COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

JIMMIE MORGAN,
Appellant

v.

D1-13-155

TOWN OF BILLERICA,
Respondent

Appearance for Appellant:

James T. Dangora, Jr., Esq.
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566 Boston Road
Billerica, MA 01821

Appearance for Respondent:

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Commissioner:

Cynthia A. Ittleman

DECISION

On June 26, 2013, the Appellant, Jimmie Morgan, (Mr. Morgan), pursuant to G.L. c. 31, § 43[1], filed an appeal with the Civil Service Commission (Commission), contesting

[1] Mr. Morgan, via counsel, filed this appeal solely under the provisions of Section 43 regarding whether there was just cause for the termination. He did not submit an appeal under Section 42 to contest any alleged procedural errors related to such issues as whether Mr. Morgan received his termination notice in a timely manner after the local hearing, etc. For this reason, Mr. Morgan may not, as he attempts to do in his post-hearing brief, now take issue with any alleged procedural violations. Even if he could, I have not found that any procedural errors occurred and, even if they did, that they would not have prejudiced Mr. Morgan in any way, a perquisite for prevailing on an appeal filed under Section 42. Rather, any "delay" in terminating Mr. Morgan only *benefited* Mr. Morgan, allowing him to continue to receive Town-sponsored health insurance and to accrue sick and vacation time.

the decision of the Town of Billerica (Town) to terminate him from his position as a Heavy Motor Equipment Operator (HMEO).

On July 30, 2013, a pre-hearing conference was held at the offices of the Commission. On October 16, 2013, I held a full hearing at the same location.[2] The full hearing was digitally recorded and both parties were provided with a CD of the recording.[3] I entered thirty (30) joint exhibits at the hearing. As part of the hearing, I asked counsel for Mr. Morgan to provide me with a copy of Mr. Morgan's application for disability retirement which was subsequently submitted and marked as Exhibit 31. The parties submitted post-hearing briefs on December 4, 2013. Via subsequent email communication, I received a status update from the parties regarding the status of Mr. Morgan's disability retirement application.

FINDINGS OF FACT

Based on the exhibits, the testimony of:

Called by the Town:

- John C. Curran, Town Manager;

Called by Mr. Morgan:

- Jimmie Morgan, Appellant;
- Wayne O'Loughlin, Town employee & Local Union President;

[2] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.
[3] 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 substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

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

1. Mr. Morgan is forty-two (42) years old. He is divorced, has four (4) children and is a disabled Army veteran. (Testimony of Mr. Morgan)
2. Mr. Morgan was first hired by the Town in November 2001. After a break in service in 2005, he was rehired as a HMEO in January 2005. (Testimony of Mr. Morgan and Exhibit 1)
3. Mr. Morgan had various work-related injuries that resulted in absences from work. (Testimony of Mr. Curran and Mr. Morgan and Exhibits 3 & 4)
4. Mr. Morgan was out of work due to work-related injuries beginning in September 2012. His orthopedic surgeon submitted documentation to the Town stating that he saw Mr. Morgan on September 7, 2012 and that he (Mr. Morgan) should be excused from work *from* September 7, 2012 *to*: "to be scheduled for surgery." (Testimony of Mr. Morgan and Exhibit 4)
5. On October 19, 2012, the Town's DPW Director wrote to Mr. Morgan explaining that he would soon exhaust his accrued vacation and sick time and thereafter would be on unpaid status pending the disposition of a workers compensation claim that had been filed by Mr. Morgan. (Exhibits 5 and 30)
6. The Town did not allow Mr. Morgan to accrue sick and vacation time while he was on leave. (Testimony of Mr. Morgan)
7. Subsequent to the full hearing before the Commission, the Town acknowledged that it was an error to not allow Mr. Morgan to accrue sick and vacation time while he was

on leave and sent him a payment of $5,394.18 for sick and vacation time that Mr. Morgan should have been allowed to accrue between September 2012 and his eventual termination in June 2013. (Town Post-Hearing Brief)

8. On November 6, 2012, Mr. Morgan underwent shoulder surgery. His orthopedic surgeon completed an updated form stating that Mr. Morgan should be excused from work from September 7, 2012 to "further notice". (Exhibit 7)
9. On November 28, 2012, the Town's DPW Director wrote to Mr. Morgan stating in relevant part: "You have been out on Workers Compensation[4] since September 6, 2012. The Town is in need of the services provided by your position; accordingly the Department of Public Works is considering filling the HMEO position due to our staffing shortage and needs. If you can provide a date of your return to work, we will consider that date and determine whether or not we need to move forward filling the position at this time. Please respond in writing with your return to work date by December 5, 2012 if you are interested in maintaining your position." (Exhibit 8)
10. On December 3, 2012, Mr. Morgan penned a letter to the DPW Director stating in relevant part: "I am interested in keeping my position. Unfortunately as you know I am under a doctors (sic) care and my return date is not definite as of yet." (Exhibit 9)
11. On December 13, 2012, the Town Manager sent Mr. Morgan a letter that stated in relevant part: "Please be advised that pursuant to Chapter 31, Section 41 of the Massachusetts General Laws a hearing has been scheduled for December 20, 2012 at 11:00 A.M. in the Town Manager's office in Town Hall for the purpose of determining whether or not just cause exists to either remove or replace you from

[4] At the time of the DPW Director's letter, the Town was actually contesting Mr. Morgan's application for worker's compensation.

your position … The issue to be considered in this hearing concerns the fact that you have been absent from work since September 6, 2012 and apparently your medical providers have no idea when, or if, you will be able to return to work. We have held your position open since September 6, 2012 but the Department Head needs your position filled." (Exhibit 11)

12. By mutual agreement, the hearing scheduled for December 20, 2012 was re-scheduled and held on January 3, 2013. (Exhibit 11 and Testimony of Mr. Curran and Mr. Morgan)
13. The January 3, 2013 hearing was left open for Mr. Morgan to provide any additional medical documentation regarding his ability to return to work. (Testimony of Mr. Curran)
14. On January 24, 2013, the Department of Industrial Accidents (DIA) allowed Mr. Morgan's workers compensation claim (which had been contested by the Town) and ordered the Town's insurer to pay Mr. Morgan workers compensation benefits (60% of his gross salary) retroactive to September 7, 2012. (Exhibit 12)
15. On May 6, 2013, the DPW Director sent a letter to Mr. Morgan ordering Mr. Morgan to provide him with a letter from his treating physician indicating whether Mr. Morgan was cleared to return to work, or, if not, an estimate of when Mr. Morgan would be able to return to work. (Exhibit 19)
16. On May 13, 2013, Mr. Morgan hand-delivered a letter to the DPW Director stating that he was under the impression that the Town's workers compensation insurer was providing him with status updates on his medical condition. Mr. Morgan attached notes from his orthopedic surgeon, including notes dated May 6, 2013. Those notes

state in relevant part that "I told the patient I think [there] is a good chance he is not going to be able to return to work doing heavy labor, but right now it is only 6 months after surgery and will be another 4 to 6 months before maximum medical improvement …. I will see him again in 4 to 6 weeks for repeat exam … He will remain out of work until further notice." (Exhibit 20)

17. On June 11, 2013 Mr. Morgan signed an "Application for Disability Retirement" which was submitted to the Commonwealth's Public Employee Retirement Administration Commission (PERAC). (Exhibit 31)
18. The PERAC application states in relevant part: "In order to receive a disability retirement allowance, a member must be permanently and totally disabled from performing the essential duties of his/her position." (Exhibit 31)
19. As part of his application with PERAC, Mr. Morgan submitted a "Treating Physician's Statement" from his orthopedic surgeon. The orthopedic surgeon checked "yes" to the following question: "Is the applicant mentally or physically incapable of performing the essential duties of his or her particular job?" The orthopedic surgeon also checked "yes" to the question: "Is the condition for which the applicant seeks disability retirement likely to be permanent?" (Exhibit 31)
20. The Town Manager was unaware, at the time, that Mr. Morgan had filed a disability retirement application with PERAC. (Testimony of Mr. Curran)
21. On June 17, 2013, the Town Manager notified Mr. Morgan in writing that he was terminated. The termination letter stated, in its entirety:

"Dear Mr. Morgan:

As you know, several weeks ago a hearing was conducted for the purpose of determining whether or not you should be removed from your employment with the Department of Public Works. As you know, you have been absent from work since August 27, 2012 as a result of a Workers Compensation claim you filed. Please note that this decision does not in any way impact your right to file and pursue a Workers Compensation claim. Rather, this decision is solely based on the DPW's need to fill your slot in order to efficiently perform the work that must be done by the DPW.

At your hearing you requested additional time to provide medical information on your return to work. I granted your request and keep the hearing record open for this purpose. While you did provide me with a letter from a physician, this letter does not indicate that you will be able to return to work now or any time in the near future. Since that time you have not submitted anything further. At your hearing, Mr. Alkhatib explained both the need to fill your position and the fact that he had attempted to find a suitable temporary worker but had been unsuccessful in finding a suitable replacement.

Accordingly, at this time I have decided to remove you from your employment with the Town effective immediately so that Mr. Alkhatib may promptly fill your position. Please note that you should notify me if, and as soon as, you are medically cleared to return to work for Billerica. If you are medically cleared to return to work, you will be re-appointed as soon as your position or a similar position opens up.

Should you have any comments or questions on this correspondence, please contact me. I wish you the best and look forward to your return to employment when your condition allows.

Sincerely,

John C. Curran, Town Manager" (Exhibit 21)

22. The Town, at the time it terminated Mr. Morgan, failed to provide him with notification of his rights to COBRA[5], as required by law. (Town Post-Hearing Brief)

[5] I take administrative notice that a federal government website states that COBRA is, "[a] Federal law that may allow you to temporarily keep health coverage after your employment ends, you lose coverage as a dependent of the covered employee, or another qualifying event. If you elect COBRA (Consolidated Omnibus Budget Reconciliation Act) coverage, you pay 100% of the premiums, including the share the employer used to pay, plus a small administrative fee." https://www.healthcare.gov/glossary/cobra/ (September 17, 2015)

23. Mr. Morgan's Town-sponsored family health insurance plan was terminated shortly after his termination from employment. His children were placed on MassHealth via their mother. Mr. Morgan did not obtain health insurance, explaining that he would obtain any emergency care, if needed, through the Veterans Administration. (Testimony of Mr. Morgan)

24. The applicable collective bargaining agreement (CBA) between the Town and the local union does not provide for light duty in the DPW. (Stipulated).

25. On February 24, 2014, Mr. Morgan's disability application was approved by PERAC. (Post-hearing email communication)

Legal Standard

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 (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 (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).

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. However, "[t]he 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. Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

Analysis

At the time of his termination on June 17, 2013, Mr. Morgan was unable to perform the duties and responsibilities of HMEO. This is supported by: a) his own testimony; b)

the medical documentation he provided to the Town shortly before his termination; and c) the medical documentation that he completed, prior to his termination, in regard to his disability retirement application with PERAC.

The medical documentation submitted to PERAC also stated that the physical condition that prevented Mr. Morgan from performing his duties was likely to be permanent. Although the Town Manager was unaware of the PERAC application at the time of his decision, it is relevant information that can be considered as part of this de novo proceeding. (See Leominster v. Stratton, 58 Mass.App.Ct. 726 (2003).

It is undisputed that, subsequent to his termination, Mr. Morgan's disability retirement application was approved by PERAC, based on the opinions of multiple physicians. Finally, the parties stipulated that "light duty" is not provided for in the CBA and is not permissible in the DPW based on past practice.

An appointing authority may terminate an employee who is medically incapable of performing his position. See Bracket v. Gloucester Housing Authority, 10 MCSR 127 (1997)(termination of maintenance worker who was unable to work because of back problems, receiving workers compensation and filed an application for disability retirement) and Hilton v. Dept. of Employment and Training, 10 MCSR 247 (1997)(termination of employee who was unable to work because of chronic fatigue and receiving workers compensation).

The facts in the instant appeal are distinguishable from the facts in Rivera v. Department of Correction, 26 MCSR 502 (2013), in which Mr. Rivera's termination was reversed subject to a physical exam based on doubts raised by differing medical reports

whether Mr. Rivera could perform the essential functions of the job.[6] In Rivera, there was a dispute at the time of the hearing regarding whether Mr. Rivera could perform the duties and responsibilities of a correction officer. Here, there is no such dispute. Mr. Morgan was unable to perform the duties and responsibilities of HMEO as of September 2012; he was unable to perform such duties at the time of the hearing before the Commission and at all time in between.

Consistent with the Commission's decisions in Bracket and Hilton, Mr. Morgan's undisputed inability to perform the duties and responsibilities of his job constitutes just cause for terminating him.

The crux of Mr. Morgan's case appears to be that, based on the Town's past practice, the Town should have allowed Mr. Morgan to stay on the Town's payroll so he could continue collecting his Town-sponsored family health insurance benefits. To do so, according to Mr. Morgan, would not impede the productivity of the DPW and would be a more fair and equitable path for the Town to take.

Here, I don't believe the Town was required to prove that keeping the position vacant impeded the efficiency and operation of the DPW in order to show just cause for terminating Mr. Morgan. Rather, as referenced above, the undisputed fact that Mr. Morgan was unable to perform his job duties constitutes just cause for terminating him. Even if that were the standard, however, it appears self-evident that operating a division within the DPW with fourteen, instead of fifteen, employees, would result in less productivity. If it didn't, that would raise the natural question of why the position should be filled at all.

[6] The Rivera v. DOC, 26 MCSR 502 (2013) decision also held that that Mr. Rivera was not entitled to back pay prior to taking the new medical exam. Id.

Based on the testimony of a witness called by Mr. Morgan, it was also established that filling this vacancy through a temporary appointment, even if such a decision was within the purview of the Commission, was not feasible. Individuals with the licenses and certifications to be a HMEO are highly sought after and it is highly unlikely that the Town would be able to recruit such an individual for a temporary position that could end at any time, without any civil service protections.

While Mr. Morgan and another witness alluded to other cases where the Town may have waited a longer period of time to terminate someone who was out of work and collecting workers compensation, it was not established that the facts in those cases were identical to the one here.

Although Mr. Morgan argues (or more accurately, suggests) that the Town's decision to terminate him may have been influenced by the fact that he served as a union steward, there was no evidence to establish that. To the contrary, I credit the testimony of the Town Manager that it played no role in his decision.

While it can be argued that a more fair, equitable and compassionate outcome here would have been to allow Mr. Morgan to maintain his active employment status and maintain his Town-sponsored family health insurance plan, such an outcome is not required by the civil service law and the Commission does not have the authority to substitute its judgment for that of the appointing authority in this regard.

Finally, counsel for Mr. Morgan argues in his post-hearing brief that the Town's decision to terminate Mr. Morgan deprives him of the re-employment rights afforded to individuals who are separated based on disability under G.L. c. 31, § 39 (civil service law) and G.L. c. 152, § 75A (workers compensation law). This is contrary to the stated

position of the Town and my reading of the applicable statutes. In fact, the Town has written that, if and when Mr. Morgan receives medical clearance, he "will be reappointed" to the next available HMEO or similar position.

In summary, Mr. Morgan's inability to perform the essential functions of his job constitutes just cause for his termination.

Conclusion

For the reasons stated above, Mr. Morgan's appeal under Docket No. D1-13-155 is hereby ***denied***.

Civil Service Commission

/s/ Cynthia Ittleman
Cynthia A. Ittleman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on October 1, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
James Dangora, Esq. (for Appellant)
Daniel Brown, Esq. (for Respondent)