COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOSEPH F. McDOWELL,
Appellant

v. D-05-148

CITY OF SPRINGFIELD,
Respondent

Appellant's Attorney: John S. Ferrara, Esq.
Dalsey, Ferrara & Albano
73 State Street: Suite 101
Springfield, MA 01103

Respondent's Attorney: Maurice M. Cahillane, Esq.
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Law Department
36 Court Street: Room 210
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Commissioner: Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43[1], the Appellant, Joseph McDowell (hereinafter "McDowell" or "Appellant") filed the instant appeal with the Civil Service Commission (hereinafter "Commission") on April 22, 2005 claiming that the City of Springfield (hereinafter "City" or "Appointing Authority") did not have just cause to terminate him from his position as Deputy Director of Maintenance in the City's Parks, Buildings and Recreation Management Department for using City property and equipment for his own personal benefit and conducting private business on City time. A pre-hearing conference was held on September 22, 2005. The

[1] The Appellant's complaint also included an appeal of procedural issues under G.L. c. 31, § 42 which was later waived.

Commission referred the case to the Division of Administrative of Law Appeals (DALA) for a full hearing which was held on December 18, 2006.

At the commencement of the full hearing, the City made an oral motion to dismiss the Appellant's appeal, arguing that since the Appellant was provisionally promoted to his current position of Deputy Director of Maintenance (as opposed to being "permanent" in his current position), the Commission did not have jurisdiction to hear his appeal. The DALA magistrate took the City's oral motion under advisement. During the hearing, the magistrate, after misconstruing Exhibit 6, erroneously concluded that the Appellant was "permanent" in his current position, and orally denied the City's motion to dismiss. After the hearing was concluded, the magistrate reviewed Exhibit 6 again and realized that the Appellant's *predecessor* had been permanent in the title of Deputy Director of Maintenance, but the Appellant was not. On August 17, 2007, the magistrate sent a recommended decision to the Commission recommending that the appeal be dismissed for lack of jurisdiction without addressing whether the City had just cause to terminate the Appellant.

On September 13, 2007, the Appellant submitted objections to the magistrate's recommended decision, arguing that the Commission does have jurisdiction to hear the instant appeal and requested that the Commission review the hearing transcript and make a determination regarding whether the City had just cause to terminate the Appellant. At the request of the Commission, both the Appellant and the City submitted additional briefs in March 2008 regarding whether an individual holding a permanent civil service position who is subsequently *provisionally* promoted to another civil service position, maintains any right of appeal to the Commission. (Here, the Appellant had been serving as a permanent civil service employee in the title of Carpenter prior to being provisionally promoted to the civil service title of Deputy Director of

Maintenance.) Both parties submitted briefs. On March 28, 2008, a hearing was held at the Springfield State Building in Springfield, MA at which time oral argument was heard from both parties.

On May 8, 2009, the Commission issued an Interim Order seeking additional information regarding whether the title of Deputy Director of Maintenance was part of the "official service" or "labor service" civil service titles. In response, both parties submitted briefs agreeing that the title fell within the "official service" category of civil service titles.

On February 12, 2010, the Commission issued a decision not to adopt the recommended decision of the magistrate. The Commission concluded that a provisional employee such as the Appellant, who held a tenured position in the labor or official service, and who, while in such tenured position, is provisionally promoted to an official service position, does have the right of appeal to the Commission to contest the just cause for his discharge under Section 41. The Commission concluded that, although an Appointing Authority may remove an employee from his provisional position or discipline without just cause (under Section 41), unless the Appointing Authority acts with just cause, the individual is entitled to be restored to the tenured position from which he was permanently appointed. (See attached Commission decision dated 2/12/10.)

As referenced above, although the DALA magistrate conducted a full hearing regarding the issue of just cause, he limited his recommended decision to the issue of whether the Commission had jurisdiction to hear the appeal. The magistrate who heard the appeal has since retired. The parties jointly agreed at a status conference held on April 14, 2010 that the case should be reassigned to another hearing officer to review the tapes of the proceeding and the documents

submitted in order to render a decision.[2] I carefully reviewed the three (3) tapes of the one-day hearing and reviewed all of the documents submitted into evidence as well as the post-hearing briefs of the parties.

FINDINGS OF FACT:

Based upon the fourteen (14) documents entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Patrick J. Markey, Esq., City Solicitor from January 2004 to January 2006;
- Patrick J. Sullivan, Director of Parks, Buildings and Recreation Management, City of Springfield;
- Joseph F. McDowell, Appellant;

Called by the Appellant:

- James Sullivan, Zone Chief, Parks, Building and Recreation Management, City of Springfield;

I make the following findings of fact:

1. The Appellant is a forty-seven (47) year old male who is married with two children, ages 18 and 20. He graduated from Classical High School in Springfield in 1977. He served four (4) years in the United States Coast Guard and was honorably discharged in 1981. (Testimony of Appellant)
2. The Appellant began working for the City in 1987 as a skilled laborer, a civil service position that falls within the "labor service". He was promoted to the labor service title of carpenter in 1989 and served in that position until 1993. (Testimony of Appellant; Exhibits

[2] Pursuant to 801 CMR 1.11 (e), when a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence again from the beginning.

2 and 6) There is no dispute that the Appellant was a permanent, tenured civil service employee when he served in the position of carpenter.

3. The Appellant was provisionally promoted to Assistant Deputy of Maintenance on November 1, 1993 and was then provisionally promoted to Deputy Director of Maintenance on June 23, 1994. He served in this position until his termination on April 15, 2005. (Testimony of Appellant; Exhibits 2 and 6) In its February 12, 2010 Decision, the Commission determined that this was an "official service" title to which the Appellant was provisionally promoted.

4. As the Deputy Director of Maintenance, the Appellant was responsible for assigning work to approximately forty (40) tradesmen and skilled laborers that performed work in approximately fifty-two (52) City-owned buildings. He regularly interacted with private vendors and responded to emergencies that occurred during and after normal working hours. He was issued a City-owned Nextel phone with the phone number (413) 246-2205. (Testimony of Appellant)

5. Prior to his termination, the Appellant had no prior discipline and occasionally received letters of thanks or commendation. (Testimony of Appellant and Exhibit 8)

6. The Appellant was also the sole proprietor of "McDowell and Sons", a company he began in 1994. According to the Appellant, he was a contractor that performed such jobs as designing and installing kitchens. During the time that he was employed by the City, he estimated that his total revenues for the company ranged from $20,000 - $30,000 annually. Although he was the company's only employee, he occasionally used subcontractors to assist him, some of whom were City employees or vendors. (Testimony of Appellant)

7. Until 2002, the Appellant and another Deputy Director, John R. Mastrangello, reported to a director named Jack Teague. Mastrangello was responsible for all budget, billing and payroll-related issues while the Appellant was responsible for day-to-day operations. (Testimony of Appellant)

8. In 2002, Teague retired and Mastrangello was appointed as Director, but he still maintained his responsibilities regarding budget, billing and payroll-related issues. The Appellant's job duties and responsibilities did not change. (Testimony of Appellant)

9. On December 2, 2004, Patrick J. Sullivan was appointed as Director of the City's Parks, Buildings and Recreation Management Department. Mastrangello reported to Sullivan and the Appellant reported to Mastrangello. The Appellant's job duties remained unchanged. (Testimony of Sullivan)

10. In December 2004, Patrick J. Markey served as the City's Solicitor. This was a part-time position in which he served from January 2004 to January 2006. As City Solicitor, Markey oversaw the City's Law Department. He previously worked as a Special Assistant in the United States' Attorney's Office and worked for four years at the United States Department of Justice under Attorney General Janet Reno. (Testimony of Markey)

11. Sometime during the Summer of 2004, Markey was informed by an agent of the Federal Bureau of Investigations (FBI) that the FBI was targeting what was then the City's Facilities Management Department.[3] The agent told Markey that the department was being targeted for possible "kickbacks" from vendors because it was "bleeding money". (Testimony of Markey)

[3] The Facilities Management Department was subsequently merged into the newly-created Parks, Buildings and Recreation Management Department.

12. Sometime in January 2005, Markey was informed by the same FBI agent that search warrants would be executed to search the offices and homes of the Appellant and Mastrangelo for allegedly doing private work on City time and for receiving kickbacks. (Testimony of Markey)

13. On January 12, 2005, Markey went to the offices of the Park, Buildings and Recreation Management Department, met with the Department's Director, Patrick Sullivan, and then they both observed the FBI conduct its search. According to Markey, the FBI removed almost every document from the offices of the Appellant and Mastrangelo. (Testimony of Markey) The homes of the Appellant and Mastrangelo were also searched by the FBI the same day. (Testimony of Appellant)

14. Markey was directed to conduct an internal investigation regarding the Appellant and Mastrangelo by the City's Mayor and the local "control board", an entity that was responsible for the day-to-day operations of the City during a period of receivership. (Testimony of Markey)

15. Mastrangello resigned sometime after the investigation began. (Testimony of Markey)

16. Markey's investigation included: 1) a review of all documents seized from the Appellant's office and home by the FBI; 2) a review of phone records from the Appellant's city-issued cell phone to determine if any calls were made to vendors listed on a McDowell and Son's document found in the Appellant's office; and 3) interviews with approximately eight (8) employees that reported to the Appellant and Mastrangelo who might have relevant information. (Testimony of Markey)

Review of Documents

17. Exhibit 9 contains the documents seized from the Appellant's office that were reviewed by Markey which he deemed relevant to his investigation. There are eighteen (18) pages in total. (Testimony of Markey and Exhibit 9)

18. The first page of Exhibit 9 is a "proposal" from Excavation Plus, Inc. dated 4/21/04 addressed to the Appellant's home address. The job name is listed as "House Site Excavation". The job location is listed as: "116 Klaus Anderson Rd. Swck". The job phone is listed as: "246-2205" which is the number of the Appellant's City-issued cell phone. The quote for the excavation work is listed as $8,800. (Exhibit 9, Page 1)

19. The second page of Exhibit 9 is a proposal from McDowell and Son's to Ed & Patty Leyden for "lot clearing" at the same address listed in the Excavation Plus, Inc. proposal. The proposal description states that McDowell and Son's will remove trees at this address and "clear and prep property for excavator". The proposed bid, signed by the Appellant, is for $9,935.00. (Exhibit 9, Page 2)

20. Pages 3 and 4 of Exhibit 9, under the letterhead, "McDowell and Son Construction" contain a list of several contractors with a description of the type of work to be performed and the estimated price of the work. For example, one entry has a description of: "Septic System" with the contractor listed as "Newmen Eng." For a price of "$20,000". (Exhibit 9, Page 3)

21. Page 5 of Exhibit 9 is a fax cover sheet on City stationery addressed to: "Ed", from: "Joe" with a hand-written message "Kelly Application / Excavation Proposal". Page 6 of Exhibit 9 is a document with the heading "Application for Credit". (Exhibit 9, Pages 5 and 6)

22. Page 7 of Exhibit 9 is a fax cover sheet on City stationery addressed to "Ed Leyden", from "Joe McDougle", Re: Construction Estimates and Invoice" with the following written under the "message" section: "Any questions give me a call." (Exhibit 9, Page 7)

23. At the time of Markey's investigation, there was nobody by the name of Joe McDougle working for the City. (Testimony of Markey)

24. Page 8 of Exhibit 9 is a copy of a Friday, February 14, 2003 email from "Cleve Carrens" (ccarrens@springfieldcityhall.com) to "Edward Leyden" at 10:13 A.M. with the following Subject line: "RE: Example of Work". The email contains four paragraphs. At the bottom of this page, there is a header indicating that the initial email was sent to Cleve Carrens from Ed Leyden on Wednesday, February 12, 2003 at 12:27 P.M. The text of that initial message is not contained in the exhibit. (Exhibit 9, Page 8)

25. It is undisputed that Cleve Carrens is an employee of the City and is employed as an architect in the City's Parks, Buildings and Recreation Management Department. It is also undisputed that Ed Leyden is the Appellant's brother-in-law who was building a log cabin home in Southwick at the time of this email exchange.

26. The full text of the 2/14/03 email message from Carrens to Leyden states:

> "Ed,
>
> Sorry for the delay in response. The plans appear to adequately describe the building of the log portion of the structure (only to someone who has erected them before). I would suggest shopping a local framer that was familiar with this type of work, hence where would a firstimer get his questions answered or what if the thing doesn't fit together quite right? Gravitas has sent an example of a home in Texas which is completely opposite in climate character so the foundation drawings are not a great example although you can reasonably deduct what the drawings would be though for a New England requirement. The Drawing Notes are generic and don't realistically indicate what is in the drawing so some confusion might exist with someone not knowing whether to following the drawing or the note (hence confusion in bid price). The Drawing Notes generally

> leave it up to the contractor to "follow all State and Local codes" so to speak. I frown on this, the drawings should show exactly what to do so no or few decisions are left to be made in the field by the contractor. Each contractor will do whatever is easiest regardless if the following contractor inherits a burden.
>
> In general I think the drawings will be fine but you may need local design and review help. You'll need additional work for site, foundation and electrical drawings I suspect and certainly fire, mechanical and plumbing as well. You'll need a MassEnergy Audit for your design (that's fancy for their BTU worksheet) when it's completed.
>
> Southwick is pretty tight with their protocol so there may be some kind of review / approval process locally before a Building Permit is granted.
>
> I hope this helps you and give me a ring to discuss if necessary.
>
> Cleve
> P.S. I would like to see the video"
> (Exhibit 9, Page 8)

27. Page 9 of Exhibit 9 is a cover sheet regarding chain of custody from the FBI. (Exhibit 9, Page 9)

28. Pages 10 through 18 of Exhibit 9 are pictures of a log house, including pictures of cracked concrete. (Exhibit 9, Pages 10 – 18)

29. All eighteen (18) pages of what is now Exhibit 9 were also presented by the City as part of the local Appointing Authority hearing that was requested by the Appellant prior to his termination. The Appellant opted not to testify at the local hearing conducted by the City and thus did not offer any testimony regarding these documents or any other matter pertaining to Markey's investigation.

30. The Appellant did testify at the Civil Service Commission hearing conducted by the DALA Magistrate.

31. The Appellant testified that Ed Leyden is his brother-in-law and that he helped him build a log home between March 2004 and April 2006. According to the Appellant, he did all of the "internal work" in the house, including kitchen cabinets, "overhang" work, etc. The Appellant testified that he performed most of the work on the log cabin house after he was separated from employment in January 2005. In regard to the work performed before that time, the Appellant testified that all of the work was completed on nights and weekends and never occurred during "City time". (Testimony of Appellant)

32. In regard to Pages 3 and 4 of Exhibit 9, the Appellant acknowledged that he compiled this list of vendors and quotes for his brother-in-law after contacting the various contractors and getting prices. (Testimony of Appellant)

33. In regard to Pages 5 and 6 of Exhibit 9, the Appellant acknowledged in his testimony that he used a City fax machine to fax a credit application to his brother-in-law related to the building of the log house. (Testimony of Appellant)

34. In regard to Page 7 of Exhibit 9, the Appellant offered no explanation why the fax cover sheet had the name "Joe McDougle" written on it, but acknowledged that it could be his handwriting. (Testimony of Appellant)

35. In regard to Page 8 of Exhibit 9, the Appellant acknowledged that he did talk to Cleve Carrens, a City employee, about the construction of his brother-in-law's log house and that he recommended Carrens to his brother-in-law because he was a good architect. (Testimony of Appellant)

36. In regard to Pages 10 – 18 of Exhibit 9, the Appellant testified that he brought the photographs of the log house and the cracked concrete into the office so Carrens could take a look at the cracked concrete. The Appellant testified that any of his conversations with

Carrens regarding the log house took place during lunch hours or while en route to a City job. (Testimony of Appellant)

37. Patrick Sullivan testified that he found a Personnel Manual in the office of John Mastrangelo that included Section 2.07, "Outside Employment / Consulting", which states, " … No outside work may be performed during City paid time periods … The consulting of outside employment activities may not in anyway utilize any City resource, i.e., facilities, materials, equipment, vehicles, telephones, other personnel or their services, or confidential information." (Testimony of Sullivan and Exhibit 11)

38. The Appellant testified that his regular hours were supposed to be 37.5 hours per week. He typically worked from 7:00 A.M. to 5:00 P.M. each day, however and, as referenced above, responded to emergency calls after hours. (Testimony of Appellant)

39. Page 2 of the "Agreement for Personal Services" between the Appellant and the City states "The Deputy Director of Maintenance shall perform said services for a maximum of thirty seven and one half hours (37.5) per week under the direction of the Director of Facilities Management or his designee." (Exhibit 5)

Review of Phone Records

40. As part of his investigation, Markey also reviewed the phone records of the Appellant's City-issued Nextel phone. Markey was looking for phone numbers associated with contractors listed on pages 3 and 4 of Exhibit 9, a list of contractors on McDowell and Son letterhead related to the building of the log house of the Appellant's brother-in-law. (Testimony of Markey)

41. Markey presented a summary of phone calls made from the Appellant's City-owned cell phone to contractors on the above-referenced list from Exhibit 9 from April 2004 to

October 2004. That summary was marked as Chalk 1 and the actual phone records were entered as Exhibit 10. (Testimony of Markey, Chalk 1, Exhibit 10)

42. As an example, Chalk 1 indicates that dozens of calls totaling 26 hours and 26 minutes were made to or from the Appellant's City-issued Nextel phone and Excavation Plus, Inc. between April 2004 and October 2004. (Chalk 1)

43. The Appellant testified that prior to the hearing before the DALA magistrate, he reviewed the phone records in Exhibit 10. Although he does not dispute that Excavation Plus, Inc. is not a city vendor and he did make calls to them on his City-issued Nextel during work hours, his review of the records shows that only 11 calls totaling 14 minutes were made to or from Excavation Plus, Inc. and his phone between April 2004 to October 2004. (Testimony of Appellant and Exhibit 10)

44. The Appellant testified that calls to other contractors, such as Custom Cabinets and Dimauro Carpet & Tile, were all related to City business as these entities are vendors used by the City. (Testimony of Appellant)

45. In its post-hearing brief, the City states: "The City presented Mr. McDowell's cell phone records showing calls to and from his city cell phone. The City concluded that there were many hours of calls to and from contractors but cannot now identify from what records it determined this since it is not clear from the exhibit in this case. The City cannot now prove exactly how many of the calls to Mr. McDowell's city cell phone were from private contractors. (Mr. McDowell admits to the calls from his phone to contractors) but the City's conclusions were not disputed at the appointing authority hearing of Mr. McDowell." (City's post-hearing brief)

Interviews with Employees of the Parks, Buildings and Recreation Management Department

46. Markey identified eight (8) current or former City employees who worked for the Appellant or Mastrangello who may have had relevant information and interviewed them. Although Markey took handwritten notes, the interviews were not recorded and none of the employees were asked to prepare written statements at the conclusion of the interviews. Markey conducted most of the interviews one-on-one with the exception of Michael Molinari and Gary Dejorge, two former laborers who came to Markey's office together. (Testimony of Markey)

47. Markey never interviewed the Appellant per request of the FBI. (Testimony of Markey)

48. Markey's notes of the interviews were not entered as an exhibit at the Commission hearing before the DALA magistrate.

49. At the local appointing authority hearing, counsel for the Appellant requested copies of Markey's notes and the local hearing officer denied that request. (Exhibit 2)

50. Markey testified that Molinari and Dejorge told him that the Appellant had them do work related to his private business while on City time, including unloading cement and putting ceiling tiles in the Appellant's truck. (Testimony of Markey)

51. Neither Molinari or Dejorge testified at the Commission hearing before the DALA magistrate. These two individual also did not testify at the local appointing authority hearing. (Exhibit 2)

52. Markey testified that both Molinari and Dejorge appeared to have a personal animus for the Appellant because they believed that the Appellant was responsible for them being laid off in 2003. (Testimony of Markey)

53. As previously referenced, the Appellant did not testify at the local Appointing Authority hearing at which Markey also testified about his conversations with Molinari and Dejorge. In his testimony before the Magistrate at the Commission hearing, the Appellant denied ever taking city cement and using it for his private business. In regard to ceiling tiles, the Appellant testified that he occasionally asked employees to bring ceiling tiles not being used at one school due to construction delays and bring those tiles to another school that needed them immediately. He denied ever asking employees to put ceiling tiles in his personal truck. (Testimony of Appellant)

Testimony of Patrick Sullivan & Alleged Marking-Up of Prices with Vendors

54. The City's April 15, 2005 termination notice to the Appellant stated, "I find that you used City property and equipment for your own personal benefit and that you conducted private business on City time." Although the issue was broached at the local appointing authority hearing, there is no reference in the termination letter to the Appellant being terminated for issues related to the marking-up of prices with vendors. (Exhibit 2)

55. G.L. c. 31, § 41 states in relevant part: "Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, <u>which shall state fully and specifically the reasons therefore</u>." (<u>emphasis added</u>) G.L. c. 31, § 41.

56. As referenced above, Patrick J. Sullivan was appointed as the Director of Parks, Buildings and Recreation Management on December 2, 2004. He was present with Markey when the FBI conducted a search of the Appellant's office. He also assisted Markey in reviewing relevant documents. (Testimony of Sullivan)

57. At some point, Sullivan learned that the FBI was looking to see if a contractor by the name of "T.J. Conway" was giving kickbacks to City employees. As a result, Sullivan reviewed various documents related to this vendor. (Testimony of Sullivan)

58. Exhibit 13 contains a "price agreement" between the City and T.J. Conway for calendar year 2004 and a renewal letter for calendar year 2005. According to the price agreement, T.J. Conway was to provide the services of journeymen plumbers for the City for a total price of $33,600 based on 800 hours at a rate of $42.00 per hour. Paragraph 10 of the price agreement specifications states: "Should the City request that the contractor provide materials, the allowable cost for such materials will be low column from the national price service plus 15% plus 10%. The Director of Facilities for the City of Springfield reserves the right to request of the vendor awarded, copies of their supply invoices for materials and supplies used on city projects in order to insure that only the allowable markup is being invoiced to the City." (Exhibit 13)

59. Sullivan testified that the Appellant, as the Department's Deputy Director, would need to be familiar with this price agreement and the facts that back-up information is required to show that the vendor is not charging more than a 15% mark-up on supplies. On cross examination, Sullivan acknowledged, however, that the Appellant did not have any involvement in negotiating price agreements. Rather, it is handled by the City's Purchasing Department. (Testimony of Sullivan)

60. Sullivan testified that he reviewed several T.J. Conway invoices that had been approved by the Appellant where the mark-up on supplies greatly exceeded 15%, including an $1104 charge for a supply that cost $417.60; a $511 charge for a supply that cost $369 and a $121 charge for a supply that cost $36.35. (Testimony of Sullivan)

61. It is unclear what documentation entered as evidence support Sullivan's above-referenced testimony. During his testimony, there was reference to Exhibit 12, which Sullivan testified did not have the necessary back-up. Exhibit 12 appears to be an invoice from T.J. Conway to the City for $5,150. Although it is addressed to the Appellant, there is a handwritten note indicating "OK" with the initials "JRM". "JRM" represent the initials of Joseph R. Mastrangelo, not Joseph F. McDowell. (Exhibit 12)

62. Sullivan testified that shortly after confronting the owner of T.J. Conway about what he concluded was overcharging, T.J. Conway rescinded its pricing agreement with the City. The City retained a contractual relationship, however, with T.J. Conway for "steam" services and several months later entered into a new pricing agreement with T.J. Conway for plumbing services. Sullivan never asked the owner of T.J. Conway about his relationship with the Appellant. (Testimony of Sullivan)

63. The Appellant testified that he had no role in selecting vendors for price agreements. He did, however, receive bills and invoices from companies that were under a price agreement. In those cases, the Appellant testified look over the invoice to see what the scope of work was and see if it appeared to be consistent with similar work completed in the past. He testified that he never analyzed the specific breakdown of labor and materials. He testified that he never accepted "kickbacks" from any City vendors. (Testimony of Appellant)

64. On March 23, 2005, the Appellant was given a local Appointing Authority hearing regarding the charges that resulted in his termination. He did not testify at that hearing. (Testimony of Appellant)

65. The hearing officer submitted a memorandum regarding the hearing to Patrick J. Sullivan, the Appellant's Appointing Authority on April 13, 2005. Sullivan notified the Appellant in writing on April 15, 2005 that he was terminated. (Exhibit 2)

66. The Appellant filed a timely appeal with the Commission on April 22, 2005.

CONCLUSION

G.L. c. 31, § 43, provides:

> "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."

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. of Boston, 359 Mass. 211, 214 (1971); 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 Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "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).

"The commission's task…is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." 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." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also 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. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

The notice of termination sent to the Appellant on April 15, 2005 explicitly states that the Appointing Authority "found that you used City property and equipment for your own personal benefit and that you conducted private business on City time." This termination notice does not

make any findings or conclusions regarding an allegation contained in the notice of hearing sent to the Appellant two weeks earlier, which alleged that the Appellant also "presided over inappropriate billing with contractors." The City's hearing officer also did not make any findings or conclusions regarding this charge. Thus, it is inappropriate for the City to use that allegation as justification for terminating the Appellant in the hearing before the Commission.

Even it were appropriate to raise this allegation at the Commission hearing, I find that the City failed to show by a preponderance of the evidence that the Appellant presided over inappropriate billing with contractors. The documents submitted into evidence fail to show that the Appellant was aware that the invoices submitted by T.J. Conway exceeded the 15% mark-up allowed for supplies under its pricing agreement with the City. Rather, the only relevant documents submitted contain the initials of "JRM" for John R. Mastrangelo, not the Appellant's initials of "JFM". Further, Sullivan inexplicably failed to question the owner of T.J. Conway about his relationship with the Appellant. Finally, despite the City's allegation that T.J. Conway was bilking the City with the help of the Appellant, they maintained a contractual relationship regarding "steam" services at all relevant times and then re-entered into a contract for plumbing services several months after T.J. Conway rescinded the pricing agreement that was submitted as evidence in this case.

In regard to the allegations that the Appellant used City property and equipment for his own personal benefit and conducted private business on City time, the City relies primarily on the three-pronged investigation completed by its City Solicitor, Patrick Markey, who testified at the Commission hearing. His investigation consisted of a review of all relevant documents seized by the FBI from the Appellant's office, a review of the Appellant's phone records from his City-issued Nextel phone, and interviews with eight (8) current and former employees of the Parks,

Buildings and Recreation Management Department. I address the evidence and testimony regarding each part of Markey's investigation in the reverse order listed above.

Interviews with Employees of the Parks, Buildings and Recreation Management Department

Markey interviewed eight (8) current or former City employees as part of his investigation. None of these interviews were recorded and no employee was asked to prepare a written statement confirming what was told to Markey. Markey kept his own notes but these were not submitted as evidence at the Commission hearing (or at the local Appointing Authority despite a request to do so by counsel for the Appellant). None of these eight (8) former or current employees testified before the Commission (or at the local Appointing Authority hearing). Thus, the Commission must rely solely on the hearsay testimony of Markey to determine if the statements made by any of these individuals show that that the Appellant used City property and equipment for his own personal benefit and conducted private business on City time.

Based on Markey's testimony, only two individuals made statements implicating the Appellant: Molinari and Dejorge. According to Markey, Molinari and Dejorge told him that the Appellant had them do work related to his private business while on City time, including unloading cement and putting ceiling tiles in the Appellant's truck. Markey acknowledged in his testimony that he interviewed these two individuals together after they arrived at his office together and he (Markey) concluded that they had a personal animus toward the Appellant as they believed that he caused them to be laid off two years earlier.

For all the reasons reference above, this is not sufficiently reliable evidence to show that the Appellant used City property and equipment for his own personal benefit and conducted private business on City time. The Appellant denied the allegations of both Molinari and Dejorge and gave what appeared to be plausible explanations regarding the alleged incidents. However, the

Appellant had the opportunity to offer these explanations at the local appointing authority hearing after hearing the same testimony by Markey and he chose not to do so. Thus, I give no weight to his testimony in this regard. As referenced above, however, I have concluded that Markey's testimony regarding the statements of these two witnesses, even without considering the Appellant's denial offered at the Commission hearing, is not sufficiently reliable to show that the Appellant the Appellant used City property and equipment for his own personal benefit and conducted private business on City time.

Review of Phone Records

The testimony of Markey and the documents submitted regarding the phone records of the Appellant's City-issued Nextel phone failed to show that the Appellant used City property and equipment for his own personal benefit and conducted private business on City time. Markey was unable to explain how a summary of the phone records was prepared and how it related to the actual phone records in Exhibit 10. Moreover, it was clear that the summary, which the City relied on at the local appointing authority, contained egregious errors including a notation that the Appellant had 26 hours and 26 minutes of phone conversations with Excavation Plus, Inc. from April 2004 to October 2004. It appears that the correct time is 14 minutes.

The City acknowledged the unreliability of the summary and phone records in its post-hearing brief stating, "The City cannot now prove exactly how many of the calls to Mr. McDowell's city cell phone were from private contractors..." The City, however, appears to argue that it was allowed to rely on these erroneous records as the Appellant did not dispute their accuracy at the local appointing authority hearing. I disagree. The City acknowledges that the information can not be verified. It would be an error for the Commission to rely on this information as part of its de novo proceeding to determine whether the City has met its burden of proof.

Ironically, the only reliable information regarding the Appellant making private business calls on his City-issued Nextel phone is the Appellant's own testimony before the Commission. He acknowledges making 11 calls for a duration of 14 minutes to Excavation Plus, Inc. using his City-issued Nextel phone during work hours. He acknowledges that Excavation Plus, Inc. is not a City vendor and the calls were not related to City business.

Review of Documents

There is no dispute that documents related to the Appellant's private business were seized from his City office as part of the FBI's search. Those documents included a document from a subcontractor, Excavation Plus, Inc., which list the "job phone" as 246-2205 which was the Appellant's city Nextel phone number. Other documents in the office included proposals and prices related to a home in Southwick that the Appellant was helping his brother-in-law build, details of the prices for the project, photographs of the property in question and faxes from the Appellant's City office on City letterhead related to the project. There was also a fax from the Appellant's City office on City letterhead to his brother-in-law of a personal credit application form from a lumber company. On one occasion, it is clear that the Appellant sent a fax to his brother-in-law under the name "McDougle". Finally, there is an email from Cleve Carrens, an architect for the City, to the Appellant's brother-in-law giving him professional advice about the construction of the log house in Southwick that was sent using the City's email system during work hours. The Appellant acknowledges that that he did talk to Carrens about the construction of his brother-in-law's log house and that he recommended Carrens to his brother-in-law because he was a good architect. The Appellant testified that he also brought the photographs of the log house and cracked concrete into the office so Carrens could take a look at the cracked concrete. The Appellant testified that any of his conversations with Carrens regarding the log house took

place during lunch hours or while en route to a City job. I give no weight to the Appellant's testimony that all of his conversations with Carrens regarding the log house took place during lunch hours or when en route to a City job. This same evidence was presented at the local appointing authority hearing and the Appellant opted not to testify. Further, common sense and the documentary evidence strongly suggest that the Appellant's testimony is not plausible. The email from Carrens to the Appellant's brother-in-law was done using City property during normal working hours. While the Appellant is not copied on that email, it defies logic that Carrens and the Appellant then used more discretion to ensure that their own conversations did not involve City time. Finally, even I were to accept the Appellant's testimony, discussing the project while en route to a City job does not constitute a break or lunch period.

State Ethics Law

In its post-hearing brief, the City also argues that the Appellant's actions violated state ethics laws. Regardless of the merits of this argument, this was not an allegation contained in the notice of hearing sent to the Appellant nor was it listed as a reason for termination. Further, there was no evidence presented that the City filed a complaint against the Appellant with the State Ethics Commission.

Neither the City nor the Commission can determine whether there was a violation of the state's conflict of interest laws. Rather, the City may refer any alleged violation to the State Ethics Commission for investigation and a determination. Since there is no evidence that this occurred, this can not now be used as a basis for termination. (See Erickson v. Oxford, 22 MCSR 14, 20 (2009)).

Adverse Inference

Further, consideration must also be given to the adverse inference that the City is allowed to draw against the Appellant as a result of his declining to testify at the underlying disciplinary hearing. As the courts have held, the Appellant's refusal to tell his side of the story at the disciplinary hearing and the adverse inference that the City can draw therefrom is an integral part of the circumstances that existed when the City made its decision. Falmouth (2006) at 826, 827.

Where appropriate, I have given consideration to the City's adverse inference by giving no weight to certain testimony offered by the Appellant at the Commission hearing that he opted not to give at the local appointing authority hearing. I have also considered that the City, generally, was able to draw an adverse inference from the Appellant's failure to testify at the local hearing in determining whether he used City property and equipment for his own personal benefit and conducted private business on City time.

Summary of Final Conclusion

I give no weight to the testimony of Mr. Markey regarding the statements of two former employees who allegedly witnessed misuse of City property by the Appellant. Based on the Appellant's own testimony, I conclude that he used his City-owned Nextel phone for 14 minutes on 11 occasions during regular work hours regarding matters related to his private business, McDowell and Sons. Based on a review of the documents submitted into evidence and relevant testimony, I also conclude that the Appellant engaged in misconduct by: 1) using a City-owned fax machine on at least two occasions for matters related to his private business; 2) asking a City employee (Carrens) to provide professional advice during City time on matters related to his private business; 3) compiling and /or reviewing proposals and prices related for a project related to his private business during normal City work hours.

For all of these reasons, I conclude that the City, by a preponderance of the evidence, has shown that it had reasonable justification for disciplining the Appellant for using City property and equipment for his own personal benefit and conducting private business on City time.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was termination.

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.' " Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. *See* Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

Although I have given no weight to the testimony of Mr. Markey regarding statements from former employees and the phone records and summaries introduced, I have reached the same findings and conclusions as the Appointing Authority regarding the Appellant's misconduct, but with important distinctions. It is clear that the City concluded that the Appellant used his City-issued Nextel phone for private business hundreds of times over many hours. Here, based on the evidence and testimony at the de novo hearing, I have concluded that the phone usage was limited to 11 calls over 14 minutes, a stark distinction. It also appears that the City's conclusion regarding the Appellant's "use of City property and equipment for [his] own personal benefit" included the use of cement and ceiling was based on unreliable testimony. I have given that testimony no weight and I do not believe the City was justified in giving that testimony weight, particularly given that both of these employees had a personal animus toward the Appellant. In summary, the Commission, after a de novo hearing, has reached significantly different conclusions regarding the actual misconduct committed and the degree and nature of this misconduct. Thus, I conclude that the City has not shown, by a preponderance of the evidence, that there is reasonable justification to terminate the Appellant. Rather, it is warranted for the Commission to modify the discipline imposed by the City.

For all of the above reasons, the Appellant's appeal is *allowed in part*. The termination is hereby *modified* to a 19-month suspension from April 15, 2005 to November 15, 2007. The Appellant is deemed to be reinstated to his permanent civil service position of Carpenter as of November 16, 2007.

ORDER

There has been a significant gap in time between the filing of this appeal and the issuance of this decision, due in part to the Commission's failure to process this appeal in a timely manner.

In light of the fact that five (5) years has transpired since the City terminated the Appellant, and that both parties, in view of the Commission's decision, may want to consider executing a settlement agreement, the Commission's decision regarding this appeal will not become effective until July 1, 2010 and then only if the parties have not reached a settlement agreement and they have informed the Commission that the Appellant withdraws his appeal based on such agreement. Should the parties be unable to reach an agreement acceptable to both parties and informed the Commission thereof in writing by the close of business on July 1, 2010, the decision shall become effective as of July 1, 2010.

Civil Service Commission

_____

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on May 6, 2010.

A true record. Attest:

_____

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
John S. Ferrara, Esq. (for Appellant)
Maurice Cahillane, Esq. (for Appointing Authority)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
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(617) 727-2293

JOSEPH F. McDOWELL,
Appellant

v. D-05-148

CITY OF SPRINGFIELD,
Respondent

CONCURRING OPINION OF
COMMISSIONERS DANIEL M. HENDERSON AND PAUL M. STEIN

The concurring opinion of Commissioners Henderson and Stein is that the Appellant's appeal should be ***allowed*** but that he should also receive the traditional remedial order issued by the Commission which is: "The Appellant's appeal under Docket No. D-05-148 is hereby ***allowed***. The Appellant shall be returned to his permanent civil service position without any los of pay or other benefits."