COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

BRIAN LAFLAMME,
Appellant

v. D-06-30

CITY OF HOLYOKE,
Respondent

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Respondent's Attorney: Meghan B. Sullivan, Esq.
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Hearing Officer: John J. Guerin, Jr.[1]

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Brian LaFlamme (hereafter "Appellant"), is appealing the decision of the Respondent, City of Holyoke (hereafter "City") as Appointing Authority, suspending him on November 18, 2005 for three (3) days without pay from his position as a Motor Equipment Repair Man for the City's Department of Public Works (hereafter "DPW"). The Appellant filed a timely appeal. A hearing was held on December 12, 2007 in the City Council Chambers at Holyoke City Hall and on February 27, 2008 at the State Office Building in Springfield.

[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. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

For the purpose of administrative efficiency, the parties stipulated that this appeal would be heard concurrently with LaFlamme v. City of Holyoke, D-06-202, but that separate decisions on the two appeals would be issued by the Civil Service Commission (hereafter "Commission"). The hearing on these matters was tape recorded. As no written notice was received from either of the parties, the hearing was declared to be private. Witnesses offering sworn testimony were not sequestered. The parties submitted Proposed Decisions thereafter, as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence relative to both appeals (Joint Exhibits (JE) 1 – 14 and Appellant's Exhibits (APP) 1[2] – 4) and the testimony of City DPW General Superintendent William Fuqua (hereafter "Mr. Fuqua"), DPW Supervisor of Solid Waste and Recycling Coordinator Timothy Price (hereafter "Mr. Price"), President of the Holyoke Employees Association (hereafter "Union") and City DPW employee Michael Gallagher (hereafter Mr. Gallagher") and the Appellant, I make the following findings of fact, the first nine (9) of which are stipulated in JE 7:

1. The Appellant was an employee of the City's DPW. He was employed as a Motor Equipment Repair Man. His date of hire with the City's DPW was November 26, 1996.
2. Mr. Price is the Supervisor of Solid Waste and Recycling Coordinator and has held that position since 2005 and at all times relevant to this case. Prior to that, he was a

[2] Appellant's Exhibit 1 was a video tape created personally by the Appellant to illustrate conditions on State Route 202 in Holyoke on December 12, 2007 at approximately 10:50 a.m. The tape was made for the purposes of the appeal under Docket No. D-06-202 and was viewed by this hearing officer and the parties at hearing. A copy of the tape was to have been submitted by the Appellant along with his Proposed Decision on that appeal. While reference may be made to conditions witnessed on the tape at hearing, the tape was not received by the Commission thereafter and is, therefore, not included in the record.

Laborer and a Motor Equipment Repair Man. He was hired by the City's DPW in 1997.

3. Mr. Price is the supervisor of the yard waste pile and was so at all times relevant to this case.
4. The Appellant was injured off duty in a car accident in 2005. When he returned to work, he was not able to work as a Motor Equipment Repair Man. He was given light duty assignments consistent with those of a DPW Laborer.
5. On November 18, 2005, the Appellant was stationed at the yard waste pile that is supervised by Mr. Price.
6. The Appellant was suspended for three (3) days following the November 18, 2005 assignment at the yard waste pile.
7. The appellant appealed the suspension to the Board of Public Works, the Appointing Authority.
8. The Board of Public Works met regarding the Appellant's 3-day suspension and upheld the 3-day suspension.
9. Mr. Fuqua is the General Superintendent of the Board (Department) of Public Works.
10. The Appellant was on leaves of absence for a period of two (2) years; first due to military leave and then due to breaking his foot and ankle in an automobile accident outside of work. He returned to work involuntarily on October 31, 2005 and received make-work, light duty Laborer assignments consistent with his medical restrictions. The Appellant testified that he did not care for these Laborer assignments and that he felt singled out for menial tasks. (Testimony of Appellant)

11. The Appellant also testified that he expected that he would be returning to work on light duty as a mechanic. He stated that he was not familiar with, nor trained in, the duties of a Laborer. (Id.)
12. Mr. Fuqua testified that he had agreed to find light duty work to fit the Appellant's medical restrictions according to the instructions of the Appellant's doctor. Mr. Fuqua wrote a letter to the Appellant's doctor on September 26, 2005 to ascertain exactly what restrictions the Appellant was under. Mr. Fuqua related to the doctor that since the time of the Appellant's accident on April 9, 2005, the DPW had received medical slips regarding the Appellant where the forms used for light duty restrictions were nearly always left blank. (Testimony of Mr. Fuqua and APP 2)
13. One of the medical notes from the Appellant's doctor, dated May 18, 2005, indicated that the Appellant had light duty medical restrictions of: no lifting greater than 30 lbs.; no repetitive bending or stooping; may alternate between sitting and standing as tolerated; and limited use of injured area, may rest as needed. (APP 2)
14. The Appellant had a history of previous discipline as follows:

    - July 15, 1997 – failure to call-out per policy (3-day suspension)
    - August 11, 1997 – failure to call-out per policy (5-day suspension)
    - April 10, 2000 – failure to call-out per policy (3-day suspension)
    - September 8, 2000 – failure to call-out per policy (5-day suspension)
    - January 26, 2001 – failure to punch time clock (3-day suspension)
    - March 9, 2001 – failure to report to duty while on stand-by (1-day suspension)
    - August 2, 2001 – tardiness and failure to call-out per policy (3-day suspension)
    - August 20, 2001 – failure to call-out per policy (5-day suspension)
    - May 17, 2002 – insubordination (balance of the day without pay)
    - May 20, 2002 – absenteeism (3-day suspension)
    - October 17, 2002 – failure to call-out per policy (3-day suspension)

    (JE 6)

15. To comply with the Appellant's light duty restrictions, Mr. Fuqua assigned the Appellant to monitor resident access to the City's yard waste pile. Only Holyoke residents are able to discard of yard waste at the pile. The yard waste pile is adjacent to the City's wastewater treatment plant. Residents access the area via an entrance at which there is a shack where a DPW employee confirms that the user is a City resident. The shack is equipped with a seat, table, heater and a television bolted to the ceiling, but no restroom facility. The monitor was required to use the restroom in the waste water treatment plant. (Testimony of Mr. Fuqua, Mr. Price and Appellant and JE 10)

16. The Appellant was assigned to the shack as an attendant from 7:00 a.m. until 2:30 p.m. with occasional opportunities for overtime, depending on the season, from 2:30 p.m. until 6:00 p.m. The assignment seemed to comport with the Appellant's light duty restrictions as he had a limited area in which to work, could sit or stand as needed and could stay warm. (Testimony of Appellant)

17. Inappropriate dumping of yard waste was a constant problem at the area as people would avoid the check-in requirement and leave waste along Berkshire Street which abuts the yard waste area but is located across the area from the attendant's shack, approximately 200 feet away. This waste was left at a gap in the fence that surrounded the area and most often discarded after the area was closed for business. Some of the waste that was left along Berkshire Street was improperly disposed of in black plastic bags. As a result, each attendant was expected to clean up this waste on each shift. (Testimony of Mr. Price and Appellant)

18. When attendants required a snack or restroom break, they could close the gate to the yard waste area and access the wastewater treatment plant. The Appellant testified that he was aware that he could leave his post for breaks by closing the gate. Mr. Fuqua credibly testified that he had received complaints from wastewater staff that the Appellant had been roaming around the plant, not performing break activities, in the weeks prior to November 18, 2005. In response to this issue, Mr. Fuqua required attendants to check in at the wastewater treatment plant when they were taking breaks so their activity could be monitored. He also directed the DPW Office Manger, Debbie Reardon (hereafter "Ms. Reardon") to remind the Appellant of his duties in the yard waste area. Eventually, Mr. Fuqua instructed Mr. Price to specifically check on the Appellant to ensure that he understood his duties and that his responsibilities were being met. (Testimony of Mr. Fuqua, Appellant and Mr. Price)

19. I found Mr. Fuqua to be a credible witness. His description of his efforts to determine what duties to which he could assign the Appellant based on the light duty restrictions was believable and reasonable. Mr. Fuqua has been found by this hearing officer to have provided professional, unembellished and unemotional testimony in the past and his testimony in this matter was no exception. His demeanor was professional and his statements were unhesitant and straightforward. I found his testimony to be reliable, consistent and informative. He clearly harbored no animus towards the Appellant, only a frustration with his poor work habits. (Testimony and Demeanor of Mr. Fuqua)

20. Mr. Price credibly testified that he was driving an orange City vehicle on the morning of November 18, 2005. On his way to the yard waste area shack at approximately 8:30 – 9:00 a.m., Mr. Price discovered that waste had been dumped along Berkshire Street. Mr. Price drove to the shack and reminded the Appellant that the removal of the improperly discarded waste was one of his duties and that the waste needed to be taken care of. He estimated that between checking in vehicles, there was ample time for the Appellant to perform this task, even with his light duty restrictions. (Testimony of Mr. Price)

21. Mr. Price testified that, after instructing the Appellant to deal with the waste across the yard, he drove behind an adjacent garage, out of view of the shack but within view of the subject waste, and waited 40 – 45 minutes for the Appellant to complete, or at least begin, the task. No work was done in this time period so Mr. Price drove back to the shack to again remind the Appellant of his obligation. Mr. Price testified that he found the Appellant reclining and watching television when he returned to speak with him. Mr. Price observed that the Appellant was not busy checking in residents at the time. Mr. Price then left the shack. In response to being asked why the improperly discarded waste hadn't been cleaned up, Mr. Fuqua was later told by the Appellant's Union representative that the Appellant couldn't "be in two places at one time." (Testimony of Mr. Price and Mr. Fuqua)

22. I found Mr. Price to be a credible witness. His testimony was confident and detailed. He did not attempt to disparage or revile the Appellant on a personal basis, even though he was displeased with the Appellant's work performance.

He appeared at all times to build his testimony on relevant facts and limited his comments to the instant incident, only. His statement that he spent approximately 45 minutes out of view to determine if the Appellant was going to perform his duties was reasonable and indicative that he had, indeed, made clear to the Appellant that the waste clean-up was to occur immediately upon his directive. Mr. Price appeared knowledgeable of his own supervisory responsibilities and his testimony corroborated that of Mr. Fuqua regarding the policies and procedures of the DPW. I found his testimony to be reliable and unfettered by any personal bias against the Appellant. (Testimony and Demeanor of Mr. Price)

23. After leaving the shack following his second visit to the Appellant on November 18, 2005, Mr. Price went to inform Mr. Fuqua about the Appellant's failure to perform his duties after being instructed to do so. Mr. Fuqua then instructed Ms. Reardon to prepare the paperwork for issuance of a three-day suspension of the Appellant for insubordination. Ms. Reardon hand-delivered the suspension letter to the Appellant as the Appellant punched his time card to leave for the day on November 18, 2005. (Testimony of Mr. Fuqua, Mr. Price and Appellant)

24. The Appellant testified that his view of the Berkshire Street side of the yard waste area was obscured by the waste pile which, by his estimation, was 20 – 25 feet high. He stated that he told Mr. Price that he could not traverse the 200 feet of waste area quickly to clean the excess waste outside the area because of his injured foot. He also testified that he didn't immediately attend to the excess waste because he had a line of cars at the shack and could only allow 2 -3 cars

access the area at any given time. This statement indicated that he understood his charge from Mr. Price to be accomplished "immediately." The Appellant related that he usually waited until after his shift to access and clean up the excess waste. However, the Appellant was also aware that he could simply close the gate to vehicle access while he performed the task of cleaning up the excess waste. (Testimony of Appellant)

25. The Appellant further testified that he had been assigned to the yard waste area for approximately two weeks as of November 18, 2005. He had been issued a radio with which he was required to report his breaks at the wastewater treatment plant. He complained that Mr. Fuqua, Mr. Price and Ms. Reardon constantly changed his work rules but provided no evidence of this claim. He denied "wondering" or "roaming" idly in the wastewater plant and said he only went there for restroom breaks and to heat up his soup for lunch. (Id.)

26. The Appellant stated at hearing that he was unaware of any complaints about his activities from wastewater plant staff but contradicted himself in this regard when he said that he was cognizant that he was the only attendant who was required to report his restroom breaks. At this point, under cross examination by the City, the Appellant became unnaturally nervous and defensive. He began answering questions with questions and was nearly unresponsive when confronted with questions about his disciplinary history and offering "Complained about?" and "What do you mean complain about?" when asked about complaints from the wastewater plant staff that he was idling at the plant. He couched answers by saying things like, he "may have" watched television during lunch. He

categorically denied that Mr. Price had re-visited him later in the morning to remind him to clean up the excess waste. When asked by the City's counsel if Mr. Price had been "lying through his teeth" about his return to speak with the Appellant, the Appellant answered, "Yes!" He also contradicted Mr. Price's testimony when he said that he (the Appellant) did eventually clean the excess waste at the conclusion of his shift. Mr. Price had testified that, when he checked back the next day (November 19) to see if the waste had been attended to, he found even more waste. (Testimony of Appellant and Mr. Price)

27. I found the Appellant to be an unreliable witness and generally not credible in his recollection of the events of this matter. It was clear from the Appellant's statements at hearing that he was rationalizing after the fact to illustrate himself in a more favorable light rather than being forthcoming with the facts. The only explanations he seems to have had for his actions were to blame others for his situation. He made it very clear that he took umbrage with the "menial" tasks to which he was assigned, forgetting or ignoring that he was under light duty restrictions. He was, however, cognizant of these restrictions when avoiding the completion of these tasks. The Appellant's complaints that he was singled out for degrading tasks and discipline were selective and convenient to his cause. His unsupported claims that directly contradicted the corroborated testimony of Mr. Price and Mr. Fuqua (e.g. – the volume of residents accessing the yard waste area, complaints about him from wastewater plant staff, etc.) demonstrated an inability to accept responsibility for his work performance. (Testimony and demeanor of Appellant)

28. While Mr. Fuqua and Mr. Price had no reason to unreasonably harm the Appellant's work status, the Appellant had every motivation to embellish his testimony to improve his standing due to his lengthy discipline history. The Appellant could ill afford another blemish on his personnel record. I found that his assertion that Mr. Price never re-visited him to remind him to pick up the excess trash was an absolute fabrication. I also credit Mr. Price's assertion that he discovered the Appellant watching television as being true and consistent with the Appellant's demonstrated attitude that the yard waste area assignment was not worthy of his attention. (Id.)

29. The Appellant was suspended for insubordination. Insubordination, defined as a refusal or failure to perform work assigned, or to comply with the instructions of a supervisor, is a Section II Offense according to the DPW General Safety and Conduct Rules and Regulations. A Section II Offense "may be cause for a suspension up to five days or discharge based upon the circumstances surrounding the incident." (JE 3)

30. The Appellant appealed the three-day suspension the Board of Public Works in a letter dated November 21, 2005. The Board of Public Works met in Executive Session on January 23, 2006 regarding the discipline and upheld the Appellant's three-day suspension for insubordination. The Appellant and his Union representative were present at the hearing, held in accordance with G.L. c. 31, § 27. (JE 4)

31. The Appellant then filed a timely appeal of that action with the Commission. (Stipulated)

CONCLUSION

The role of the Civil Service Commission is to determine "whether, on the basis of the evidence before it, 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). 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). "In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions, including, of course, promotions, and to protect efficient public employees from political control." Id.

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 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).

The Respondent did show by a preponderance of the credible evidence that it had just cause to suspend the Appellant for three (3) days without pay for insubordination. This is a Section II Offense under the DPW General Safety and Conduct Rules and regulations which authorizes suspensions up to five (5) days or discharge depending on the circumstances. For this infraction, the Appellant was suspended for three (3) days, for which there exists just cause given the facts as found. In this situation, the Appellant failed to comply with a reasonable directive from his supervisor, Mr. Price.

The Appellant has a lengthy history of discipline, including a May 2002 suspension for the same charge of insubordination. The Appellant was specifically directed by Mr. Price to complete the yard waste assignment. The Appellant was not singled out for this

task. It was part of his responsibilities. All yard waste area attendants were responsible for the very same duty. Mr. Price observed the excess waste along the roadway for 40 – 45 minutes. In that time, the Appellant made no attempt to comply with Mr. Price's directive to attend to the waste. He was not expected to sprint the 200 feet to where the excess waste was and hurriedly dispose of it while cars were actively accessing the yard. Mr. Price credibly testified that the Appellant had ample time, however, to close the gate, go to the roadway area, pick up the bags of waste and go through them.

Mr. Price had to repeat the direction to the Appellant. A supervisor should not have to repeat a simple, clearly articulated instruction to a seasoned employee. The Appellant's dismissive attitude towards his supervisor's directive underscores his negativity and resentment towards his return from injured leave to unskilled, make-work duties.

For all the reasons stated herein, the Respondent has sustained its burden of proving just cause for the suspension of the Appellant and, therefore, the appeal on Docket No. D-06-30 is hereby ***dismissed***.

Civil Service Commission

_____
John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein , Marquis and Taylor, Commissioners) on July 31, 2008.

A true record. Attest:

_____
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)
Meghan B. Sullivan, Esq. (for Appointing Authority)