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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.: BRCV2013-0709-A

THE NEW BEDFORD AIRPORT COMMISSION, ACTING BY
AND THROUGH ITS MANAGER, THOMAS VICK,
Plaintiff,

BRISTOL, SS SUPERIOR COURT
FILED

SEP 12 2014

vs.

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

MASSACHUSETTS CIVIL SERVICE COMMISSION
and ANTHONY MONIZ,
Defendants.

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

The plaintiff, City of New Bedford, acting by and through the New Bedford Airport Commissioner (the "City"), filed this action pursuant to G.L. c. 30A, § 14, and G.L. c. 31, § 44. The City challenges a "Decision" issued by the Massachusetts Civil Service Commission (the "Commission"), on June 27, 2013, which modified a determination in a personnel action taken with respect to its employee, Anthony Moniz ("Moniz"). Presently before the court is the City's motion for judgment on the pleadings. For the reasons hereinafter stated, the City's motion must be allowed.

BACKGROUND

The following facts are taken from the administrative record. Moniz was hired by the city to work for the Department of Public Facilities on September 16, 1998, to a civil service position of Motor Equipment Operator. He thereafter worked as a heavy equipment operator until he assumed the position of Diesel Engine Repairman in October of 2005. On July 3, 2011, he was involuntarily transferred to work at the New Bedford Airport as a diesel engine repairman. Prior to this transfer, Moniz had accumulated a lengthy disciplinary history which included a seventeen (17)

day suspension for using city equipment on his private property. At that time, he executed an agreement that this was his "final warning," and any further discipline would result in immediate dismissal.

On February 2, 2002, he received a warning for refusing an assignment. On March 6, 2006, he received a warning for failing to report for a snow emergency. On December 21, 2010, he was suspended for one day for not showing up for work.

In March 2011, the superintendent for the public works department for the City gave Moniz a warning relating to violation of the City's sexual-harassment policy. On April 6, 2011, Moniz was again warned about allegations that he threatened a co-worker. He denied making threats, but indicated that he would like to "bash his head in," referring to the co-worker.

The job description given Moniz when he first began working at the airport was to perform skilled "repair and operation of airport diesel, gasoline, natural gas, electric and other power equipment systems." Numerous disciplinary issues arose, and continued after Moniz began working at the airport. Employees at the airport were required to wear shirts with collars. These shirts essentially consisted of the airport workers' "uniform." Moniz advised his supervisor, Thomas Vick ("Vick"), that he found such shirts to be uncomfortable. Vick told him they could work something out. Moniz then began wearing t-shirts. After approximately thirty (30) days, Moniz was advised that he would have to comply with airport policy and wear a shirt with a collar. Moniz essentially ignored this directive, and on September 6, 2011, Vick reiterated to all employees that the required attire must be worn at all times. Moniz also ignored this directive, and was observed multiple times wearing a t-shirt in public areas of the airport, including the terminal building.

In March of 2011, Vick implemented a requirement of all airport employees to complete

daily activity sheets. Moniz was advised that this requirement would begin at least by August 1, 2011. Vick issued a warning to him on September 14, 2011, relating to his failure to submit any such sheets. The first daily activity sheets submitted by Moniz were on September 15, 2011. While daily activity sheets were prepared by airport employees, most of them could not identify their exact time, or their exact location at a specific time. Moniz testified that he usually guessed the times that he did job tasks and duties on his logs.

On August 1, 2011, Moniz told Vick that he needed to get a product at True Value Hardware located in Fairhaven. The receipt which he received indicated that the product was purchased at 11:11 a.m., but Moniz did not return to work until 12:30 p.m., and failed to provide a valid reason for the delay in returning from the hardware store.

On September 6, 2011, Vick gave Moniz a list of projects to be completed while Vick was away. These projects included a requirement that certain snowplows be painted. Moniz did not paint any of the snowplows but instead, painted one snow pusher. When Vick returned, Moniz explained that there was a misunderstanding as to whether he was to paint the snow pusher or the snowplows. Vick clarified what painting needed to be done, however, Moniz still did not complete the project, and was given a written warning on September 14, 2011.

As part of Moniz's work responsibility, he was required to monitor and service two generators of the airport, one of which controlled the airport lights. After Hurricane Irene, the generator required attention. There was a faulty battery creating a strong odor, and causing the alarm to sound. This was reported to Vick. There was a delay in servicing the generator which was attributable to Moniz who was required to monitor the same. At that time, Vick gave Moniz the two written warnings of September 14, 2011, which included a warning for insubordination, and a

warning for substandard work. Moniz refused to sign the same, and threw it at Vick.

On September 19, 2011, Moniz demanded that Vick speak with him about the warning given to him on September 14, 2011, and he walked towards Vick's desk. Vick advised Moniz that he did not appreciate the way he was going about speaking with him regarding the warning.

On September 19, 2011, between 12:15 p.m. and 2:15 p.m., Moniz could not be located at the airport, although his daily log showed that he took lunch at 1:20 p.m. Moniz admitted that the time sheets are not always accurate. On September 20, 2011, at approximately 2:45 p.m., Moniz entered the airport office, and asked the account clerk if she heard if he pissed off "Chiefy" yesterday, referring to Vick. Moniz laughed when he said this, and told her he was not going to "let it go." She told him that he could not grieve the warning, but Moniz told her that he knew this, but that he was still not going to "let it go."

On September 20, 2011, Moniz was assisting contractors working at the Airport Grille, a restaurant located in the airport. He was not instructed to assist the contractors, and this was not part of his duties.

On September 21, 2011, Moniz received a letter from Vick stating that he was suspended immediately, and that his termination was being contemplated for repeatedly not wearing his prescribed uniform, being absent from work areas for excessive amounts of time, for substandard work and insubordination, for falsifying logs, and for creating a hostile work environment on September 20, 2011.

On September 27, 2011, a disciplinary hearing was held in accordance with G.L. c. 31, § 41, and on September 28, 2011, Vick terminated Moniz's employment resulting in his appeal to the

Commission.

Thereafter, Moniz filed his appeal with the Commission. An evidentiary hearing was held pursuant to G.L. c. 31, § 43, which concluded on March 30, 2012. By decision dated June 27, 2013, the Commission, by a 3 - 2 vote, allowed Moniz's appeal, in part, by modifying the City's decision. The decision states, *inter alia*, that the City's claim of hostile work environment was not proven, and that the other charges of misconduct and substandard performance, standing alone or in combination therewith, did not justify his termination. The decision further states,

"His delay in attending to the generator, which was part of his required job duties, could have resulted in serious consequences, but he did eventually complete that assignment. His failure to properly complete the painting assignment, neglect of his time records and failure to comply with the airport's attire policy are less serious, but they all do carry a thread of an insubordinate spirit that cannot be tolerated in the public service."

The decision concluded that the Commission should exercise its discretion and modify Moniz's termination to a suspension of one year and nine months. The decision noted that this represents a significant step in progressive discipline for the actual misconduct proved in this case, and would constitute a clear signal to Moniz that his insubordinate behavior "... does leave much to be desired and needs to improve immediately."

The dissenting Commissioners issued an opinion concurring with the majority's conclusion that there is just cause to discipline Moniz, but indicating disagreement with the decision to convert his termination to a long term suspension. The dissenting opinion states, *inter alia*:

"Prior to being transferred to the City's airport, Mr. Moniz had a lengthy and eyebrow-raising disciplinary history that included verbal and written warnings, a 1-day suspension and a 17-day suspension. The seriousness of these prior offenses should not be understated. Mr. Moniz failed to show up for work and/or refused an assignment on three occasions. On another occasion, he was found, *while on duty*, using City-owned property to remove tree stumps from his private yard. As recently as 2011, he received two warnings for allegedly violating the City's harassment policies. While he denied

those allegations, he nonetheless, acknowledged to his supervisor that he wanted to 'bash [a coworker's] head in.'

With this as a backdrop, we are hard-pressed to understand how anything less than termination is warranted for his most recent transgressions which include refusing to wear the proper uniform while on duty at the City's airport, failing to satisfactorily complete an assignment; and failing to properly maintain generators at the airport. Further, while we defer to the findings that Mr. Moniz did not harass his supervisor, it is noteworthy that Mr. Moniz, at a minimum, boasted to at least one other airport employee about how he had 'pissed off Chiefy.'" (Emphasis in original).

The dissenting Commissioners further observed that the termination of Moniz was justified, and consistent with the principles of progressive discipline and that "the Commission should not provide a safe harbor for Mr. Moniz or any other individuals who continuously engage in behavior that tarnishes the image of public service."

DISCUSSION

Discipline imposed upon a civil service employee is statutorily governed by G.L. c. 31, §§ 41-45. These statutory provisions provide tenured civil service employees with certain procedural protections before the appointing authority can impose disciplinary action against them.¹ G. L. c. 31, § 41. In particular, a tenured civil service employee shall not be "discharged, removed, suspended for a period of more than five days, laid off, transferred from his position . . . nor his position be abolished," except for "just cause," and not without first being given a hearing " . . . before the appointing authority or a hearing officer designated by the appointing authority." *Id.*

If, after the hearing before the appointing authority's designee, a tenured employee is

¹ A "tenured employee" is defined as "a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2), a promotional appointment on a permanent basis." G. L. c. 31, § 1. And, "appointing authority" is defined as "any person, board or commission with power to appoint or employ personnel in civil service positions." G. L. c. 31, § 1.

aggrieved by the appointing authority's decision, that employee may appeal to the commission. G.L. c. 31, § 43. At that point, the employee "shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission." *Id.* After the completion of this hearing, "the member or hearing officer shall file . . . a report of his findings with the commission . . . [and] the commission shall render a written decision" *Id.*

In reviewing the appointing authority's decision, the commission must "conduct a *de novo* hearing for the purpose of finding facts anew." *Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006), *citing Sullivan v. Municipal Court of Roxbury Dist.*, 322 Mass. 566, 572 (1948); *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727-728 (2003).

"The commission's task, however, is not to be accomplished on a . . . blank slate." *Falmouth*, *supra* at 823. "After making its *de novo* findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority]; rather, it determines 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." *Id.* at 823-824, *quoting Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). If the commission finds by a preponderance of the evidence that there was just cause for a disciplinary action taken against an employee, the commission shall affirm the action of the appointing authority. *Watertown*, *supra* at 334.

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.'" *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997), *quoting Sullivan*, 322 Mass. at 572-573; see also *Selectmen of Wakefield v. Judge of the First Dist. Court*

of E. Middlesex, 262 Mass. 477, 482 (1928). Essentially, the commission's role 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, 43 Mass. App. Ct. at 303; see also Leominster, 58 Mass. App. Ct. at 728; McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995). In making this determination, the commission asks "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Justices of Second Dist. Court of E. Middlesex, 389 Mass. 508, 514 (1983). When the appointing authority fails to meet its burden to demonstrate just cause, the commission may vacate or modify the discipline imposed. G. L. c. 31, § 43.

In undertaking the above analysis, the commission must be guided by the purpose of the civil service legislation, which is "to free public servants from political pressure and arbitrary separation" while at the same time, "not . . . prevent[ing] the removal of those who have proved to be incompetent or unworthy to continue in public service." Cullen v. Mayor of Newton, 308 Mass. 578, 581 (1941). "When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000), *citing Cambridge*, 43 Mass. App. Ct. at 304. Nevertheless, "[i]t is not within the authority of the commission . . . to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *Collins*, *supra*, *citing Cambridge*, 43 Mass. App. Ct. at 304. See also Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800-801 (2004), *citing Cambridge v. Civil Serv. Comm'n*, *supra* at 304.

In the case at bar, the record, and the findings of the Commission, clearly support a determination that the City was justified in its decision to terminate Moniz. The record is replete with evidence of insubordinate and inappropriate conduct on numerous occasions over the years of his employment. He chose, on multiple occasions, to disregard direct orders from his superior, showing a total disrespect for authority and his job responsibilities. One must keep in mind that his employment involves working in an airport where safety and attention to detail is of the utmost importance.

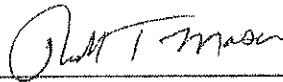
The Commission's majority decision observed that Moniz's conduct "... carries a thread of insubordinate spirit that cannot be tolerated in public service." The majority of the commissioners, however, concluded that a suspension of one year and nine months is more appropriate than termination. They did not make any finding that the decision of the appointing authority was motivated by political pressure, bias or favoritism. In substance, they have chosen to substitute their judgment for that of the City. This court finds that the City validly exercised its discretion in terminating Moniz for just cause. This court concurs with the dissenting commissioners that "[t]he Commission should not provide a safe harbor for Mr. Moniz or any other individuals who continuously engage in behavior that tarnishes the image of public service."

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. The plaintiff, City of New Bedford's Motion for Judgment on the Pleadings is hereby ALLOWED.
2. The decision of the Civil Service Commission, dated June 27, 2013, modifying the decision of the City of New Bedford, dated September 28, 2011, which terminated Moniz, is hereby VACATED.

By the Court,



Richard T. Moses
Justice of the Superior Court

DATED: September 12, 2014