COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS **CIVIL SERVICE COMMISSION**
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

JAMES KRAS,
Appellant

v. D-05-199

CITY OF HOLYOKE,
Respondent

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Hearing Officer: John J. Guerin, Jr.[1]

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, James Kras (hereinafter "Kras" or "Appellant"), is appealing the action taken by the Respondent, the City of Holyoke (hereinafter "City" or "Appointing Authority") suspending him for one day without pay from his employment as a Foreman Automotive Maintenance for failing to

[1] John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Prior to the leaving the Commission, however, Mr. Guerin authorized the drafting of this decision, including the referenced credibility assessments, which were made by Mr. Guerin. Pursuant to 801 CMR 1.01 (11)(e) of the Standard Adjudicatory Rules of Practice and Procedure, this case was reassigned to Chairman Bowman so that it may be brought before the full Commission for review and disposition.

provide medical certification for his absence on March 25, 2005. The appeal was timely filed. A full hearing was held on September 11, 2007 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Two (2) audiotapes were made of the hearing.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1-11, Appointing Authority's Exhibit 1, and Appellant's Exhibits 1-2) and the testimony of the Appellant, William Fuqua, Debra Reardon and Patrick McCann, the hearing officer made the following findings of fact:

1. Appellant, a tenured civil servant, was hired by the Department of Public Works ("DPW" or "the Department") of the City as a motor equipment operator in 1994. Since 1999, he has been employed as a Foreman Automotive Maintenance, a supervisory position. He had not been disciplined prior to the one day suspension that is the subject of this appeal. (Stipulations of Fact and testimony of Appellant)
2. Foremen in the Department are required to be placed on "stand-by" for a period of one week at a time. Stand-by is done in case of emergencies. Debra Reardon, the DPW office manager for over twenty years, testified that she makes up the standby roster every six months. The roster consists of five supervisors, with a supervisor on one week and off the next four. Stand-by has been in place for over twenty years. (Testimony of Reardon and Fuqua)
3. Appellant testified that, as a Foreman, he became part of the Standby roster in 2000 or 2001.

4. On January 14, 2005, Appellant called out sick for stand-by. He provided a doctor's certificate for this absence. (Stipulations of Fact and Ex. 4)
5. On February 18, 2005, Appellant called out sick for stand-by. He provided a doctor's certificate for this absence. (Stipulations of Fact and Ex. 5)
6. Appellant called out sick for stand-by on March 25, 2005, Easter weekend. He did not provide a doctor's certificate for his absence. (Stipulations of Fact)
7. A letter dated April 1, 2005 from William Fuqua, General Superintendent of DPW since 1998 and responsible for day-to-day operations and enforcement of rules, regulations and procedures, stated that it had come to his attention that Appellant had not produced a doctor's certificate covering his absence on Friday, March 25, 2005. Fuqua's letter stated that this certification was required "when a supervisor, who is scheduled for Stand-By service, calls out sick and is unable to fulfill their standby requirement." The letter further noted that Appellant had called out sick on the Friday before the start of his scheduled week for the last three weeks of scheduled stand-by service thus avoiding serving as on-call Foreman for that weekend and that these actions had placed a hardship on his fellow supervisors who must cover his time as well as constituting an abuse of the Department's standby policy. Fuqua informed Appellant that he had until April 5, 2005 to produce a doctor's certificate and failure to do so would result in further disciplinary action being brought against him. (Stipulations of Fact and Ex. 6)
8. Appellant did not discuss Fuqua's letter with him and did not submit a doctor's certificate. (Testimony of Appellant)

9. A letter dated April 7, 2005 was sent to Appellant from Fuqua informing him that he was suspended without pay for one day for failure to provide medical certification for the March 25, 2005 absence. (Stipulations of Fact and Ex. 7)
10. Reardon and Fuqua testified that if a supervisor on stand-by called in sick on a Friday, the foreman is not eligible for duty on Saturday or Sunday.
11. Reardon testified credibly that the Department's practice was that a supervisor who called in sick for stand-by had to provide medical documentation. She stated that this was a well known past practice.
12. Reardon and Fuqua testified that there are draft Stand-by Rules and Regulations from April 2005 that reflect past practice. The draft states that "employees on standby that call in sick on a Friday or holiday will provide the Office Manager with a doctor's note covering their absence for that day." Fuqua stated that the draft attempted to document the past practice of the past few years, stating that as the employees practiced the procedure, this implied they knew the procedure. (AA Ex. 2)
13. Fuqua acknowledged that the stand-by policy had not been presented to the Union representing supervisors.
14. Appellant stated that he did not know of any policy to provide a note for calling in sick on stand-by. He testified credibly that he provided a doctor's note because he went to the doctor, not because he thought he needed to by policy. Accordingly, he did not provide a note for his illness in March because he did not see a doctor.
15. Patrick McCann, a DPW supervisor since 1992, and a union office holder from 2003 through 2005, testified that he was responsible for keeping Union members informed

of work policies. McCann stated that he was not aware of a policy that required providing a doctor's note if a supervisor called in sick for stand-by.

16. The Collective Bargaining Agreement (hereinafter "CBA") states, in relevant part, that sick leave shall apply to any full time permanent employee who has been absent from work for more than two (2) consecutive work days in any single calendar year, and the Board of Public Works (hereinafter the "Board") may require a certificate signed by the attending physician of the employee for an illness or injury for which sick leave is claimed. (Ex. 1)
17. The CBA also states that the City, in operating the Department, may establish and enforce policies, rules and regulations governing employee conduct and operating procedures. (Ex. 1)
18. Prior to the Appellant's suspension, one other foreman had called in sick on a Friday for his scheduled stand by duties. His discipline was a three day suspension without pay. (AA Ex. 1)
19. By letter dated April 8, 2005, Appellant appealed the one day suspension to the Appointing Authority, the Board. (Stipulations of Fact)
20. On June 6, 2005, the Board met in Executive Session and upheld Appellant's suspension. (Stipulations of Fact)
21. Appellant filed an appeal with the Commission on June 13, 2005.

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 which is established "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 here 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).

Here, the evidence shows that the Appointing Authority had reasonable justification to suspend Appellant for one day when he did not submit a doctor's note as directed to by his supervisor after calling in sick for stand-by on March 25, 2005. The evidence showed that Fuqua wrote Appellant on April 1, 2005 informing him that he had until April 5, 2005 to produce a doctor's certificate. That letter also documented that failure to do so would result in further disciplinary action being brought against him. Appellant did not submit the medical documentation as ordered and was suspended for a day. In the letter suspending him, Fuqua noted that Appellant had called out sick on the Friday before the start of his scheduled week for the last three weeks of scheduled stand-by service. The credible testimony of Fuqua and Reardon established that it was the Department's practice to require a medical documentation if a supervisor on stand-by called in sick. Their testimony further established that although this practice was not a written policy in March 2005, it was a longstanding practice followed in the Department. Accordingly, it was not unreasonable for Fuqua to request the doctor's certification given the above facts.

Moreover, if Appellant disputed Fuqua's right to request medical certification, he should have complied with the request and then grieved it pursuant to the terms of the Collective Bargaining Agreement and a well entrenched rule of labor relations: obey now, grieve later. *See* Beal, et. al. v. Boston Public Schools, 18 MCSR 57 (2005); Ouillette v. City of Cambridge, Civil Service Case No. D-03-123 (September 14, 2006) (citing concept of "obey now, grieve later"). If Appellant believed being required to submit a doctor's note was a violation of the CBA, he could have filed a grievance over this after complying with the order. However, in this instance, neither Appellant nor the union filed a grievance.

Based on the above, the Appellant's appeal under Docket No. D-05-199 is hereby ***dismissed***.

Civil Service Commission

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Christopher C. Bowman
Chairman

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; and Taylor, Commissioner - Yes) on May 8, 2008.

A true record. Attest:

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Commissioner

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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30)

days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Marshall T. Moriarty, Esq. (for Appellant)
Melissa Shea, Esq. (for Appointing Authority)