

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

SCOTT NADILE,
Appellant

v.

D1-07-69

CITY OF SOMERVILLE,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Scott Nadile (hereafter "Nadile" or "Appellant"), pursuant to G.L. c. 31, § 43, filed a timely appeal with the Commission on January 31, 2007 claiming that the City of Somerville (hereafter "City" or "Appointing Authority") did not have just cause to terminate him as a Laborer / Special Heavy Equipment Operator on January 22, 2007.

A pre-hearing conference was conducted on April 12, 2007 and a full hearing was conducted over two days on June 19, 2007 and July 12, 2007 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. All witnesses, with the exception of the Appellant, were sequestered.

Three (3) tapes were made of the hearing

FINDINGS OF FACT:

Four (4) Exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Jason Fucile, Laborer, Somerville DPW;
- Dan Hardy, Laborer, Somerville DPW;
- Stanley Koty, Commissioner, Somerville DPW;

For the Appellant:

- Scott Nadile, Appellant;

I make the following findings of fact:

1. The Appellant, Scott Nadile, was a tenured civil service employee of the City of Somerville. He is 27 years old and had been employed by the City of Somerville for just over one (1) year as a Laborer / Special Heavy Equipment Operator prior to being terminated on January 22, 2007. (Testimony of Appellant)
2. The Appellant appeared mild-mannered, well-dressed and soft-spoken during his testimony before the Commission. (Testimony, Demeanor of Appellant)

3. Jason Fucile, the Appellant's co-worker, was hired by the City, also as a laborer, in March 2006, approximately three months after the Appellant was hired. Mr. Fucile is a more rugged, "rough-around-the-edges" individual who also appears to be in his mid-twenties. (Testimony of Appellant and Fucile)
4. It is undisputed that the Appellant and Mr. Fucile struck up a friendship of some sort shortly after Mr. Fucile was hired in March 2006. According to both men, they would socialize after work, at times with a larger group and at times just the two of them. (Testimony of Appellant and Fucile)
5. It is also undisputed that approximately 3-4 months prior to the incident in question which resulted in the Appellant's termination, Mr. Fucile, while he was out with co-workers one Friday night, called the Appellant on the phone and, based on misinformation, accused the Appellant of speaking badly about him (Mr. Fucile) to their co-workers. (Testimony of Appellant and Fucile)
6. While both the Appellant and Mr. Fucile testified before the Commission regarding the specifics of the above-referenced phone call, I credit the Appellant's testimony regarding what was said during this phone call as it was consistent and plausible. Specifically, the Appellant testified that Mr. Fucile, during this phone conversation, stated words to the effect, "I heard you were talking shit about me; don't fuck with me". (Testimony of Appellant)
7. Subsequent to the above-referenced phone call, Mr. Fucile learned that the Appellant had actually not been speaking badly about him. According to Mr. Fucile, he told the Appellant about his mistake at some point and "made it right" with him. (Testimony of Fucile) The Appellant testified that Mr. Fucile never spoke to him about having

received misinformation and that Mr. Fucile never apologized to him for the late-night phone call. (Testimony of Appellant)

8. Both the Appellant and Mr. Fucile agree that their friendly relationship ended after the above-referenced phone conversation. (Testimony of Appellant and Fucile) The Appellant testified that subsequent to the phone conversation, he just “tried to stay away from [Fucile].” (Testimony of Appellant)
9. Sometime in November 2006, the Appellant was told by another co-worker that Mr. Fucile had told fellow employees that he didn’t like the way the Appellant “carried himself”. (Testimony of Appellant) Mr. Fucile, during his testimony before the Commission, did not dispute making the above-referenced comment. However, Mr. Fucile testified that his comment was in reference to what he (Fucile) considered to be the Appellant’s poor work ethic. (Testimony of Fucile) The Appellant testified that he took the comment to mean that Fucile was criticizing the way he dressed and the music he listened to. (Testimony of Appellant)
10. On January 3, 2007, the day before the January 4, 2007 incident, the Appellant, while at work, received a call on his cell phone from Mr. Fucile at approximately 10:30 A.M. According to the Appellant, Mr. Fucile questioned why the Appellant had left collected Christmas trees near the “chipper”, instead of running them through the “chipper”. (Testimony of Appellant)
11. On January 4, 2007, both the Appellant and Mr. Fucile were working their regular shifts and were separately assigned to collecting and “chipping” Christmas trees. The first time they spoke to each other on this day is when the two men returned to the DPW facility after lunch. (Testimony of Appellant)

12. During the above-referenced post-lunch break encounter, the Appellant testified that he was getting into a DPW truck when he was approached by Mr. Fucile, who angrily told the Appellant, "If you have something to fucking say to me, be a man and say it to my face." According to the Appellant, he (the Appellant) responded by telling Mr. Fucile that he didn't know what he was talking about and that he didn't have a problem with Mr. Fucile. Again according to the Appellant, Mr. Fucile then stated that he (Fucile) was not someone to be "fucked with" and that he would "blow [the Appellant] the fuck up". (Testimony of Appellant) During his testimony before the Commission, Mr. Fucile acknowledged having a heated conversation with the Appellant after their lunch break for which another co-worker felt the need to intervene. However, Mr. Fucile said he couldn't remember what was said during this conversation. (Testimony of Fucile)
13. In regard to the above-referenced post-lunch break encounter, I again credit the testimony of the Appellant. Mr. Fucile's testimony that he couldn't recall what he said during this encounter was not plausible, particularly considering that Mr. Fucile was able to offer detailed testimony regarding his recollection of most other events during his testimony before the Commission. His lapse of memory appeared to this Commissioner to be self-serving and an attempt to avoid portraying himself in a bad light.
14. The next time the Appellant saw Mr. Fucile on January 4, 2007 was at the DPW facility at approximately 4:00 P.M, at which time both men concluded their shifts and signed out with their co-workers. The Appellant saw Mr. Fucile inside the DPW facility but they did not have any conversation at that time. (Testimony of Appellant)

15. After signing out for the day, the Appellant walked out of the DPW facility with Dan Hardy, another co-worker. Mr. Hardy also testified before the Commission as a witness for the Appointing Authority. (Testimony of Appellant and Hardy)
16. Both the Appellant and Mr. Hardy then walked to their respective cars, each parked on the opposite side of the road in front of the DPW facility, facing opposite directions. (Testimony of Appellant and Hardy)
17. It is undisputed that Mr. Fucile subsequently left the DPW facility (separately from the Appellant and Hardy) and proceeded to get into the passenger side of a vehicle driven by his girlfriend. It is also undisputed that the automobile of Mr. Fucile's girlfriend was parked several car lengths back from the Appellant's, facing the same direction as the Appellant's automobile.
18. According to the Appellant, he got into his automobile and sat in the driver's seat and began changing CDs in his CD player. (Testimony of Appellant)
19. According to the Appellant, there was one truck parked in front of his automobile and no automobiles parked directly behind him. Again according to the Appellant, he backed up his automobile, putting some room between his automobile and the truck in front of him so that he could pull his automobile out onto the road. The Appellant testified that as he was beginning to pull his automobile out onto the road, an automobile pulled up directly next to him, facing the same direction. (Testimony of Appellant)
20. The Appellant testified that he saw Mr. Fucile in the passenger seat of the vehicle that had pulled up next to him (with the passenger window down) and Mr. Fucile's girlfriend in the driver's seat. According to the Appellant, he (the Appellant) rolled

his window down at which time Mr. Fucile stated to him, “You’re not worth me losing my job over, but I’ll kill you if it comes down to it.” (Testimony of Appellant)

21. The Appellant testified that he plays several recreational sports with his friends and occasionally keeps sports equipment, including basketballs and a baseball bat, in his automobile. (Testimony of Appellant)

22. The Appellant, after hearing Mr. Fucile’s comments, opened the driver’s side door of his automobile, retrieved a baseball bat from the back of his automobile and, according to the Appellant’s direct testimony, “hit his (Fucile’s girlfriend’s) car.” Later during his direct testimony the Appellant clarified that he hit the automobile “a couple times”. Asked during direct testimony why he took this action, the Appellant stated, “Based on previous incidents with Mr. Fucile, and the threats that he made, I was afraid of what was going to happen. And where he blocked me in to my parking spot, I had no idea what his intentions were. I just thought they were going to be bad based on comments made towards me. And, like I said, the fact that he blocked me in.” Asked during cross-examination why he didn’t back up his automobile and leave, the Appellant stated, “I reacted on how I was feeling with the incidents that occurred...he frightened me.” The Appellant also testified on cross-examination that Mr. Fucile never attempted to get out of the automobile he was in. (Testimony of Appellant)

23. The Appellant acknowledged during his testimony that his actions were inappropriate and that he regretted what he had done. (Testimony of Appellant)

24. Asked during cross-examination to clarify how many times he struck the automobile on the day in question, the Appellant stated, “I’d say three times at the most; even

four; it could have been more to be quite honest with you.” Also during cross-examination, the Appellant stated that he still doesn’t remember ever striking the Appellant (in addition to the automobile) with the baseball bat, “but, according to medical records, I did.” (Testimony of Appellant)

25. During his testimony before the Commission, Mr. Fucile testified that the Appellant, in addition to striking his girlfriend’s automobile with a baseball bat, struck his elbow and then his leg with the baseball bat as he (Mr. Fucile) was trying to pull away from the striking bat. Mr. Fucile, who testified that he was “nervous” at the time, then instructed his girlfriend to drive away, which she did. (Testimony of Fucile)

26. Dan Hardy, whose truck was parked across the street, testified that he witnessed the altercation and saw the Appellant strike Mr. Fucile with the baseball bat as Mr. Fucile was trying to avoid the blows by moving his body toward the driver’s side of the automobile. (Testimony of Hardy)

27. Two days after the incident, the Appellant was charged with assault and battery and destruction of property over \$250. (Testimony of Appellant)

28. The above-referenced criminal charges were dismissed on the condition that the Appellant reimburse Mr. Fucile for the cost of automobile repairs and medical bills, totaling \$888.00. According to the Appellant, those payments have now been made. (Testimony of Appellant) Neither party introduced any exhibits regarding these charges or the court’s disposition of this matter.

CONCLUSION

The role of the Civil Service 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 Commission, 43 Mass. App. Ct. 300,304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Appellant is a polite, well-spoken 27-year old Somerville resident. While all Appellants try to present themselves in a positive light when appearing before the Commission, I found no false pretense about the Appellant and found his expression of regret regarding the incident in question to be sincere.

Notwithstanding the polite and sincere demeanor of the Appellant, it is undisputed that he engaged in an inexplicable act of violence, striking an automobile with a baseball bat up to four or more times. Further, based on the testimony of the witnesses, including the Appellant himself, I conclude that the Appellant also struck his co-worker, who was a passenger in the vehicle, with the baseball bat, hitting the co-worker on the elbow and leg.

The Appellant argues that his actions were taken in self defense after the co-worker in question, Jason Fucile, threatened him. While I conclude that Mr. Fucile did indeed make the comments that the Appellant attributed to him, there is still no justification for the violent acts of the Appellant. The Appellant had several more appropriate options available to him to address the threatening comments of Mr. Fucile, including, but not

limited to, bringing his concerns to the attention of a supervisor or law enforcement officials. While that course of action may appear naïve to some veteran members of the DPW, it is far more reasonable than the actions taken by the Appellant. Further, in regard to the day of the violent incident in question, I reject the Appellant's argument that he was "trapped" into a parking spot with limited options available to him. Specifically, both men were in their respective automobiles when Fucile made the threatening comments. It was the Appellant who responded by getting out of his automobile, pulling out a baseball bat and violently striking both Mr. Fucile and the car he was traveling in. The Appellant's own testimony confirms that no automobiles were parked behind him. Moreover, the fact that the Appellant was able to get out of his automobile and retrieve the bat illustrates that he had the ability to simply walk away and report Fucile to an appropriate supervisor. The Appellant took none of these reasonable steps. Rather, in an act that is inconsistent with the outwardly calm, mature manner of the Appellant, he engaged in violent behavior. There is no place for such violence in the workplace and, therefore, no place for Scott Nadile in the City of Somerville's Department of Public Works.

On a final note, while it is beyond the Commission's scope, this Commissioner was dismayed that the City did not also seek to terminate Jason Fucile, who I conclude did indeed make life threatening comments to the Appellant. Exhibit 1 includes the report of the City's hearing officer regarding the disciplinary hearing conducted by the City. In that report, the hearing officer, who is also the City's personnel director, dismissively states, "It is hearsay whether or not Scott Nadile and Jason Fucile were involved in any prior verbal encounters as alleged." By not exercising greater diligence and actually

making a determination as to whether or not Fucile did indeed threaten the Appellant's life, the City has inexplicably turned a blind eye to employee misconduct.

For all of the above reasons, the City has proven by a preponderance of the evidence that there was just cause to terminate Scott Nadile and there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the penalty imposed. Therefore, the Appellant's appeal under Docket No. D1-07-69 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis, Commissioners [Taylor – Absent]) on August 2, 2007.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:

Mark A. Hickernell, Esq. (for Appellant)

Jason R. Powalisz, Esq. (for Appellant)

John G. Gannon, Esq. (for Appointing Authority)