

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

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

Michael Lydon,
Appellant

v.
Boston Housing Authority,
Respondent

Case No. D-04-347

DECISION ON MOTION FOR SUMMARY DECISION

Michael Lydon (hereinafter referred to as "Appellant"), a Laborer for the Boston Housing Authority (hereinafter referred to as "Respondent"), filed this appeal on July 23, 2004, challenging the Appointing Authority's decision to discharge him on July 15, 2004. The above-entitled matter had a Pre-Hearing Conference on November 1, 2004 at 11:30 AM. At the Pre-Hearing Conference, the Appellant appeared pro se. On May 3, 2006, the Commissioner called both parties to inform them the subsequent scheduled Full Hearing Conference was changed to a Status Conference. A Status Conference was held on July 7, 2006 at 9:30 AM. No tapes were made at the Status Conference.

The Respondent, represented by Attorney Susan Whalen, filed a Memorandum in Support of its Motion for Summary Decision with the Commission on July 17, 2006. With the Motion for Summary Decision, the Respondent filed an Affidavit of Joyce Tognacci dated July 14, 2006, and exhibits (A-L). The Respondent's evidence included: Respondent's absentee notice to the Appellant dated February 3, 2004 (A); Respondent's suspension letter to the Appellant dated February 4, 2004 (B); Respondent's letter to Appellant regarding his administrative leave without pay dated February 17, 2004 (C); Respondent's "A Drug-Free Workplace Policy" Statement (D); Boston Housing Authority Substance Abuse Prevention Program Agreement (E); Respondent's letter to the Appellant regarding an administrative leave without pay on June 11, 2004 (F); Respondent's letter to the Appellant regarding an administrative leave without pay on June 18, 2004 (G); Respondent's letter to the Appellant regarding contemplation of termination dated June 29, 2004 (H); Contemplation of Termination Hearing dated July 14, 2004 (I); Appellant's termination letter dated July 15, 2004 (J); Boston Police Incident Report related to the Appellant's possession of drug narcotics, specifically crack cocaine, dated June 30, 2006 (K); Court Document regarding Appellant for charge of

possession of class B drugs, pursuant to G.L. 94c, §34, dated June 30, 2006, for which he was later convicted (L).

The Appellant, represented by Anthony Pini, a representative from the Laborer's International Union of North America, AFL-CIO, Local 367, did not enter in any evidence to the record at the Status Hearing and did not file a written response to the Respondent's Motion for Summary Decision.

Pursuant to 801 CMR 1.01 (7)(h), the Respondent has moved to dismiss the appeal on the basis that there is no genuine issue of fact relating to all or part of a claim or defense and that he is entitled to prevail as a matter of law. From the evidence entered into the record, I find:

- 1) The Appellant was hired as a Laborer on August 8, 1988. (Tognacci Affidavit).
- 2) On February 3, 2004, the Appellant was given written notice that he had been a no call/no show from his position of Laborer at the Washington Beech Development, a housing development managed by Boston Housing Authority. In the Respondent's notice, the Appellant was informed that if he failed to return to work "immediately" he would be abandoning his position. (Tognacci Affidavit; Exhibit A).
- 3) On February 4, 2004, the Appellant was suspended without pay for three (3) days for a continuous pattern of absenteeism and abuse of sick time. Specifically, the Appellant had called in sick on four days in three weeks and was a no call/no show on an additional four days. The Appellant had previously received verbal and written warnings concerning his abuse of sick leave. The Appellant was also notified that further incidents of this nature may result in further disciplinary action, including termination. (Tognacci Affidavit; Exhibit B).
- 4) Upon his return to work on February 10, 2004, the Appellant was transported from his work site at the Washington Beech Development to the Logan International Health Center where he underwent a "reasonable suspicion" drug test. He was placed on administrative leave without pay pending the results of the test and apparently, did not return to work. (Tognacci Affidavit).
- 5) On February 17, 2004, the Appellant was suspended without pay for ninety (90) days as a result of testing positive for cocaine. The Appellant was notified that his scheduled return to work date was June 15, 2004. The Appellant was also notified he must attend the Respondent's Employee Assistance Program (EAP) and undergo a drug and alcohol test at his own expense at the conclusion of the ninety (90) day suspension prior to his return to work. He was also subject to random substance abuse testing for a period of six (6) months upon his return to work. (Tognacci Affidavit; Exhibit C).
- 6) The Respondent has a Drug-Free Workplace Policy which prohibits the use of alcohol, drugs and other controlled substances in the workplace. (Tognacci Affidavit; Exhibit D).

- 7) The Respondent and the Laborer's Union, Local 367, have a Substance Abuse Prevention Program Agreement ("Substance Abuse Agreement"). The Appellant was tested pursuant to this Agreement. (Tognacci Affidavit; Exhibit E).
- 8) On June 11, 2004, Joyce Tognacci, Director of Human Resources for the Boston Housing Authority, sent the Appellant a reminder letter about the testing requirement and his return to work date was June 15, 2004. This letter was an additional reminder not required by the Substance Abuse Agreement. (Tognacci Affidavit; Exhibit E; Exhibit F).
- 9) On June 14, 2004, the Appellant called Tognacci and requested vacation leave for the remainder of June because he had rented a cottage on Cape Cod. Tognacci told him that his request was denied and he had to return to work by June 21, 2004. On June 18, 2004, Tognacci sent him a letter memorializing their conversation. (Tognacci Affidavit; Exhibit G).
- 10) The Appellant did not return to work on or before June 21, 2004. (Tognacci Affidavit).
- 11) On June 22, 2004, the Appellant went to the Human Resource Department and met with Tognacci. The Appellant showed Tognacci a notice for a drug test appointment for the next day, June 23, 2004. Tognacci accepted the Appellant's representation that he would take the drug test and gave him another chance to comply with the return-to-work requirements. (Tognacci Affidavit).
- 12) On June 24, 2004, Tognacci called the Appellant at his home and left a message. The Appellant did not return her call. It appears that the Appellant did not return to work in the interim. (Tognacci Affidavit).
- 13) The Appellant was a no call/no show on June 29, 2004. Tognacci sent the Appellant a letter notifying him that the Respondent was contemplating termination and scheduling a Hearing for July 8, 2004. (Tognacci Affidavit; Exhibit H).
- 14) The Hearing was held on July 12, 2004, before Officer Daniel R. Casals, Chief Procurement Officer. It is unclear from the Respondent's Memorandum or the evidence why the Hearing was held on July 12, 2004 instead of July 8, 2004 as planned. (Tognacci Affidavit).
- 15) At the hearing the Appellant admitted that he failed to take the June 23, 2004 drug test and went to the Cape for vacation. (Tognacci Affidavit; Exhibit 1).
- 16) The Hearing Officer found that the Appellant had been given more than one chance to comply with the Substance Abuse Agreement requirements and failed to do so. At the Hearing, the Appellant was represented by union member James Moore, Senior Secretary/Treasurer of Local 367, who did not deny the Appellant's on-going drug problem. (Tognacci Affidavit; Exhibit 1).

- 17) On July 15, 2004, the Appellant was terminated from his Laborer position for failing to comply with the drug testing policy, his unauthorized absence and job abandonment. (Tognacci Affidavit; Exhibit J.)
- 18) The Appellant was arrested on August 9, 2005, for Possession of a Class B Substance, crack cocaine, in violation of G.L. c. 94C, §34. (Tognacci Affidavit; Exhibit K).
- 19) On December 19, 2005, the Appellant admitted to sufficient facts for a guilty verdict and his case was continued without a finding. Drug-testing is a condition of his probation. (Tognacci Affidavit; Exhibit L).

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). In order to show reasonable justification, the appointing authority must demonstrate that “the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be proven by a preponderance of the evidence. G.L. c. 31, § 43; Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). The Commission does not possess the authority “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id.

The Respondent has demonstrated that the decision to terminate the Appellant was justified. There is little or no dispute as to the facts of this case. The Respondent had just cause to terminate the Appellant from his employment on July 15, 2004, due to his failure to comply with the drug testing policy, absence without leave, and job abandonment. The Respondent gave the Appellant more than one chance to redeem himself in regard to his substance abuse and job abandonment. In another case that involves drug use, the Commission found that the City of New Bedford had just cause for the termination of a garbage-truck driver for testing positive for cocaine use notwithstanding the employee’s excellent record of service or the extraordinary circumstances surrounding his personal life. Burt v. City of New Bedford, D-5931, 11 MCSR 202 (1998). Unlike Burt, the Appellant did not have an excellent record of service with the Respondent, leaving a trail of no call/no shows in addition to failing to show up for a mandatory drug test. Thus, the Respondent was left with little choice but to terminate the Appellant.

Consequently, the Petitioner, Michael Lydon, has not raised any genuine issue of fact that would prevent the Respondent from prevailing in this matter. The Respondent's Motion for Summary Decision is *allowed* and the Appellant's appeal is *dismissed*.

Civil Service Commission

Donald R. Marquis,
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis, Taylor; Commissioners) on December 7, 2006.

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. 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 section 14 of chapter 30A 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:

Anthony Pini, Laborer's International Union of North America, AFL-CIO, Local 367
Susam M. Whalen, Esq.