

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

THOMAS E. O'CONNOR,
Appellant,

v.

Docket No.: D1-11-61

NEWTON PUBLIC SCHOOLS,
Respondent

Appellant's Attorney:

F. Robert Houlihan, Atty.
Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446

Respondent's Attorney:

Donnalyne B. Lynch Kahn, Atty.
City Solicitor- City of Newton
City Hall
1000 Commonwealth Avenue
Newton, MA 02459

Commissioner:

Daniel M. Henderson

DECISION

Appellant Thomas E. O'Connor (hereafter "O'Connor" or "Appellant"), pursuant to M.G.L. c. 31, §§ 42-43, is appealing from the decision of the Appointing Authority, Newton Public Schools claiming that the Newton Public Schools, (hereafter "Newton") did not have just cause for terminating him from his position as Junior Custodian with the Newton Public Schools.

At the time of his termination, Appellant was subject to two prior disciplinary Settlement Agreements where he agreed to refrain from "any argumentative or other confrontational verbal outbursts directed at his supervisors, co-workers or others," and also agreed that if he did engage

in such behavior he was subject to immediate termination after a Civil Service hearing determined just cause for said action.

The Appellant filed a timely appeal at the Civil Service Commission (hereafter "Commission"). A full hearing was held at the Commission offices of the, on July 6, 2011. The hearing was digitally recorded. As no notice was received from either party, the hearing was declared private. The parties submitted post-hearing proposed decisions.

At Appellant's request, all witnesses were ordered sequestered with the exception of Appellant.

Twenty-two (22) Exhibits were entered into evidence.

Eight witnesses testified on behalf of the Appointing Authority:

- Christina Bibbo, City of Newton Parks & Recreation Department;
- Officer Thomas DeStefano, City of Newton Police Department;
- Aran Oppenheim, City of Newton Parks & Recreation Department;
- Officer Amanda Schlegel, City of Newton Police Department;
- Sergeant Frank Foley, City of Newton Police Department;
- Colette Duffy, City of Newton Parks & Recreation Department;
- Paul Anastasi, City of Newton School Department; and
- Mike Cronin, Chief of Operations-City of Newton School Department.

Two witnesses testified on behalf of Appellant:

- Appellant Thomas O'Connor; and
- Nancy Holczer, City of Newton School Department.

Based on the 22 exhibits and a Stipulation and the testimony above listed witnesses, I make the following findings of fact:

FINDINGS OF FACT

1. Appellant was a tenured civil service employee of the City of Newton. He had been employed by the Newton Public Schools for twenty-six and one-half (26 ½) years as a Junior Custodian prior to being terminated on February 15, 2011. He has been assigned during the relevant time of this appeal to the Newton North High School (“NNHS”), the Mon.-Fri, 11PM-7:30AM shift. (Testimony of Appellant).

Appellant’s Disciplinary Record:

2. Michael Cronin, the Chief of Operations for the Newton School Department testified in a very direct, knowledgeable and professional manner. His position calls for him to be in charge of general overall maintenance; and the Appellant’s ultimate supervisor. He has firsthand knowledge and familiarity with the Appellant’s personnel file and employment history, including his performance and disciplinary background. He has dealt with the Appellant directly on many of these matters. He described how the Appellant approached him requesting assignment to overtime details due to the Appellant’s “financial hardship”. As a result of this request, Cronin did exercise his discretion and allowed the Appellant’s reassignment to overtime details, by letter dated March 26, 2010. The incident provoking this discipline occurred on Saturday, January 22, 2011, an overtime detail. (Exhibit 14, testimony of Michal Cronin)
3. Michael Cronin displayed an excellent memory for detail. Yet, he did not volunteer extraneous or unresponsive answers, even if advantageous to Newton’s position. He answered precisely and accurately without the need to later revise his answers. He held up exceptionally well under cross-examination. His demeanor including eye-contact and language evidenced credible and accurate answers. I did not detect any bias or favoritism

or other untoward overtone in his testimony. He readily admitted that the Appellant had been a good producer or performer of custodian tasks. I find his testimony to be reliable and credible. (Exhibits, testimony and demeanor of Michael Cronin).

4. Appellant has a prior record of disciplinary actions taken against him by the Appointing Authority, dating back to at least 1990. (Exhibits 8-12, testimony of Michael Cronin).
5. Newton submitted documentation indicating that on March 19, 1990, Appellant “threw a milk carton at a student in the [school] cafeteria, used abusive language toward the student, and then challenged him [the student] to a fight.” (Exhibit 8, testimony of Michael Cronin).
6. Newton submitted documentation indicating that on June 12, 1991, Appellant “argued with [his] supervisor . . . and yelled at him when he told [Appellant] to get to work.” (Exhibit 8, testimony of Michael Cronin).
7. Newton submitted documentation indicating that on June 10, 1992, Appellant concurred with the school principal that he had “spoken to a student on the cafeteria on June 3, 1992 in a rude and demeaning manner.” Appellant was then “transferred to third shift (11:00 p.m. to 7:30 a.m.) in order to remove [him] from any contact with students.” (Exhibit 8 testimony of Michael Cronin).
8. Newton submitted documentation indicating that on November 21, 1995, Appellant “argued with [his] supervisor” about working overtime shifts. Appellant, during the argument, “pointed [his] finger at [the supervisor] and spoke in a loud voice. . . . [and] continued to follow [the supervisor] down Main Street and argue with him while he was trying to walk away from this confrontation.” (Exhibit 8, testimony of Michael Cronin).

9. Newton submitted documentation indicating that on September 20, 22, 26-29 and October 2-3, 1995, Appellant “was absent from work without permission . . . while . . . under house arrest after [his] arraignment in District Court.” As a result of this arraignment, Appellant pled guilty to “assault and battery with a dangerous weapon (tub and wall), assault with a deadly weapon (BB gun), and possession of a Class D substance (marijuana).” (Exhibit 8, testimony of Michael Cronin).
10. On September 11, 1996, Appellant entered into a settlement agreement, (hereinafter, the “1996 Settlement Agreement”), for the conduct referenced in paragraphs 3-7 above. (Exhibit 7, testimony of Michael Cronin).
11. The 1996 Settlement Agreement contained the following pertinent disciplinary actions: Appellant served a six month suspension with no pay; was returned to “the back shift at Newton North High School (NNHS)” and was required to “remain on the back shift [11PM-7:30AM] at NNHS unless and until the parties agree that he can bid out to a different assignment”; was required to complete a “weekly counseling program for batterers” and periodic reports from his treating physician; and agreed to “refrain from any argumentative or other confrontational verbal outbursts directed at his supervisors, co-workers, or others.” The 1996 Settlement Agreement states at para. 5.- that “...the next incident involving argumentative or other confrontational verbal outbursts directed at his supervisors, co-workers or others shall constitute just cause for dismissal. Accordingly, Mr. O’Connor and the Union agree that, if such argumentative or other confrontational outbursts directed at his supervisors, co-workers or others is alleged, any disciplinary proceedings will be limited to the issue of whether the argumentative or other confrontational verbal outbursts occurred; if such conduct or noncompliance is

proven, termination is the appropriate penalty.” (Emphasis added)(Exhibit 7, testimony of Michael Cronin).

12. Newton submitted documentation indicating that on February 9, 2007, Appellant was involved in a verbal altercation with a group of young high school girls in the lunchroom at Newton South High School. (Exhibit 6 testimony of Michael Cronin).
13. The School Principal set up a meeting with the Appellant and a complaining student to discuss the February 9, 2007 incident. The Appellant was accused of misconduct toward a student including using the F-word several times and being very angry and confrontational. The Appellant denied using the F-word despite several students reporting that he had. However, he did admit that he was angry and claimed he had a right to defend himself. The School principal cautioned the Appellant about this incident and pattern of behavior. She referred him to a previous similar incident, which occurred in December, 2006. It is noted that in the meeting to discuss the February 9, 2007 incident the Appellant became angry, raised his voice and leaned forward toward the Principal; prompting the Principal to end the meeting and asking the Appellant to leave the office. The Principal wrote Michael Cronin: “It is my recommendation that [O’Connor] not work around children. He has demonstrated behavior that is angry and explosive. He shows no remorse or apology for his outburst.”(Emphasis added) (Exhibit 6, testimony of Michael Cronin)
14. On June 20, 2007, Appellant entered into a settlement agreement, (hereinafter, the “2007 Settlement Agreement”), for the conduct referenced occurring on February 9, 2007, above. (Exhibits , 6 & 7, testimony of Michael Cronin)

15. The 2007 Settlement Agreement contained the following pertinent disciplinary actions: Appellant served an unpaid suspension from May 9, 2007 to June 22, 2007; was “assigned to the back shift at NNHS . . . so as to minimize or eliminate his contact with children and staff members”; and agreed to ineligible “for overtime assignments, except in the sole discretion of Chief of Operations Michael Cronin or his designee.” The 2007 Settlement Agreement also explicitly incorporates by reference the 1996 Settlement Agreement, which includes the language regarding argumentative and confrontational outbursts referenced in paragraph 9 above. (Exhibit 5).

January 22, 2011 Incident:

16. On Saturday, January 22, 2011, Appellant was scheduled to work an overtime shift at Newton North High School (hereinafter, “NNHS”). (Testimony of Appellant).

17. Mr. Cronin authorized Appellant’s overtime work pursuant to the terms of the 2007 Settlement Agreement after considering a request from Appellant, due to the Appellant’s claim of “financial hardship”. (Testimony of Mr. Cronin).¹

18. Appellant discovered an injured hawk on the ground near the gym entrance of NNHS. (Testimony of Appellant). Appellant located Mr. Oppenheim, a member of the City of Newton Parks & Recreation Department, and requested that Mr. Oppenheim contact the Massachusetts Society for the Prevention of Cruelty to Animals (“MSPCA”). (Exhibit 3).

19. Mr. Oppenheimer relayed the request to Ms. Bibbo, a member of the City of Newton Parks & Recreation Department, she contacted the Newton Police Department on the

¹ The 2007 Settlement Agreement states in pertinent part that Appellant “will not be eligible for overtime assignments, except in the sole discretion of Chief of Operations Michael Cronin or his designee.” (Exhibit 5, ¶ 5).

business line after concluding that it was unlikely that the MSPCA would travel to Newton on a Saturday. (Exhibit 1; Testimony of Ms. Bibbo).

20. Ms. Bibbo went outside the NNHS building to wait for the police when Appellant approached her from behind and began yelling at her for calling the Newton Police instead of the MSPCA. She asked Appellant to stop yelling, but he continued and began making “aggressive forward movements” towards her, at one point getting within two feet of her face. (Exhibit 1). During his outburst, Appellant called Ms. Bibbo an idiot. (Exhibit 1; Testimony of Ms. Bibbo, Appellant). Appellant admitted that he was yelling at Ms. Bibbo when he called her an idiot. (Testimony of Appellant).
21. Officer Thomas DeStefano of the Newton Police Department responded to a call regarding an injured animal at NNHS. (Exhibit 4; Testimony of Officer DeStefano). Upon arrival, Officer DeStefano witnessed the Appellant yelling at Ms. Bibbo and commanded that he discontinue using his very loud voice. (Exhibit 4; Testimony of Officer DeStefano). Appellant continued to yell at Ms. Bibbo for calling the police and not the MSPCA. (Exhibit 4). The altercation drew the attention of passersby entering NNHS. (Testimony of Officer DeStefano). At Officer DeStefano’s request, Ms. Bibbo went back into NNHS (Testimony of Ms. Bibbo), where she was crying and appeared “visibly shaken up.” (Exhibits 1, 3; Testimony of Mr. Oppenheim).
22. Appellant resumed yelling at Officer DeStefano, using profanity (F-word). (Testimony of Officer DeStefano). Officer DeStefano told Appellant that he “would be subject to possible arrest” if he continued. There were at least ten people within earshot as the Appellant was yelling. (Exhibit 4; Testimony of Officer DeStefano). Officer DeStefano “perceived these actions to be disruptive to the public peace.” (Exhibit 4). After clearing

the call with Dispatch, Officer DeStefano remained on site to offer assistance to the Animal Rescue League of Boston and prevent the occurrence of a further breach of the peace by Appellant. (Testimony of Officer DeStefano).

23. Later that afternoon, while Ms. Bibbo was working in the Parks & Recreation classroom at NNHS, Appellant “stationed himself” across the hall from the classroom. (Exhibit 3). Appellant proceeded to stare and make faces at Ms. Bibbo. (Exhibit 1; Testimony of Ms. Bibbo, Ms. Duffy). Ms. Bibbo asked Appellant to stop staring at her and to leave her alone, stating, “You’ve already upset me once and made me cry. Leave me alone.” (Exhibit 1; Testimony of Ms. Bibbo, Ms. Duffy). Appellant admitted to standing and staring at Ms. Bibbo. (Testimony of Appellant).

24. Mr. Oppenheim tried to intercede; however, Appellant then began mocking Mr. Oppenheim, asking if he “hurt his feelings” and continued his mantra of insisting that the MSPCA should have been called and not the Police. (Testimony of Mr. Oppenheim). Appellant then “aggressively approached” him, making a “threatening advance into [his] private space.” (Exhibit 3). Ms. Bibbo was visibly shaking and crying again because of the Appellant’s actions. (Exhibit 3). She called 911 because she was scared and “did not know what Tom O’Conner [sic] would do.” (Exhibit 1, Testimony of Ms. Bibbo).

25. Sergeant Frank Foley and Officer Amanda Schlegel of the Newton Police Department responded to a 911 call concerning a “verbal dispute” between City employees at NNHS. (Exhibit 4). Upon arrival, Sergeant Foley spoke with Appellant, while Officer Schlegel took statements from the Parks & Recreation Department employees. (Testimony of Sergeant Foley, Officer Schlegel).

26. Appellant was moving down a hallway in NNHS when Sergeant Foley approached to discuss the incident with him. (Testimony of Appellant). Sergeant Foley, in an attempt to “quell the situation,” explained to Appellant that Ms. Bibbo probably did not know who to call regarding the hawk, so she called the police. (Testimony Sergeant Foley). Appellant was still agitated about the police being called, and he continued to tell Sergeant Foley that Ms. Bibbo did not listen to him in regarding his directive to call the MSCPA. (Exhibit 4; Testimony Sergeant Foley). In his discussion with Appellant, Sergeant Foley felt that the situation would only continue if he left, so he asked Appellant to contact his supervisor. (Testimony of Sergeant Foley).
27. Sergeant Foley contacted Mr. Anastasi, Appellant’s supervisor. (Testimony of Sergeant Foley). Mr. Anastasi arrived and discussed the situation with Sergeant Foley. (Testimony of Sergeant Foley, Mr. Anastasi). While they were talking, Appellant yelled out “I’m already guilty.” (Testimony of Mr. Anastasi). Mr. Anastasi sent Appellant home for the remainder of the weekend. (Testimony of Sergeant Foley, Mr. Anastasi). After informing Mr. Anastasi that he was scheduled to work additional overtime, Appellant left the premises. (Testimony of Mr. Anastasi, Appellant).
28. The Animal Rescue League of Boston (ARLB) not the MSPCA responded to the scene and removed the injured hawk, after the ARLB was called by the Newton Police Department’s Officer Geary. Officer Geary was there at the scene. He has experience dealing with animal situations and knew that the MSPCA was not open on Saturday. Officer DeStefano waited in his cruiser for ARLB to arrive. While waiting he could hear the Appellant continue his yelling, so he rolled up the window of his cruiser to block the noise. (Testimony of Officer DeStefano)

29. Newton's witnesses: Christina Bibbo, Aran Oppenheim, Officer Thomas DeStefano, Officer Amanda Schlegel, Sergeant Frank Foley, Collette Duffy, Paul Anastasi and Michael Cronin all testified directly, responsively and in an unembellished manner. I have previously described Michael Cronin's testimony in detail and I also find these other witnesses to be similarly sound. They all held up well under cross-examination. The police personnel were especially unflappable. They each described their observations and exchanges so as to provide a complete and consistent picture of the events that day. They corroborated each other's testimony where capable. Ms. Bibbo testified at times displaying spontaneous emotion at recalling the events. Even at this later date she seems genuinely upset at the memory of these events. I also find that Ms. Bibbo was emotionally upset by the Appellant's verbal and physical behavior toward her. I find that under the circumstances of this incident that her reaction was reasonable. I find all Newton's witnesses to be credible and reliable. (Testimony and demeanor of the named Newton witnesses).

30. The Appellant, Thomas O'Connor testified. He displayed more concern for the injured hawk than his fellow employees. Why he expected that his directive to Oppenheim to telephone the MSPCA would be explicitly followed, instead of him making the call directly, was not explained. Why he continued to harangue a young woman, Ms. Bibbo, for not following his directive, long after the situation was concluded, was not explained. Ms. Bibbo and Mr. Oppenheim acted reasonably and appropriately in addressing the injured hawk situation by contacting the Newton Police Department. Ironically, the NPD determined that ARLB and not the MSPCA was the proper agency to contact on a Saturday. The Appellant employed many ruses to deflect responsibility here. He claimed

that he didn't yell at Ms. Bibbo, but she yelled and screamed at him. He claimed that the problem was prompted by his confronting Ms. Bibbo regarding smoking outside the building. Ms. Bibbo denied smoking or any conversation with him about smoking. He claimed that he "zipped my lip" as soon as Officer DeStefano warned him. He initially denied staring at Ms. Bibbo from the hallway, through the glass door of the classroom as a provocation or confrontation. He claimed that he was not aware of it. Yet his cross-examination and query from this hearing officer thoroughly debunked this claim. The Appellant appeared nervous and backtracked frequently under cross-examination. He denied confronting anyone that day. Basically, he claimed that all of Newton's witnesses were wrong and he was right. He denied using the F-word to Officer DeStefano. However, he did admit calling Ms. Bibbo an idiot and taunting Oppenheim with "did I hurt your feelings". Finally, he did admit having problems with his temper. Substantially the Appellant's testimony lacks reliability or credibility. (Testimony and demeanor of Appellant)

31. Nancy Holczer, a Newton Public School employee is a social worker in the "Newton Partnership". She was called by the Appellant as a witness in this matter. On Saturday, January 22, 2011 she was at NNHS to supervise a "Mentoring Program" for the Big Brother and Big Sister organizations. It was a "swim & gym & ice cream" party, in which she matched 6-12 year olds with high school students. (Testimony of Nancy Holczer)
32. Holczer arrived at Tiger Drive outside NNHS by automobile that day, at approximately 2:50 PM, as the program was scheduled for 3:00-5:00 PM. She arrived to deliver coolers and other items. Her husband followed her in another vehicle. She did observe the Appellant standing outside near the hawk, at that time and he "seemed edgy". There was

“definitely a lot of tension that day”. She was “in a rush” and “breezed by very quickly”. She proceeded to the gym to meet and greet parents and students, of which there were 70 matched pairs or 140 students. She moved around a lot, in the gym, the hallway and the locker room. (Testimony of Nancy Holczer)

33. Holczer did not remember seeing police officers or police cruisers that day, of which there were approximately 2-4 cruisers at various times. She did not see an MSPCA or Animal Rescue League vehicle that day. There seemed to be some yelling but the Appellant was not yelling when she was there. She heard Ms. Bibbo speaking loudly on the telephone. She had hired a custodian for her program that day and the Appellant was that custodian. She needed tables and went to the Appellant, “at some point” for the tables. She saw the Appellant, at various times, up and down the hallway that day. (Testimony of Nancy Holczer)

34. Holczer was very busy and distracted during the time of these events on January 22, 2011. She missed observing many overt events, which other witnesses testified to and corroborated. None of her testimony contradicted or showed inconsistency in the testimony of any of Newton’s witnesses. She appeared not to have been a percipient witness to the relevant and material events testified to by the other witnesses. (Testimony and demeanor of Nancy Holczer, reasonable inferences)

35. On or about January 25, 2011, Appellant was placed on paid administrative leave pending a hearing. (Exhibit 13).

36. On or about January 28, 2011, the Appointing Authority forwarded Appellant a Notice of Hearing, scheduled for February 4, 2011. (Exhibit 16). The date of the hearing was changed twice, and Appellant was notified of each date change. (Exhibits 17-18).

37. On or about February 11, 2011, the Appointing Authority held a hearing. (Exhibits 16-18). Both Appellant and his counsel attended the hearing. (Exhibit 22).
38. On or about February 15, 2011, Appellant was terminated from his position as Junior Custodian with the Newton Public Schools. (Exhibit 22).
39. The Appellant was on duty and acted in his capacity as a custodian, on NNHS property during this entire incident. He was paid for this overtime detail through his employer, Newton Public Schools (NPS). He held himself out as a custodian. He exerted authority and gave directives to Oppenheim and Bibbo as if they were co-workers. Oppenheim, Bibbo and Duffy although employees of the City of Newton Parks & Recreation Department were at the NNHS, with the authority and approval of the NPS. They were conducting activities which were in conjunction with and related to NPS business and certainly activities in the Newton public interest. These named employees and the named Newton Police Department employees are reasonably and expectedly included in the general category of City of Newton employees. The members of the public who observed or potentially observed the Appellant's behavior are also to be considered in the context of this incident. ((Exhibits, testimony and reasonable inferences)
40. The Appointing Authority concluded that, based on the evidence and testimony presented at the hearing, Appellant engaged in "conduct unbecoming" by making "argumentative, loud, and confrontational outbursts as well as intimidating behavior towards co-workers, which created an intimidating and hostile working environment" This behavior violated both the 1996 and 2007 Settlement Agreements. In addition, Appellant engaged in "conduct unbecoming in violation of the Newton Public Schools Harassment Policy." Independently, the Appellant's behavior that day, under the circumstances found here,

standing alone provide the Appointing Authority with sound and sufficient reason to terminate his employment. (Exhibit 22, Exhibits, testimony and reasonable inferences).

CONCLUSION

Section 42 Appeal

Under G.L. c. 31, § 42, a tenured civil service employee may file a complaint with the Civil Service Commission (the “Commission”) if the appointing authority failed to follow the procedural requirements outlined in c. 31, § 41—providing the employee with “a written notice ... which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five” and a full hearing.

In order to succeed on a § 42 claim, the Commission must find that the Appointing Authority “failed to follow” the requirements of § 41 and that the failure to follow the requirements prejudiced the Appellant. G.L. c. 31, § 42; see also Foley v. Bos. Police Dep’t, D-07-148 & D-07-235, Civil Serv. Comm’m (2009) (citing cases); Encarnacion v. Merit Rating Bd., D1-07-236, Civil Serv. Comm’m (2009) (finding procedural error, but Appellant not prejudiced); Lacet v. Bos. Police Dep’t, D-05-4, Civil Serv. Comm’m (2008); Ouillette v. City of Cambridge, D-03-123, Civil Serv. Comm’m (2006).

Failure of the Appointing Authority to include violation of the harassment policy as a specific reason for the termination in the Notice of Hearing did not prejudice Appellant because Appellant had sufficient and specific notice that his described behavior on January 22, 2011 was unacceptable, and in violation of Newton’s employee behavior policies regardless of whether the Appointing Authority also concluded that Appellant was in violation of the Harassment Policy. Moreover, the Harassment Policy did not provide the only basis for termination. Appellant also violated the terms of both the 1996 and 2007

Settlement Agreements. The Settlement Agreements explicitly state that “the next incident involving argumentative or other confrontational verbal outbursts directed at his supervisors, co-workers or others shall constitute just cause for dismissal.” (Exhibits 5, 7).

Section 43 Appeal

The role of the Commission is to determine, by a preponderance of the evidence, 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 Serv. Comm’m, 43 Mass.App.Ct. 300, 303 & n.3, *rev. denied*, 426 Mass. 1102 (1997); see also Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956); City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev. denied*, 440 Mass. 1108 (2003); Police Dep’t of Bos. v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, *rev. denied*, 726 N.E.2d 413 (2000); McIsaac v. Civil Serv. Comm’m, 38 Mass.App.Ct. 473, 477 (1995); City of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev. denied*, 390 Mass. 1102 (1983).

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 correct rules of law.” City of Cambridge v. Civil Serv. Comm’m, 43 Mass.App.Ct. 300, 304 (quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928), *rev. denied*, 426 Mass. 1102 (1997); see also Comm’rs of Civil Serv. v. Mun. Ct. of Bos., 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.” Sch. Comm. of Brockton v. Civil

Serv. Comm'm, 43 Mass.App.Ct. 486, 488, *rev. denied*, 426 Mass. 1104 (1997); see also Murray v. Justices of the Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983).

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 the action taken against an Appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Serv. Comm'm, 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 [C]ommission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision.” Arria, 16 Mass.App.Ct. at 334; see Stratton, 58 Mass.App.Ct. at 727-28.

Appellant has a protracted history of progressive discipline. All of Appellant’s disciplinary infractions are related to his inability to control his temper and inability to refrain from engaging in confrontational and argumentative behavior in the presence of co-workers, supervisors, students and others.

The January 22, 2011 incident is very serious, especially in the context of the Appellant’s past disciplinary history and the restraining or cautionary effect it should have had on the Appellant’s behavior. It appears that although the Appellant might be an effective and productive worker; he occasionally lacks restraint and self-discipline, when dealing with others. His loud, confrontational and aggressive manner can be offensive and frightening to a young female employee like Ms. Bibbo. It can also be disruptive, irritating and concerning to experienced police officers like Officers Schegel and DeStefano and even a Police Sergeant, Frank Foley. The Appellant was not especially cooperative with any of these police

personnel, who were all in uniform and there to address the situation. Officer DeStefano tried to intervene when the Appellant was yelling at Ms. Bibbo, outside the building. Ms. Bibbo was then directed to return inside the building. The Appellant then began yelling at Officer DeStefano, including the use of the F-word, within earshot of at least ten people. Officer DeStefano had to caution the Appellant that he was causing a breach of the peace and could be arrested. The Appellant continued his intimidating, provocative and confrontational behavior later inside the building with Aran Oppenheim and Ms. Bibbo. The Appellant's unwillingness or inability to disengage and quietly retreat from his disruptive and confrontational behavior over a significant period of time is very troubling.

The January 22, 2011 incident is the latest in a long line of verbal altercations and hostile outbursts Appellant has had with City employees and students, all of which adversely affect the public interest and impair the efficiency of public service. The Massachusetts Appeals Court has acknowledged that progressive discipline policies are "designed to correct employee misconduct by informing the employee of the consequences of such misconduct and imposing incremental discipline." Chief Justice for Admin. & Mgmt. of the Trial Ct. v. Nat'l Ass'n of Gov't Emps./Serv. Emps. Int'l Union, No. 06-P-1234, 2007 WL 1437706, at *2 n.3 (Mass. App. Ct. May 16, 2007) (unpublished).

Violation of a settlement agreement may in and of itself constitute just cause for termination where the settlement agreement does not violate public policy. See Kenney v. Cambridge Housing Authority, 20 MCSR 160 (2007). These two settlement agreements, if not viewed as "last chance agreements", certainly provide specific notice that such recurring misbehavior will not be tolerated and could result in his loss of employment. Neither the 1996 Settlement Agreement nor the 2007 Settlement Agreement offends public policy.

Appellant has retained his appeal rights, as evidenced by his current appeal to this Commission. Cf. Kenney, 20 MCSR 160 (2007).

In light of Appellant's argumentative and confrontational behavior with City employees in the presence of members of the public on January 22, 2011, and Appellant's extensive progressive disciplinary history of argumentative and confrontational behavior towards supervisors, co-workers and students, the Appointing Authority has demonstrated by a preponderance of the credible evidence in the record that it had sound and sufficient reasons to terminate the Appellant from employment.

Accordingly, for the reasons stated above, the appeal of the Appellant, Thomas E. O'Connor, on Docket No. D1-11-61 is hereby *Dismissed*.

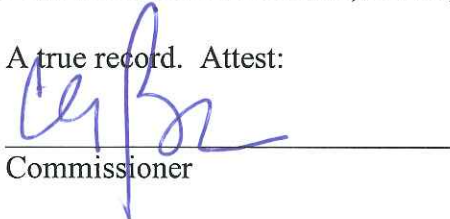
Civil Service Commission,



Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell, Marquis and Stein Commissioners), on September 8, 2011

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. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of MGL c. 31 S. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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 to:

F. Robert Houlihan, Atty. (for Appellant)

Donnalyn B. Lynch Kahn, Atty. (for Respondent)