a street sweeper unattended and unlocked. *(Exhs. 2, 4 through 8)*

3. As the Working Foreman assigned to the second shift (3PM to 11PM), Mr. Kozlowski acts as the principal SWD supervisor on that shift. *(Testimony of Appellant, DiStasi, Valpondo, Coffey)*

4. The second shift supervisor has the authority to determine when breaks are to be taken, which are not set in time but generally will be taken when the workload reasonably permits and it does not hinder completing any assignments. A shift supervisor's decision to take his own

break does not require approval of the shift supervisor's superior. (*Testimony of Appellant, Valpondo, DiStasi, Leary, Coffey*)

5. On the day in question, November 5, 2013, Mr. Kozlowski was called to work early and worked most of the first shift (7AM to 3PM) that day, reporting at approximately 10AM, as well as his regular second shift. (*Exh. 25; Testimony of Appellant, DiStasi & Valpondo*)

6. An emergency situation involving a sewer back up in the vicinity of 29 Hancock Street arose during the first shift on November 5, 2013. A crew was dispatched to the scene to address the problem. Mr. Kozlowski was not part of that crew, however, but worked most of the day laying curbing behind the DPW building. (*Exhs. 2 & 27; Testimony of Appellant, Parsons, DeStasi & Valpondo*)

7. At 3:00 PM on November 5, 2013, Mr. Kozlowski assumed his regular duty as the second shift supervisor. One subordinate, David Parsons, a Laborer MEO, a regular on the first shift, also worked second shift that day. (*Exh. 24; Testimony of Kozlowski, Parsons*)

8. By the time the second shift started, the crew working the back up at 29 Hancock Street had completed their work and were on their way back to the DPW building. The problem was "clear" although it would need attention from the second shift to "take a look at it later on." (*Testimony of Appellant, DeStasi, Valpondo & Parsons*)

9. At some time between 3:00 PM and 3:30 PM, Mr. Kozlowski and Mr. Parsons were on their way to check the situation at 29 Hancock Street when they were advised that the problem was "all clear" and they were not needed to report to the scene. (*Testimony of Appellant, DiStasi, Parsons*)

10. After being cleared for reporting to the 29 Hancock Street incident, Mr. Kozlowski and Mr. Parsons took a work break. During this break, Mr. Parsons drove a City assigned vehicle, with

Mr. Kozlowski, to a bank where Mr. Parsons cashed a paycheck. Thereafter, Mr. Parsons drove to St. John's Church. Mr. Kozlowski went inside where he voted. He had forgotten until his wife called him (about 2:00 PM) to remind him to vote. (*Testimony of Appellant & Parsons*)

11. I take administrative notice that November 5, 2013 was a municipal election day. http://www.quincyma.gov/CityOfQuincy_Content/documents/SKMBT_60113110608320pdf_Adobe_Acrobat_Pro.pdf

12. I also take official notice that the Massachusetts Attorney General has promulgated a policy, construing M.G.L.c.149, Section 178, that requires certain private sector employers to grant employees a period of two hours leave to exercise their right to vote. (*Exh. 26*)

13. While at St. John's Church, Mr. Parsons was seen by Quincy DPW Commissioner Raymondi, who was also at the polling station. Mr. Parson's told Commissioner Raymondi that they had "nothing pending", were on break and stopped so that Mr. Kozlowski could vote. They were at the church for about 8 to 10 minutes. (*Exh. 2; Testimony of Appellant, Parsons & Coffey*)

14. After voting, at 4:01 PM, Mr. Kozlowski received a phone call from his supervisor, Mr. Valpondo, who ordered him to report to the DPW shop, which he did shortly after 4:00 PM. While there, he was briefed by Messrs. DiStasi and Valpondo on the 29 Hancock Street situation. (*Exh. 25; Testimony of Appellant, DiStasi & Valpondo*)

15. Mr. Kozlowski mentioned to Mr. Valpondo that he had just voted. Mr. Valpondo is a military veteran and considers voting a "patriotic duty." Mr. Valpondo took no action to counsel or reprimand Mr. Kozlowski for having stopped to vote. (*Testimony of Valpondo*)

16. Mr. Coffey, the Quincy DPW Business Manager, and a former DPW Commissioner, acknowledged that it would be appropriate for an employee to vote while on a work break. (*Testimony of Coffey*)

17. Mr. Kozlowski then completed his second shift. The daily log shows no significant activity on the shift until after 6 PM. (*Exh. 24; Testimony of Appellant & Parsons*)

18. On November 8, 2013, on orders of Commissioner Raymondi, Mr. Kozlowski received notice of a three (3) day suspension for directing a co-worker to “drive you in a City work truck to St. John’s Church to conduct personal activities” and “Leaving your position or assignment without prior approval by your Supervisor to conduct personal business. . . .” On the same day, Mr. Parsons was issued a written reprimand for his participation in this alleged misconduct. (*Exhs. 2 & 23; Testimony of Appellant, Parsons & Coffey*)

19. On November 12, 2013, Mr. Kozlowski protested his suspension by notice to Mr. Valpondo via a union “Grievance Form”. By letter dated November 15, 2013, Quincy initially informed Mr. Kozlowski that it considered his “grievance” as a request for a civil service appointing authority hearing under G.L.c.31, and would process the request accordingly. On December 2, 2013, Quincy retracted its position and informed Mr. Kozlowski that they did not consider the “grievance” a request for a civil service hearing, but that it did not conform to collective bargaining rules and would not be reviewed as a union grievance either. (*Administrative Notice [Quincy’s Motion to Dismiss, Exhs B & C]*)

20. Mr. Kozlowski duly appealed to the Commission asserting violation of his substantive and procedural civil service rights under G.L.c.31. Quincy moved to dismiss the appeal for lack of jurisdiction. (*Administrative Notice [Claim of Appeal; Quincy’s Motion to Dismiss]*)

21. By interim order, Commission Chairman Bowman denied the Motion to Dismiss and ordered Quincy to conduct the required appointing authority hearing on or before March 12, 2014. (*Administrative Notice [Order on Motion to Dismiss]*)

22. On February 27, 2014, Quincy conducted the appointing authority hearing before a hearing officer appointed by Quincy Mayor Koch. The Hearing Officer recommended that Mr. Kozlowski's suspension be upheld. On March 6, 2014, Mayor Koch adopted the Hearing Officer's recommendation and affirmed Mr. Kozlowski's three (3) day suspension. (*Exhs. 2 & 3*)

CONCLUSION

A tenured civil service employee may be disciplined only for "just cause" after due notice and hearing, followed by a written decision "which shall state fully and specifically the reasons therefore." G.L. c.31, §41. An employee aggrieved such a decision may appeal to the Commission under G.L. c.31, §43. Under Section 43, the role of the Commission is to determine, under a de novo "preponderance of the evidence" test, "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997).

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." E.g., Commissioners of Civil Service v. Municipal Ct. 359 Mass. 211,214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477,482 (1928); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). 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.

Applying these principles to the facts of this case, Quincy has failed to establish just cause for suspending Mr. Kozlowski.¹ For Quincy to call Mr. Kozlowski's stop to exercise his right to vote as he returned to the DPW shop from the field – while in the process of working a double shift which he began about 10AM that morning – a "frolic", as Quincy argued in its post-hearing memorandum, is a most unfortunate choice of words. The preponderance of the evidence, including very credible testimony from Mr. Kozlowski and evidence from other witnesses that corroborated his testimony, established that, at shortly after 3:30 PM, Mr. Kozlowski and Mr. Parsons were working the second shift and were returning to the DPW shop (Mr. Parsons driving) when they took a work break. Mr. Parsons stopped to cash his paycheck and then drove Mr. Kozlowski to St. John's Church so that he could vote. There was no ongoing activity that required the attention of Mr. Kozlowski or Mr. Parsons when they took their break. This activity was entirely justified and violated no Quincy work policy or procedure. It did not interfere in any way with the business of the WSD or the DPW. I find no basis to conclude that this activity constitutes "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Although Mr. Kozlowski was not required to seek permission to authorize this activity, I find it wholly implausible, if not inappropriate, that a request to take

¹ Quincy presses its claim that the Commission lacks jurisdiction of the appeal because Mr. Kozlowski failed to follow the proper procedure to request an appointing authority hearing and did not timely appeal his discipline to the Commission. I deem Chairman Bowman's denial of Quincy's motion to dismiss to have disposed of that claim as law of the case, and do not choose to reconsider the issue but address the important public policy concern about voting rights implicated by the substantive issue in the appeal. Moreover, were the matter reconsidered, it would clearly fail. For Quincy to take the position that its first impression of Mr. Kozlowski's assertion of a "grievance" was meant to be an exercise of his civil service rights, and then turn around and claim he missed the deadlines because he chose the wrong form is patently without merit.

such a break from work to vote would be deemed unreasonable by any supervisor (especially Mr. Valpondo) or would not have been approved. There is simply no just cause to discipline a supervisor, such as Mr. Kozlowski, for stopping to vote during his break.

Accordingly, for the reasons stated, the appeal of the Appellant, Stephen Kozlowski, CSC Docket No. D-13-271, is hereby allowed. The three (3) day suspension is vacated and the Appellant shall be restored to his position with no loss of compensation or other rights as required by civil service law.

Civil Service Commission

Paul M. Stein

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell [Absent], and Stein Commissioners) on October 30, 2014.

A true record. Attest:

Commissioner

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 the 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 a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Joseph McCardle (for Appellant)

Diedre J. Hall, Esq. (for Respondent)