

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place – Room 503

Boston, MA 02108

(617) 727-2293

KEVIN MONTEIRO,

Appellant

v.

CITY OF NEW BEDFORD,

Respondent

Docket No. D1-14-299

Appearance for Appellant:

Philip Brown, Esq., Associate General Counsel

AFSCME Council 93

8 Beacon Street, 7th Floor

Boston, MA 02108

Appearance for Respondent:

Jane Medeiros Friedman, Esq.,

First Ass't City Solicitor, City of New Bedford

133 William Street

New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

Pursuant to G.L.c.31, §43, the Appellant, Kevin Monteiro, appealed to the Civil Service Commission (Commission) from the decision of the City of New Bedford (New Bedford) to discharge him from his position of Motor Equipment Operator (MEO). A prehearing was held on January 23, 2105 and a full hearing on April 10, 2015, both at the UMass School of Law in North Dartmouth.¹ The full hearing was declared private and witnesses were sequestered. Eleven exhibits were received in evidence, one document was marked for identification (Exh. 6ID) and a meteorological record was received after the hearing and marked as PH Exh. 12. I also took a view of Pine Grove Cemetery with the parties present. The hearing was digitally recorded and copies were sent to the parties.² Both parties submitted proposed decisions to the Commission.

¹ 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.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

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

Called by the Appointing Authority:

- Jose (“Joe”) Perez, Cemetery Foreman, Cemetery Division,
New Bedford Department of Public Infrastructure (DPI)
- Ronald Labelle, New Bedford DPI Commissioner

Called by the Appellant:

- Kevin Monteiro

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, I make the following findings of fact upon a preponderance of the evidence:

1. The Appellant, Kevin Monteiro, was hired by New Bedford as an MEO on June 19, 2000. He originally was assigned to the Highways Department, initially a part of the former Department of Public Works (DPW) until July 2003, when the Highways Department became a part of the newly created DPI. He was transferred to the DPI Water Department in February 2009 and in August 2013 was assigned to the DPI Cemetery Division where he worked at the Pine Grove Cemetery under the supervision of Cemetery Foremen Joe Perez and William Days. (*Exh. 1; Testimony of Appellant, Perez and Labelle*)

2. An MEO’s duties involve the operation of city motor vehicles of a size below that which would require a CDL license. (*Testimony of Appellant*)

3. Mr. Monteiro received workers’ compensation on three separate occasions.

- Injured on July 15, 2002 and out of work until September 4, 2002
- Injured on June 17, 2003 and out of work until July 1, 2003 and again from December 10, 2004 through March 7, 2005
- Injured on April 22, 2013 and out of work until July 8, 2013.

(*Exh. 1; Testimony of Appellant*)

4. Prior to 2013, Mr. Monteiro's Employee Personnel Evaluations (EPEs) described him as "dependable", "takes pride in his work" and "meets requirements". During this period, Mr. Monteiro received two written warnings and was docked for a day's pay:

- 9/11/2000 – Written warning for inattention, rear-ending another city vehicle and causing injury to two employees
- 10/1/2001 – Written warning for negligence, causing damage to city truck
- 2/21/2008 - docked one day's pay for excessive sick leave and required to produce medical note for future requests for sick leave.

(Exhs. 2e-2q; 3, 4 & 5a-5b)

5. Beginning with his August 2013 EPE, however, the assessment of Mr. Monteiro by his supervisors started to show sustained concern for substandard performance issues:

- 8/15/2013 EPE (Water) – Rated "Requires Improvement" – "Kevin has his work to do but you have to tell him every day" – "He does not take pride in his work" – "You have to stay on him" – You can't depend on him" - "He is now working for the cemetery dept. I hope they have better luck with him"
- 10/1/2013 EPE (Cemetery) – Rated "Requires Improvement/Meets Requirements" – "I have frequently observed, from a distance, him standing around watching others working" – "Although his attendance is good, I have difficulty depending on him to follow direction consistently (dumping half truck loads)" – "Kevin needs to focus on staying busy and following directions"
- 1/6/2014 EPE – Rated "Meets Expectations" – "Kevin is improving slowly"
- 2/4/2014 Written Warning – "Damaged private property"; did not follow directions
- 2/19/2014 Written Warning – "Damage to City Property. Backed City Vehicle into a second City Vehicle" causing dent to truck plow and vehicle taillight
- 4/24/2014 One Day Suspension – Failure to complete assignment to pour foundations – Supervisor's report: " [W]orking with Kevin is often difficult . . . and he does his job without caring. It is becoming disruptive to the workflow because [another employee] always has to pick up Kevin's slack" – "It is only when he sees me on the job site that he steps it up" – "Kevin did improve his performance for a period of time – hence the satisfactory review in January – but he seems to be going back to his previous ways"
- 8/22/2014 EPE – Rated "Requires Improvement" in Quality of Work – "Kevin lacks the ability to keep motivated when he is not under direct supervision." "Meets Requirements" in all other categories.
- 10/27/2014 Three Day Suspension – A variety of incidents: 9/26/2014 (complaints that he was shirking his work duties); 9/30/2014 (working without safety glasses in violation of DPI procedures); 10/14/2014 (cutting plantings while weed whacking; shifting a lawn gator while in motion which would damage transmission); 10/21/2014 (damaged gravestone when rope slipped out of his hand)

(Exhs. 2a-2d, 7, 8a-8b, 9a-9d & 10a-10)

6. On December 9, 2014, Mr. Monteiro was working at the Pine Grove Cemetery. It was raining heavily from early morning until mid-afternoon. The temperature ranged from the upper-thirties in the early morning to about 50 degrees by mid-day. The ground was wet but not frozen. *(PH Exh. 12; Testimony of Appellant, Perez & Labelle)*

7. In the late morning, Mr. Perez assigned Mr. Monteiro to “break down” a gravesite in Section 15 after burial of the deceased. This work required Mr. Monteiro to back up a pick-up truck from the cemetery driveway to the burial site, carefully navigating between the rows of graves to retrieve the “greens” (artificial grass) and burial equipment and load them onto the truck. Due to the wet conditions, as was the common practice, Mr. Monteiro and Mr. Perez had placed plywood on the grass between the cemetery driveway and the grave to protect the grass and keep a vehicle from sinking into the ground and getting stuck. Mr. Monteiro had been instructed on this procedure and had followed it in the past. *(Exh. 11c; Testimony of Appellant & Perez)*

8. Instead of lining up the truck on the driveway, Mr. Monteiro decided that he would get a better view and put the truck in a better position to back up straight into Section 15 by lining up his vehicle in Section 14, which is directly across the cemetery driveway from Section 15. *(Testimony of Appellant; Commission View)*

9. Section 14 is an older section of the cemetery, filled with wooden caskets and no cement liners as is the case with newer graves. It has a distinctly different appearance from the rest of the cemetery and includes unmarked “pauper’s” graves. Only lawn gators (golf cart style vehicles) and lawnmowers are used in these sections because heavier vehicles could sink into the graves. No new burials take place in the older sections and all experienced cemetery employees, Mr. Monteiro included, never drive a pickup truck or other heavier vehicle on them. *(Testimony of Perez; Commission View)*

10. As Mr. Monteiro was not expected to drive his truck into Section 14, no plywood had been placed in Section 14. Mr. Monteiro pulled the entire truck into Section 14 and got stuck in the mud. Mr. Perez, who was waiting in Section 15 to assist in the take down, came over to help Mr. Monteiro place the vehicle into four-wheel drive, which required manual adjustment to each wheel. Mr. Perez then guided Mr. Monteiro as he drove the truck out of the mud and parked it on the driveway, leaving ruts and wheel marks on the grass in Section 14. (*Exhs. 11c & 11d; Testimony of Appellant & Perez*)³

11. Mr. Monteiro then began backing the truck from the driveway onto the plywood along the row in Section 15 toward the burial site to be taken down. Mr. Perez began walking behind the truck to provide guidance to Mr. Monteiro as he backed up toward the open grave. As he did so, the truck suddenly accelerated, forcing Mr. Perez to jump out of the way to avoid being struck. The rear passenger side of the truck backed over the open grave, dangling over the coffin but not touching it. Mr. Monteiro and Mr. Perez put the truck in four-wheel drive and Mr. Monteiro drove it out of the hole. (*Exhs. 11c & 11e; Testimony of Appellant & Perez*)

12. Mr. Monteiro got out of the truck and told Mr. Perez his foot had slipped from the brake and caused him to “floor” the accelerator by mistake. Mr. Monteiro was shaken up by the incident. Mr. Perez moved the truck back to the driveway and he drove the truck the rest of the day. (*Exhs. 11c & 11e; Testimony of Appellant & Perez*)⁴

13. In all his years with the Cemetery Division, until December 9, 2014, Mr. Perez had never seen anyone drive a truck on Section 14 or into an open grave. (*Testimony of Perez*)

³ Mr. Monteiro later repaired and reseeded the grass where he had caused ruts in Section 14. I saw the areas that had been reseeded when I viewed the scene in April 2015. (*Testimony of Appellant; Commission View*)

⁴ Mr. Monteiro later claimed that, previously, he had problems with the gear shifter on the truck. Others who used the same truck did not report such problems and, after the December 9, 2014 incident, Commissioner Labelle had the truck checked out and no mechanical problems were found. I infer that the sudden acceleration was entirely operator error and mechanical malfunction was not a factor. (*Testimony of Appellant & Labelle*)

14. No discernable damage was done to the coffin, cement liner, the burial equipment or the truck. I saw no evidence during my view that any unusual damage had been done to the grass area around the grave site that was not typical of marks routinely caused by funeral visitors as well as others caused in the course of a grave site take down, in places pointed out to me elsewhere in the cemetery. (*Testimony of Appellant, Labelle & Perez; Commission View*)

15. Mr. Perez and Mr. Days reported the December 9, 2014 incidents to Commissioner Labelle who suspended Mr. Monteiro on December 11, 2014 and gave notice that he would hold a hearing on December 18, 2014 to consider his termination for “failure to follow established work protocol; unsafe use of a vehicle; and damage to city property and private property.” (*Exhs. 11b, 11f & 11g: Testimony of Perez and Labelle*)

16. Commissioner Labelle is the Appointing Authority for the DPI and had personal knowledge of Mr. Monteiro’s work history since 2003, when Mr. Monteiro was transferred to the DPI. Commissioner Labelle had met with Mr. Monteiro on multiple prior occasions to coach him to improve his performance over the years. (*Testimony of Commissioner Labelle*)

17. In particular, Commissioner Labelle moved Mr. Monteiro to the Cemetery Division in 2013 due to work performance issues with his previous DPI Water Department supervisor, believing that a transfer to a different division might help Mr. Monteiro improve his job performance. He specifically coached Mr. Monteiro at the time of the transfer about his work ethic. Commissioner Labelle regarded Mr. Perez as a highly responsible supervisor and had hoped that Mr. Perez would give Mr. Monteiro a new opportunity for a “fresh start” and instill in him the same sense of pride and dedication that Commissioner Labelle saw in Mr. Perez. (*Testimony of Labelle*)

18. By letter dated December 18, 2014, following the hearing before him, Commissioner Labelle concluded that Mr. Monteiro had demonstrated that he “did not understand or did not care”

to make the improvements required of him to perform his job safely and with proper attitude. He terminated Mr. Monteiro from employment, effective immediately, for the reasons previously stated in the hearing notice. (*Exh. 11a; Testimony of Labelle*)

19. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be discharged for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.” G.L.c.31,§41.

A person aggrieved by such a decision may appeal to the Commission under G.L.c.31,§43.

“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.” G.L.c.31,§43,¶2

Under Section 43, the Commission makes a de novo review “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

G.L.c.31, §43 also vests the Commission with "considerable discretion" to affirm, vacate or modify the discipline imposed by an appointing authority, although that discretion is "not without bounds" and requires sound and reasoned explanation for doing so. See Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority")

"[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of

similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’ [Citations]”

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

ANALYSIS

New Bedford has shown by a preponderance of the evidence that it had just cause to discharge the Appellant, Kevin Monteiro, from his position as an MEO for his negligent performance on December 9, 2014, putting his own safety and those of his coworkers at risk, and which followed a recent history of discipline for similar incidents of substandard work.

First, Mr. Monteiro’s actions on December 9, 2014 demonstrated a level of inattention and failure to follow instructions that fell well below the standard that New Bedford could reasonably expect of him and established just cause for imposing discipline. Mr. Monteiro was a long-term New Bedford employee with more than a year of experience working as an MEO with the Cemetery Division. In the course of this work, he came to learn the procedures to be followed when operating the department’s pickup truck to “take down” the burial equipment after a funeral. He had been told by his supervisors that he should not drive the pickup truck into gravesites when the ground was soaked unless plywood had been placed down to protect the property. He also had learned that the older sections in the cemetery, such as Section 14, were to be handled with special care and only light-duty machines were used on those sections.

In view of his prior training and experience, there was no justification for Mr. Monteiro’s decision to drive the pickup truck onto Section 14, especially in a heavy rain without any plywood down. Mr. Perez explained that there was ample room to pull the truck off the cemetery driveway directly onto the plywood down in Section 15 and there was no reason to drive the truck across the

driveway onto Section 14 in order to get a better “line” to back into Section 15. My view of the cemetery confirmed Mr. Perez’s testimony.

Mr. Monteiro then continued his careless operation of the pickup truck as he backed into Section 15. He had just had Mr. Perez help pull him out of the mud in Section 14. It was raining heavily and Mr. Monteiro’s boots were wet and muddy. He knew Mr. Perez was walking behind the truck as he began backing into Section 15. All of these factors mandated an especially high degree of care in maneuvering the truck between the rows of headstones to the gravesite. Instead, Mr. Monteiro managed to perform an operation never before seen, letting his foot slip from the brake to the accelerator causing the truck to speed up and come to rest dangling above the grave. He just missed hitting Mr. Perez. New Bedford was fully justified to conclude that such conduct, especially by a presumably experienced Cemetery Department MEO, is inexplicable and unacceptable.

Mr. Monteiro contends that there were no written rules prohibiting driving trucks onto Section 14 and no signs, walls or barriers preventing vehicles from entering that section. He also claimed that he had never been told that trucks were not supposed to be driven on those older sections. Mr. Monteiro is correct that there were no formal rules, signs or barriers in place, but I do not credit his testimony that he did not know about the nature of these older sections and first learned after the incident on December 9, 2014 that only light-duty vehicles, but not pickup trucks, were used in those sections. I also do not credit Mr. Monteiro’s testimony that he thought he needed to drive onto Section 14 in order to properly maneuver the truck back into Section 15. Mr. Perez credibly testified, and my view confirmed, that the truck could have been maneuvered, if done with care, directly into Section 15 from the cemetery driveway. There was no apparent reason that Mr. Monteiro needed to pull the truck off the driveway fully into Section 14 and again back up across the driveway into Section 15. He also knew that driving on any grounds that were soaked wet

required protective plywood to be put down. I am not persuaded that his failure to follow these common sense rules is excused merely because he never received notice of them in writing.

Second, Mr. Monteiro did establish that the only actual damage he did on December 9, 2014 was to cause ruts and wheel marks on the grass in Section 14, which he subsequently repaired and reseeded. He also established that similar damage has been caused by other cemetery employees from time to time. Thus, although Commissioner Labelle's termination letter had concluded that Mr. Monteiro had caused damage to city property and private property, in fact, the only damage was to the grass. The absence of proof of further damage, however, does not diminish the degree of Mr. Monteiro's negligence. I credit Mr. Perez's testimony that had the truck's path varied just slightly, the entire truck would have fallen into the grave and Mr. Perez could have been seriously hurt. That the actual damage was less than might have been done, does not diminish the fact that Mr. Monteiro's neglect constitutes "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service."

Third, I am not persuaded by Mr. Monteiro's argument that his termination was an excessive "gut" reaction by Commissioner Labelle and was not warranted for what Mr. Monteiro calls a "foot slip in the rain" that did no serious damage to person or property. Commissioner Labelle acknowledged that he "knew" Mr. Monteiro well, primarily because of his prior incidents of poor performance, but Commissioner Labelle was quite clear that his decision was based on a thoughtful consideration of the incident itself (with the lapse of care, not just the damage it caused, as his primary concern), together with the entire work history, which led to his conclusion that Mr. Monteiro either "did not understand" or "did not care" to change his poor work performance. I note that Mr. Monteiro did show that he was able to perform satisfactorily at times in the past. The criticism of his work ethic and performance in the past year and a half, however, was not based on

Commissioner Labelle's personal judgment alone, but was documented by multiple supervisors. He had already been transferred once to give him a "fresh start". No direct evidence of animus or bias was introduced and no reasonable inference is warranted in that respect.

Fourth, after concluding that New Bedford established just cause to impose discipline, I also considered whether the decision to terminate Mr. Monteiro should be modified. I have found that the facts established before the Commission are substantially the same as those relied upon by Commissioner Labelle in his termination letter, save for the degree of damage that Mr. Monteiro caused on December 9, 2014. After weighing this limited factual discrepancy, together with Mr. Monteiro's recent history of careless behavior over the immediately preceding year and a half, I conclude that the Commission should not exercise its discretion to modify the penalty imposed by the appointing authority and Mr. Monteiro's termination as a New Bedford MEO should stand.

CONCLUSION

For the reasons stated, the appeal of the Appellant, Kevin Monteiro, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan and Stein, Commissioners) on September 1, 2016.

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:

Philip Brown, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)