

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
617-979-1900

JAMES MCCARTHY,
Appellant

D1-21-243

v.

BOSTON HOUSING AUTHORITY,
Respondent

Appearance for Appellant:

James McCarthy
Appellant
[redacted]
Quincy, MA 02169

Appearance for Respondent:

Jay Koplove, Esq.
Boston Housing Authority
52 Chauncy Street
Boston, MA 02111

Commissioner:

Paul M. Stein¹

Summary of Decision

The Commission modified the Boston Housing Authority's discharge of a Maintenance Superintendent I to a one-year suspension, demotion from his supervisory position, and reinstatement conditioned upon successful completion of an anger management program. The Boston Housing Authority failed to provide adequate notice of alleged performance issues, and also failed to prove such performance issues before the Commission. The Appellant did engage in an unprofessional verbal abuse of a subordinate, which was part of a pattern of prior insubordinate and derogatory behavior, which justified significant discipline. The Commission found that the penalty of termination, however, was unjustified when compared to discipline meted out for other offenses involving serious workplace misconduct by other employees.

DECISION

On December 17, 2021, the Appellant, James McCarthy, acting pursuant to G.L. c. 121B, § 29 and G.L. c. 31, § 43, appealed to the Civil Service Commission (Commission) from the

¹ The Commission acknowledges the assistance of Law Fellow Courtney Timmins in the drafting of this decision.

decision of the Boston Housing Authority (BHA) to terminate him from his position as Maintenance Superintendent I.² The Commission held a prehearing conference on January 25, 2022, via remote videoconference (Webex). The Commission subsequently held a full hearing on April 5, 2022, which was conducted in person and recorded on Webex.³ Fourteen exhibits were received in evidence. Each party submitted a Proposed Decision on June 15, 2022. For the reasons set forth below, Mr. McCarthy's appeal is allowed, in part.

FINDINGS OF FACT

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

Called by the Respondent:

- Charles Henderson, Acting Maintenance Superintendent I, Boston Housing Authority
- Gerald Connolly, Plumber, Boston Housing Authority
- John McDonagh, Program Maintenance Supervisor, Boston Housing Authority

Called by the Appellant:

- Colleen Leaver, Employee Relations Coordinator, Boston Housing Authority
- Declan McGuinness, Crew Leader, Boston Housing Authority
- Aidan Coburn, Plasterer, Boston Housing Authority
- James McCarthy, Appellant

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:

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ A link to the recording of the full hearing was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent they wish to challenge the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion.

1. The Appellant, James McCarthy, was terminated from his position as a Maintenance Superintendent I at the BHA in December 2021. Having worked at the BHA since 2005, Mr. McCarthy was a tenured employee under G.L. c. 121B, § 29. (*Resp. Ex. B, R0004-5; App. Ex. 8, A032*)
2. The BHA is a public agency established under Mass. G.L. c. 121B to serve low- and moderate-income, disabled, and elderly residents of Boston by providing safe and affordable rental housing. The BHA is managed and controlled by an Administrator who is appointed by the Mayor of Boston. Kate Bennett has been the Administrator since January 2020. The BHA owns and/or oversees roughly 10,000 rental units and houses over 17,000 people. The BHA also supports tenants placed in private rental units under the federal “Section 8” voucher program and the Massachusetts Rental Voucher Program. (*Administrative Notice [<https://bostonhousing.org>]*)
3. Mr. McCarthy began working for the BHA in October 2006 as a Janitor Groundskeeper. He was promoted to the position of Crew Leader in March 2007. Mr. McCarthy was promoted to Acting Maintenance Superintendent II in March 2009, and he became a Permanent Maintenance Superintendent II in September 2009. Finally, in January 2019, Mr. McCarthy was promoted to the position of Maintenance Superintendent I. (*Testimony of Appellant; App. Ex. 8, A032-37*)
4. At all times relevant to this appeal, Mr. McCarthy was assigned to the Mildred Hailey housing development in Jamaica Plain. (*Testimony of Appellant & Connolly*)
5. Before the events that gave rise to his termination, Mr. McCarthy had two instances of prior discipline. First was a verbal warning in May 2020 “for insubordination and poor

work performance.” Second was a five-day suspension in November 2020 for related issues, detailed below. (*Testimony of McDonagh & Leaver; Resp. Ex. B, R0006-7*)

6. On Friday, September 25, 2020, Mr. McCarthy left work for the day at about 8:30 a.m. because he was “stressed” and felt “threatened” by an email from a coworker. Mr. McCarthy had expressed frustration, via email, toward the coworker for borrowing supplies necessary to restore hot water at a residence. The coworker responded flippantly, and then Mr. McCarthy reached out to multiple people at the BHA asking that the coworker be disciplined for his (flippant, but non-threatening) response. That evening, Mr. McCarthy proceeded to send a series of angry and harassing emails to his supervisor, Kellie Burgess. (*Resp. Ex. E, R0033-47*).

7. On November 11, 2020, Mr. McCarthy received a notice to “Cease & Desist all Forms of Harassment” due to emails he sent to Jay Koplove, the BHA’s attorney.

The letter notified McCarthy that the BHA considered a series of emails he sent to Attorney Jay Koplove in October 2020 to be harassing, inappropriate, and insulting. The letter noted that McCarthy continued to send harassing emails even after being directed to cease by George McGrath, Director of Property Management & Operations.

(*Resp. Ex. B, R0007*)

8. On November 23, 2020, the BHA notified Mr. McCarthy that he was being suspended for five consecutive working days beginning on November 30. Mr. McCarthy returned to work on December 7, 2020. The BHA provided the following reasons for the suspension:

(1) McCarthy failed to complete or even work towards completing 14 vacant units and [] he failed to maintain work order records; (2) McCarthy was insubordinate on 9/1/2020 when he used profanity and knowingly disregarded a directive from his supervisor to attend a meeting; (3) on 9/24/2020, McCarthy claimed to have no knowledge of changes he made on that same date to the [Mildred C.] Hailey vacant unit report, which the BHA considered to be a mishandling of important documents; and (4) McCarthy was insubordinate when he failed to complete and update the “DHW mixing valve PM log.” The

Notice of Suspension also noted that McCarthy stated in the investigative meeting that he tries to avoid his supervisors, one of whom he called a “punk.”
(*Testimony of McDonagh & Leaver; Resp. Ex. B, R0007; Resp. Ex. E, R0031-32*)

9. The Notice of Suspension also stated: “**You are hereby warned and notified that additional misconduct will result in additional discipline UP TO AND INCLUDING TERMINATION.**” (*Resp. Ex. E, R0032*) (emphasis in original)
10. Gerald Connolly has worked as a plumber for the BHA since 2015. Mr. McCarthy was Mr. Connolly’s immediate supervisor from 2017 to 2021. (*Testimony of Connolly; Resp. Ex. B, R0008*)
11. Mr. McCarthy had long been dissatisfied with Mr. Connolly’s performance and has made several requests to transfer Mr. Connolly to another property. (*Testimony of Appellant*)
12. At about 8:10 a.m. on Friday, February 26, 2021, Mr. Connolly went into Mr. McCarthy’s office to check in for the day. Mr. Connolly mentioned that he and another plumber, Mr. W, each needed a new part for their Super-Vee snake machines.⁴ Mr. McCarthy said something along the lines of, “[Mr. W] doesn’t work for me,⁵ I could not care less about [Mr. W’s] Super-Vee, I’m not ordering his part but I’ll order yours.” Mr. Connolly responded, “that’s a poor attitude.” (*Testimony of Connolly & Appellant; Resp. Ex. B, R0008, R0013; App. Ex. 4, A0008-9*)⁶

⁴ The part was a replacement cable gripper, which breaks fairly easily. It costs around \$17 or \$25 for a two-pack. (*Testimony of Henderson; Resp. Ex. C, R0013*)

⁵ Mr. W works for the BHA, but Mr. McCarthy was not Mr. W’s supervisor. However, Mr. Connolly’s partner, a new plumber, had been borrowing Mr. W’s Super-Vee machine when the cable gripper broke. Mr. W did not break anything. (*Testimony of Connolly; Resp. Ex. C, R0013*)

⁶ Mr. McCarthy’s contemporaneous written statement said the words “f***ing piss poor attitude” were used. (*App. Exh. 4, R0008*)

13. Mr. McCarthy told Mr. Connolly to leave and go to work or else sign out for the day. A heated argument then ensued. Mr. Connolly then stated he felt threatened and told Mr. McCarthy that he created a hostile work environment.
14. Two other employees—Declan McGuinness (Crew Leader) and Aidan Coburn (Plasterer)—heard this interaction, as they were waiting outside of Mr. McCarthy’s office to check in for the day. (*Testimony of Appellant, Connolly, McGuinness, & Coburn; Resp. Ex. B, R0008, R0013*)
15. At about 8:15 a.m. (approximately five minutes into the altercation), Mr. McCarthy got up from his chair and went to get Charles Henderson, who was a Maintenance Superintendent II and his second-in-command at that time, to help deal with the situation. The two of them walked back to Mr. Connolly. Mr. Henderson asked Mr. McGuinness and Mr. Coburn, the two other employees who had been waiting, to leave the area. Mr. Connolly and Mr. McCarthy continued to exchange words. Mr. McCarthy said more than once that he wished Mr. Connolly were dead, that Mr. Connolly was “annoying,” and that Mr. Connolly was “not protected by McGonagle or Baker anymore.”⁷ Eventually, Mr. Henderson separated the two men, leading Mr. Connolly to the maintenance room away from Mr. McCarthy. Mr. Henderson then returned to his own office. (*Testimony of Appellant, Henderson & Connolly; Resp. Ex. B-C, R0008, R0013*)
16. That afternoon, Mr. Connolly reported the incident with a written statement to his supervisors and the Human Resources department. The BHA also collected a written statement from Mr. McCarthy that day. (*Resp. Ex. C, R0013; App. Ex. 4, A0008-10*)

⁷ “McGonagle” refers to William McGonagle, former Administrator of the BHA, who passed away in 2019. “Baker” likely refers to Frank Baker, a Boston City Councilor.

17. The same day (February 26, 2021), the BHA notified Mr. McCarthy that he was being placed on paid administrative leave, effective immediately, pending the results of a Human Resources investigation. The notice explained: “At approximately 8:30 a.m. this morning you were involved in a verbal altercation with another BHA employee, Plumber, Gerald Connolly. Your behavior is unacceptable and will not be tolerated.” (*App. Ex. 1, A0002*)
18. By letter of April 9, 2021 (evidently misdated), the BHA sent Mr. McCarthy notice of a due process meeting scheduled for March 12, 2021. The notice reiterated: “On February 26, 2021, you were involved in a disturbing verbal altercation with one of your subordinates, BHA Plumber, Gerald Connolly. As a BHA Maintenance Supervisor, allegations regarding your conduct that morning are extremely disturbing and the Authority will not condone such disregard for policy.” (*App. Ex. 2, A0004*)
19. On November 10, 2021, the BHA sent Mr. McCarthy notice of a disciplinary hearing scheduled for November 22, 2021. The notice stated, in relevant part:
- The basis for this hearing is on or about February 26, 2021, you placed your subordinate in fear for his safety during a conversation in which you became hostile. It is also alleged that you mishandled or disposed of current work orders and intentionally falsified work documents.
- Your personal (sic) file shows that you were suspended for five (5) consecutive working days without pay for mishandling maintenance documents and related acts of poor performance.
- Also on May 19, 2020 you were issued a verbal warning for insubordination and poor work performance.
- (*App. Ex. 3, A0006*)
20. At Mr. McCarthy’s request, the BHA conducted the hearing on December 6, 2021. Moran Elitsur, Director of Human Resources, and Alexandra Flamme, Director of Grievances & Appeals, served as the designated BHA Hearing Officers. They heard testimony from the Appellant James McCarthy, Gerald Connolly, Charles Henderson, and John McDonagh

(Mr. McCarthy's direct supervisor). The BHA also presented ten exhibits related to Mr. McCarthy's work history and prior discipline. (*Resp. Ex. B, R0005-9*)

21. The Hearing Officers concluded:

The above-listed facts indicate that on 2/26/2021, McCarthy was the sole aggressor and that his actions were disproportionate to the problem at hand. McCarthy used profane language toward Connolly, wished him dead, and told him he wanted to get him "outside," which could only reasonably be interpreted as a threat of physical violence. No employer can reasonably tolerate such abusive behavior, which is clearly detrimental to the well-being of other BHA staff.

The above-listed facts also indicate that McCarthy has repeatedly demonstrated poor work performance and mishandling of BHA records. This conduct not only reflects upon McCarthy's own work, but impeded other BHA staff from properly performing their duties. It also directly impeded the BHA's mission of "providing quality affordable housing, bringing stability, opportunity, and peace of mind to thousands of low and moderate-income families and individuals across Boston, and to the city as a whole."

McCarthy was disciplined with a five-day suspension in November 2020 for similar conduct. This demonstrates a pattern of behavior that is unlikely to improve.

Based on the foregoing, we find that the BHA has established just cause to terminate McCarthy's employment, effective immediately upon the Administrator's approval of the decision.

(*Resp. Ex. B, R0010*)

22. Pursuant to these findings, the BHA terminated Mr. McCarthy on December 9, 2021.

(*Resp. Ex. B, R0004*)

23. At the Commission hearing, the BHA introduced limited evidence purporting to show that McCarthy's "turnover" performance at the Hailey Apartments—i.e., the time it took after a tenant moved out until it had been made ready for a new tenant to move in—was grossly substandard and far worse than his peers at other BHA properties. Mr. McDonagh testified that he regularly audited the turnover situation and regularly spoke to Mr. McCarthy about it. (*Testimony of McDonagh & Appellant*)

24. However, the BHA produced no documents about turnover issues for any period after McCarthy had returned from his suspension on December 7, 2021 until he was placed on administrative leave on February 26, 2021. The only business records containing information about turnover progress at the Hailey Apartments produced by the BHA covered a period prior to March 31, 2020. (*Resp. Ex. B, R0016-19*)⁸
25. The only document the BHA produced at the Commission hearing contained information from December 7, 2020 to March 31, 2021. It was a summary sheet prepared by Mr. McDonagh containing certain data regarding “monthly turnover” rates at the Hailey Apartments under Mr. McCarthy’s responsibility as well as the “monthly average” turnover rates at certain other properties for FY2021 (April 2020 through March 2021). The underlying evidence from which this “summary” was compiled was not provided or introduced in evidence, and no witness was called to explain how the calculations were made. (*Resp. Ex. B, R0015*)⁹
26. Mr. McCarthy explained that he inherited a higher turnover rate than other properties when he became the Superintendent I at Hailey Apartments in 2019, and that comparing his property to the “average” of others in the region which differed in size, age, staffing, and other factors was not a fair measure of his performance. (*Testimony of Appellant*)

⁸ Mr. McDonagh testified that he made regular audits of turnover at Hailey Apartments and regularly met with Mr. McCarthy but did not identify the timeframe and produced no documentation of such audits or meetings. (*Testimony of McDonagh*) Mr. McCarthy has no recollection of such meetings or seeing such audits. (*Testimony of Appellant*)

⁹ I note that the summary sheet indicated that the “days to turnover” average at the Hailey Apartments rose from 138.8 in April 2020 to 171.0 in November 2020 (a 23% increase) and then to 179.8 in February 2021 (a further 5.1% increase). The rest of the region had a larger 33% increase in the period from April 2020 to November 2020 (67.5 to 89.9 days) and a comparable 4.7% increase from November 2020 to February 2020 (89.9 to 94.1). (*Resp. Ex. B, R0015*)

27. At my request for more information that would permit an appropriate comparison of turnover rates, the BHA submitted a post-hearing exhibit which, again, was a summary sheet, without any underlying data, purporting to show the monthly turnover rates for Hailey Apartments and three other BHA properties for FY2019 (April 2018 through March 2019), FY2020 (April 2020 through March 2021) and FY 2021 (April 2020 through March 2021). These data showed, among other things:

- The FY21 full year turnover rate at Hailey Apartments (804 units) rose 31.5%, from 138.8 days on average in April 2020 to 194.1 in March 2021.
- One property (422 units) showed a FY21 turnover rate increase of 59% from April 2020 (40.2) to March 2021.
- One larger property (1016 units) showed turnover rate increases for the past two fiscal years (FY20 & FY21) of 98% (46.2 in April 2020 to 91.5 in March 2021). The other larger property had an 11% increase in turnover rates for that period (47.2 to 52.4).

(Resp. Ex. Ph.G, R0066-69)

28. The post hearing exhibit summary also provided monthly turnover rates for Hailey Apartments for FY22 (April 2021 to March 2022). These data showed that by June 2021, four months after Mr. McCarthy had been placed on administrative leave, the Hailey Apartment monthly turnover rate stood at 217.9. This is a 21% increase from the calculated rate for February 2021, the last month Mr. McCarthy worked. *(Resp. Ex. Ph.G, R0066)*¹⁰

29. Finally, Mr. McCarthy introduced evidence that, insofar as he was disciplined for inappropriate behavior toward a co-worker, his termination stands out as an extreme

¹⁰ This evidence conclusively impeached Mr. McDonagh's testimony to the effect that, after Mr. McCarthy was placed on administrative leave, turnover rates have steadily improved "to this day."

penalty compared to other similar instances of misconduct that resulted in far lesser discipline. These examples include:

- Verbal warning for “disrespectful, inappropriate, and offensive behavior in front of tenants.” (*Resp. Ex. F, R0051*)
- Written warning, one-day suspension, and five-day suspension, in three unrelated cases, for “insubordination and threatening workplace behavior.” (*Resp. Ex. F, R0051, R0064*)
- Five-day suspension and one-day suspension, in two unrelated cases, for “insubordination and poor work performance.” (*Resp. Ex. F, R0052, R0063*)
- Written warning for “inappropriate behavior and inability to get along with co-workers.” (*Resp. Ex. F, R0052*)
- Written warning for “insubordination and unprofessional behavior.” (*Resp. Ex. F, R0052*)
- One-day suspension for “pushing another co-worker and calling them offensive name.” (*Resp. Ex. F, R0055*)
- Written warning for “angry outburst at subordinates and failure to follow established call-in procedures.” (*Resp. Ex. F, R0059*)
- Three-day suspension for “insubordination and verbal assault.” (*Resp. Ex. F, R0063*)
- Three-day suspension for “[getting] into a verbal argument [with] another employee” and “pretend[ing] to pull a knife.” (*Resp. Ex. F, R0064*)
- Proposed written warning withdrawn for incident following the employee (Mr. Connolly) being AWOL on an overtime shift who confronted superintendent

complaining that “management and maintenance always [is] on the same page when your overtime is taken away but not with your safety” and that he was afraid of someone “pulling a gun” on him, then becoming “verbally abusive” which led to a lengthy “”expletive filled tirade” toward the supervisor and “knock[ing] over a chair”. This was the third incident of insubordination in a two-year period. (*App. Ex. 6, A0015- A0016; Testimony of McDonagh & Connolly*)

- Written warning for pulling an employee (R.C.) by the arm when he refused an instruction to take a phone call outside so that a HUD inspector would not hear him discussing maintenance issues. (*App.Exh. 5, R 0021*)¹¹
- Five-day suspension for “[physically] fighting with a co-worker at work.” (*App. Ex. 6, A0026; Testimony of Coburn*)
- Three-day suspension for “serious workplace misconduct” involving “hostile and threatening [behavior].” The same employee had previously received a one-day suspension “for behaving in the same manner,” as well as a verbal warning “for behaving in an aggressive manner (swearing, yelling, name-calling) toward[] subordinates.” (*App. Ex. 6, A0027*)
- Five-day suspension for “[getting] into a verbal and physical altercation” with a co-worker at work. The same employee had previously received a three-day suspension for “serious workplace misconduct, insubordination, and use of profanity” at work, as well as a one-day suspension for “threatening a co-worker and using hand gestures to mimic shooting a gun.” (*App. Ex. 6, A0029-30*)

¹¹ The supervisor involved appears to have been Mr. McDonagh, who is a regional manager and the immediate superior over Mr. McCarthy. (*App.Exh.6, R0021; Testimony of Appellant*).

APPLICABLE CIVIL SERVICE LAW

The mission of Massachusetts civil service law is to enforce “basic merit principles,” which means “assuring fair treatment of all applicants and employees in all aspects of personnel administration,” “providing of training and development for employees, as needed, to assure the advancement and high-quality performance of such employees,” and ensuring that all employees “are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. Basic merit principles require that discipline be remedial, not punitive, “correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected” *Id.*

A tenured housing authority employee (with at least five years of service) may be discharged only for “just cause” after due notice, a hearing (which must occur prior to discipline if it involves a suspension of more than five days), and a written notice of decision that states “fully and specifically the reasons therefore.” G.L. c. 121B, §§ 29, 41. Pursuant to G.L. c. 31, § 43, an employee may appeal from a decision for de novo review by the Commission. The Commission’s responsibility is to determine whether there was just cause for the appointing authority’s action “in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision.” *Falmouth v. Civ. Serv. Comm’n*, 447 Mass. 814, 823-24 (2006), quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983); G.L. c. 31, § 43.

“‘Just cause,’ in this context, is defined by ‘substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.’” *Doherty v. Civ. Serv. Comm’n*, 486 Mass. 487, 493 (2020) (emphasis in original), quoting *Police Comm’r of Boston v. Civ. Serv. Comm’n*, 39 Mass. App. Ct. 594, 599 (1996); see also *Brookline v. Alston*, 487 Mass. 278, 292 (2021); *Cambridge v. Baldasaro*, 50 Mass. App. Ct. 1, 3 (2000). If the Commission finds

by a preponderance of the evidence that just cause existed, “it shall affirm the action of the appointing authority, otherwise it shall reverse such action” G.L. c. 31, § 43.

The Commission also has the power to “modify any penalty imposed by the appointing authority.” *Id.* Such power “is at its core the authority to review and, when appropriate, to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and the equitable treatment of similarly situated individuals.” *Police Comm’r of Boston*, 39 Mass. App. Ct. at 600; see also *Falmouth*, 447 Mass. at 824.

ANALYSIS

A preponderance of the evidence does not support the BHA’s decision to terminate Mr. McCarthy’s employment. While the BHA has proven some, but not all, of the charges against him, those charges fall short of justifying termination. The Commission concludes that, in view of how the BHA has treated misconduct of other employees, the evidence does not justify the conclusion that Mr. McCarthy is beyond remediation, which is a requirement to justify termination. Rather, based on the serious misconduct which has been proved, the Commission concludes that a (1) one year suspension, (2) demotion from his supervisory position, and (3) required participation in an anger management program is sufficient discipline that recognizes the severity of the misconduct while providing Mr. McCarthy a “final opportunity” to rectify his behavior—*i.e.*, the type of “last chance” that the BHA has consistently provided to others.

The BHA’s charge that Mr. McCarthy “repeatedly demonstrated poor work performance and mishandling of BHA records” fails for procedural and substantive reasons.

First, there is an issue with notice. The February 2021 notice of administrative leave only cites Mr. McCarthy’s verbal altercation with Mr. Connolly. Similarly, the April 2021 notice of due process hearing only mentions Mr. McCarthy’s verbal altercation with Mr. Connolly. It is

not until seven months later, in the November 2021 notice of disciplinary hearing, that the allegation of mishandling and falsifying documents appears. This is inadequate notice, and even if the notice had been adequate, the charge was not proven by a preponderance of the evidence.

Second, the BHA failed to prove these performance-related charges. Mr. McCarthy had already been disciplined for performance issues and mishandling of work documents.¹² The BHA introduced no evidence to support any instance in which Mr. McCarthy mishandled or falsified documents at any time after he returned to work in December 2020 and before he was placed on administrative leave in February 2021. A preponderance of the evidence also failed to prove that Mr. McCarthy had “turnover” performance issues during the period between December 7, 2020 (when Mr. McCarthy returned from his suspension) and February 26, 2021 (when he was placed on administrative leave). The BHA provided “summary” documents purported to show a lack of production on Mr. McCarthy’s part, but did not provide any of the underlying sources for those summaries. Thus, the summary documents are hearsay that I cannot determine to be reliable. The BHA provided no explanation of its vacancy turnover statistics, what they mean, or how they were calculated. I requested detailed information showing how the BHA arrived at its calculations and why the data showed inadequate performance by Mr. McCarthy, but it was not supplied. The hearsay information I did receive falls far short of showing that the summary of averages is reliable, takes into proper account the variables that might influence apartment turnover, and is otherwise statistically valid. The summary data actually shows that all BHA properties, large and small, experienced increases in turnover rate,

¹² As noted previously, Mr. McCarthy was suspended in November 2020 “for mishandling maintenance documents and related acts of poor performance.” He also received a verbal warning in May 2020 “for insubordination and poor work performance.” (*App. Ex. 3, A0006*)

some even more than the Hailey Apartments. Moreover, contrary to what Mr. McDonagh stated in his testimony, turnover at Hailey Apartments actually became far worse after Mr. McCarthy was removed from his position. The data suggest there are far more variables to consider before any conclusion can be made by a preponderance of the evidence that the increase in turnover rate is directly attributable to poor performance by Mr. McCarthy.

The evidence of Mr. McCarthy's verbal altercation with Mr. Connolly, however, does support imposing serious discipline. His language and behavior as a supervisor was utterly unacceptable. He acknowledged that he told Mr. Connolly that he [McCarthy] wished Connolly "were dead". It took persistent questioning from me for him to admit he was wrong.

I am persuaded by the evidence, however, that contrary to the BHA's claims, Mr. McCarthy was not the "sole aggressor" as the BHA claimed and his outbursts, although unprofessional, were not entirely unprovoked. I also credit Mr. McCarthy's contemporaneous statement and testimony that he tried to get Mr. Connolly to leave and, when he did not, Mr. McCarthy called Mr. Henderson (his second-in-command) to join them with the intent to de-escalate the situation. It would have made no sense to have called in Mr. Henderson simply to bear witness to continued verbal attacks on Mr. Connolly and the creation of a hostile work environment. Moreover, Mr. Connolly (the only employee who came forward to accuse Mr. McCarthy of creating a hostile work environment) has a lengthy disciplinary record at least as troubling as what Mr. McCarthy has been charged with and had something of a pattern of been a nemesis to management. Mr. McCarthy had requested that Mr. Connolly be transferred to another property on more than one prior occasion. Mr. Connolly's demeanor when shown his own comparable disciplinary record, along with inconsistencies between the details of his

testimony and the brief statement he gave at the time of the incident, lend his version of events diminished weight.

I do not condone Mr. McCarthy's behavior. Nor do I endorse the Boston Housing Authority's apparent unwavering and often baffling patience for serious workplace misconduct by its supervisors and employees. To terminate Mr. McCarthy, however, for the verbal altercation involved here—as the final step in progressive discipline when only a five-day suspension and a verbal warning preceded this in his fifteen-year career at the BHA¹³—is not consistent with the BHA's treatment of similarly situated individuals. The record shows that more than a dozen other BHA employees (including supervisors) have committed serious verbal and physical abuse of coworkers and superiors and received either a suspension or no discipline at all, including employees with multiple repeat offenses. None were terminated. After carefully considering all of the circumstances, including the severity of the misconduct and his prior disciplinary history of insubordinate and abusive behavior, and in order to provide Mr. McCarthy one final chance to reform his behavior offered to others, the Commission concludes that it is appropriate to exercise the Commission's discretion to vacate Mr. McCarthy's termination and modify the discipline to a (1) one year suspension; (2) demotion to a non-supervisory position; and (3) required participation in an anger management program.

CONCLUSION

For the reasons stated above, the appeal of the Appellant, James McCarthy, CSC Docket No. D1-21-243, is *allowed in part*. The termination is vacated and the discipline is modified from termination to (1) a one-year suspension; (2) demotion to a non-supervisory position to be

¹³ If Mr. McCarthy had been subjected to other discipline during his career at the BHA, it was not presented in the record before the Commission.

determined by the BHA; and (3) required participation in an anger management program satisfactory to the BHA prior to full reinstatement.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on December 15, 2022. [Scrivener's errors corrected on December 19, 2022.]

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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission 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:

James McCarthy (Appellant)

Jay Koplove, Esq. (for Respondent)