

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JERROLD LUCAS,
Appellant

v.

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

D-17-081

Appearance for Appellant:

Phillip Brown, Esq.
Associate General Counsel
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
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New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

The Appellant, Jerrold Lucas, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43¹ contesting his ten-day suspension by the New Bedford School Department (NBSD) from his position as Motor Equipment Operator. A pre-hearing conference was held on June 9, 2017 and a full hearing, which was digitally recorded,² was held on September 15, 2017, both at the UMass School of Law in Dartmouth. The hearing was declared private. Twenty-one exhibits were received into evidence (Exhs. AA1 through AA15, AA18, EE19 through EE21) and two documents marked for identification (Exhs. AA16ID & AA17ID). Proposed decisions were received on January 2, 2018.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² Copies of a CD of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Nancy Carvalho, Supervisor, NBSD Food Service Department
- Heather Emsley, Executive Director of NBSD Human Capital Services

Called by the Appellant:

- None

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Jerrold Lucas, is a tenured labor service employee with the NBSD who became employed by the NBSD as a Laborer in 2005 and has held his current title of Motor Equipment Operator (MEO) since September 29, 2008. Prior to his employment with the NBSD, Mr. Lucas worked as a Laborer with the City of New Bedford's Department of Public Works from 1993 until July 2003, when he was laid off as part of a reduction in force. His civil service seniority date is February 1, 1993. (*Exhs. AA1, AA2, AA11*³)

2. Mr. Lucas is one of three full-time MEOs assigned to the NBSD Food Service Division, which prepares and serves approximately 18,000 meals daily, including breakfast and lunch to students at the 32 schools in the NBSD system. (*Exh. AA11, Testimony of Carvalho*)

3. The meals are prepared at one of the 12 "feeder" schools that have a full cafeteria and the MEOs are responsible to pick up the prepared food from these schools and deliver them to 20 "satellite" schools without a full cafeteria on-site. MEOs also deliver supplies, such as paper goods, to the schools from the NBSD central Administration Building. (*Exh AA11*)

4. Each Food Service MEO is assigned one of three routes (North, South & Central) and a Laborer to assist him. Mr. Lucas is responsible for nine schools, delivering meals from four (4)

³ This proceeding is the second time that Mr. Lucas has appealed as suspension by the NBSD for absenteeism. By Decision in Lucas v. New Bedford School Department, 30 MCSR 222 (2017) (Lucas I)(*Exh. AA11*), the Commission upheld the three-day suspension imposed for prior absenteeism.

feeder schools to five (5) satellite schools. The MEOs work a 6:15 AM to 2:15 PM schedule, delivering breakfast the day before and lunch on the day it is served. Food Service MEOs are “school year” employees, meaning that they work 181 days a year when school is in session. (Exh. AA1; Testimony of Carvalho)

5. Pursuant to the Collective Bargaining Agreement (CBA) between the NBSD and AFSCME Council 93, Local 641, of which Mr. Lucas is a member, he accrues 1.25 sick days per month, or a total of 12.5 days per school year. (Exh. AA18)

6. The CBA provides for incentives for employees who do not use up their sick leave, ranging from a \$450 bonus for perfect attendance to a \$200 bonus for using four days of sick leave or less. (Exh. AA11 & AA195; Testimony of Emsley)

7. Employees who exhaust all of their their sick leave accrual may be placed on vacation leave (if available) or leave without pay at the discretion of the NBSD. An employee’s department head may require a physician’s certification in cases of “frequent use of sick leave” or when the employee is suspected of sick leave abuse or medical incapacity. Prior to invoking such a requirement, the employee must be provided a non-disciplinary “Letter of Expectations” These notices advise the employee that he/she must improve his/her attendance but do not set any specific required targets for improvement. (Exhs. AA 11! & AA18; Testimony of Emsley)

8. In the four school years prior to the 2016-2017 school year, Mr. Lucas exhausted his sick leave accruals. His absences included:

| <u>School Year</u> | <u>Days Absent</u> | <u>Attendance Rate</u> |
|--------------------|--------------------|------------------------|
| 2012-2013 | 53 | 70.1% |
| 2013-2014 | 118 | 34.8% |
| 2014-2015 | 79 | 56.3% |
| 2015-2016 | 71 | 60.8% |

(Exh. AA11)

9. In most cases, the NBSD did not have advance notice of Mr. Lucas's sick leave requests. Typically, Mr. Lucas would call in sick on the day of his absence and he would be out of work for a few days at a time. This required the NBSD to reallocate the work between the other two MEOs or ask one of the Laborer assistants to work Mr. Lucas's route alone. (*Exh. AA11; Testimony of Carvalho*)

10. The NBSD has used progressive discipline to encourage Mr. Lucas to improve his poor attendance including verbal coaching, letters of expectation, written warnings and unpaid suspensions. In particular, Mr. Lucas received the following progressive discipline for his excessive absenteeism through the end of 2015-2016 school year:

- April 5, 2013 – Written Warning
- February 20, 2015 – Written Warning & Letter of Expectation
- November 13, 2015 – Letter of Expectation
- March 8, 2016 – Written Warning
- June 17, 2016 – Three Day Suspension (affirmed by Commission)

(*Exh. AA11*)

11. In the 2016-2017 school year, Mr. Lucas again exhausted his sick leave accruals. His recorded absences included 44 days as of the end of March 2017, with three months of the school year remaining. (*Exhs. AA12, AA161D & AA171D; Testimony of Emsley*)

12. On March 31, 2017, the Appellant received notice of a contemplated (10) day suspension without pay for his continued excessive absenteeism and failure to adhere to the school district's attendance policy. The March 31, 2017 letter noted that the Appellant was absent during the 2016-2017 school year for a total of forty-four (44) days to that point. The letter also stated, "Throughout the years, the District has attempted to address your excessive absenteeism through verbal coaching, letters of expectation, written warnings and a three (3) day suspension that was issued on June 17, 2016. Despite these efforts, your attendance

continues to be at a level that is well below the District's expectations." (*Exh. AA13*)

13. An Appointing Authority hearing on the matter was conducted on April 7, 2017 and, on April 13, 2017, the Appellant received a letter from Superintendent of Schools Dr. Pia Durkin upholding the ten (10) day suspension. This appeal duly ensued. (*Exhs. AA13 & AA14; Claim of Appeal*)

14. Mr. Lucas did not testify at the Commission hearing of this appeal. He proffered documentary evidence that he had provided medical notes to the NBSD regarding most of his absences, which involved medical illness, treatment and testing, covering his absences on October 26 through 28, 2016; November 4 through November 8, 2016; January 9 through January 13, 2017; January 18 through January 20, 2017; January 24, 2017 through February 17, 2017; March 15 through March 17, 2017; and March 20 through March 22, 2017. (*Exh. EE19*)

15. Mr. Lucas also proffered evidence that other NBSD employees with attendance issues received lesser discipline than he has. None of these other employees, however, presented attendance issues to the level of Mr. Lucas's absenteeism that spanned multiple school years, and all of the other employees have either corrected their attendance problems or are no longer employed with the NBSD. (*Exhs. 20 & 21; Testimony of Emsley*)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be suspended for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which provides, in part:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights;

provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

Under Section 43, the Commission makes a de novo review "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the 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 Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

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." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) 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. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”)

“[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’ [Citations]”

Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

The NBSD has established by a preponderance of evidence that it had just cause to impose discipline upon Mr. Lucas for a continuing pattern of excessive absences that substantially impaired the efficiency of the public service.

As noted in the Commission’s Decision in Lucas v. New Bedford School Dep’t, 30 MCSR 222 (2017) (Lucas I): “At the risk of stating the obvious, attendance is an essential function of any job.” Rios-Jimenez v. Principi, 520 F.3d 31 (1st Cir. 2008) and cases cited. The NBSD is not

required to continue to tolerate an employee, for the indefinite future, who has demonstrated an unacceptable level of unreliability in his/her ability to report to work. This is especially true when the employee is a part of a team that has a time-sensitive and critical mission of providing public school students with meals each school day.

Mr. Lucas again argues, as he did in his prior appeal, that he was only told that he was “expected” to “improve” his attendance, but claims that the NBSD had no specific attendance standards, never quantified its “expectations”, and never gave him any specific personal targets that would relieve him from the risk of further sanctions. Mr. Lucas also seems to believe that his “improvement” for the 2016-2017 school year over his record in prior years, and the medical justification for most of his absences, makes his 10-day suspension inappropriate as remedial, progressive discipline. As I explained in Lucas I, the acceptable range of absences for sickness was expressly negotiated and set forth in the CBA, along with specific provisions to reward those who hewed to those standards and the Commission should not intervene to fine-tune the well-designed process that the NBSD had chosen to put in place. I do not find anything about the other employees identified by Mr. Lucas to suggest he received any disparate treatment.

Finally, I note that the NBSD did not suspend him for failing to justify his absences, but because of the unacceptably high level of absenteeism in the aggregate. The NBSD indicated that it is willing to work with any employee who needs accommodations, requires an extended, defined, leave of absence, or who needs resources to help conform their attendance to acceptable standards. Mr. Lucas is regarded by the NBSD as a good employee whom the NBSD wants to continue in employment if the attendance problem can be solved. To the extent that this, and his prior suspension, has moved Mr. Lucas in the right direction, is precisely the outcome that remedial discipline under basic merit principles of civil service law was intended to achieve.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Jerrold Lucas, under Docket No. D-17-081 is *denied* and the ten-day suspension is affirmed.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on January 17, 2019.

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 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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Phillip Brown, Esq. (for Appellant)

Elizabeth Treadup Pio, Esq. (for Respondent)