

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

VICTOR OLIVEIRA,
Appellant

v.

D-09-295

TOWN OF FAIRHAVEN,
Respondent

Attorney for the Appellant:

Michael J. Maccaro, Esq.
AFSCME Council 93
8 Beacon Street, 7th Floor
Boston, MA 02108

Attorney for the Respondent:

Thomas P. Crotty, Esq.
Town Counsel
388 County Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Victor Oliveira (hereinafter “Appellant”) is appealing the decision of the Town of Fairhaven (hereinafter the “Town” or “Appointing Authority”) to suspend him for one (1) day without pay from his employment as a Special Motor Equipment Operator for negligent operation of a backhoe.

The appeal was timely filed. A full hearing was held on February 26, 2010 at the offices of the Civil Service Commission (hereinafter “Commission”). The hearing was declared private as

no party requested a public hearing. The witnesses were not sequestered. The hearing was digitally recorded. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT:

Twenty (20) exhibits were entered into evidence at the hearing. Based on the documents submitted into evidence and the testimony of:

For the Appellant:

- Victor Oliveira, Appellant

For the Respondent:

- William A. Fitzgerald, Jr., Superintendent, Department of Public Works

I make the following findings of fact:

1. The Appellant, Victor Oliveira, a permanent civil service employee of the Town, has been employed as a Special Motor Equipment Operator in the Town's Department of Public Works since July 11, 2005. (Testimony of Appellant)
2. On July 26, 2007 the Appellant passed the Massachusetts 2B4E Examination and became licensed to operate hoisting equipment, including front-end loaders and backhoes. (Exhibit 8)
3. A backhoe is a four-wheel vehicle with a pneumatically operated bucket attached to the front. The bucket can be raised or lowered to perform different tasks. It also has a pneumatically operated shovel on the rear of the vehicle, commonly used for trenching. (Testimony of Appellant, Testimony of Fitzgerald, Exhibit 11)
4. On May 22, 2009 the Appellant reported to work and began his assignment of operating a backhoe to bring landscaping equipment from the Department of Public Works facility to a work site on Cottonwood Street. (Testimony of Appellant, Exhibit 11)

5. The Appellant assisted with the loading of equipment onto the bucket of the backhoe, and drove six (6) miles to the work site. (Testimony of Appellant, Exhibit 11)
6. The bucket was raised between 12-18 inches while carrying the load to the work site.
(Testimony of Appellant)
7. On arriving at the work site, the Appellant lowered the bucket to the ground, and tilted it forward to allow the work crew to remove the equipment. (Testimony of Appellant)
8. The Appellant then slightly raised the bucket, enough to prevent dragging on the ground, and drove the backhoe back on to Cottonwood Street at a speed of five (5) miles per hour.
(Testimony of Appellant)
9. The Appellant observed a manhole cover raised approximately one and half inches above the ground. He proceeded forward and struck the bottom of the front bucket onto the side of the manhole cover. He had travelled about one hundred (100) feet down the street when he struck the manhole cover. (Testimony of Appellant, Testimony of Fitzgerald, Exhibit 16).
10. The collision with the manhole cover resulted in \$18, 606.37 worth of damage to the backhoe. (Exhibit 11)
11. The Division of Inspection's Hoisting License exam states that a bucket should be carried low enough for visibility and stability, and high enough to avoid obstacles. It recommends that a loaded bucket be carried between 12-18 inches off the ground. There is no specific height recommendation for an empty bucket. (Exhibit 16)
12. On June 16, 2009 the Town notified the Appellant of an Executive Session scheduled for June 22, 2009 to discuss the backhoe collision and possible disciplinary action. (Exhibit 3)
13. At the Executive Session the Appellant stated that he needed more training and that it was only his second time operating a backhoe. (Exhibit 3)

14. On June 23, 2009 the Town issued a one (1) day suspension without pay for negligent operation of a backhoe. (Exhibit 3)
15. The Appellant filed an appeal with the Commission on June 30, 2009.
16. The Appellant has previously been involved in the following four incidents involving the operation of Town vehicles:
 - a. On August 24, 2007 the Appellant received a verbal warning for backing into a telephone pole while operating a town vehicle. (Exhibit 13).
 - b. On October 17, 2007 the Appellant received a letter of warning for hitting a telephone pole while operating a town vehicle. (Exhibit 13)
 - c. On December 14, 2007 the Appellant was involved in an accident while operating a town vehicle. (Exhibit 14)
 - d. On August 12, 2008 the Appellant was involved in an accident while operating a town vehicle. (Exhibit 15)

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." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997). See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); 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 Civ. Serv. 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 by impairing the efficiency of public

service.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm’n, 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. Falmouth v. Civil Serv. Comm’n, 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 Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

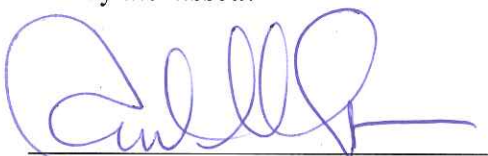
The Respondent has shown by a preponderance of the evidence that it had reasonable justification for issuing a one (1) day suspension without pay to the Appellant for negligent operation of a backhoe. The Appellant acknowledges that he saw the raised manhole cover before striking it and yet he did not lift the bucket of the backhoe to avoid collision. The manhole cover was only raised one and a half inches above the ground, so had the bucket been raised even as little as 4-6 inches it would have cleared the obstacle and prevented this accident.

I find merit in the Appellant's argument that he was new to the equipment and did not have adequate training, and that the Town is not without some responsibility for failing to provide that training. However, it seems imprudent as a matter of common sense to only provide an inch or two of clearance knowing that there is a raised obstacle ahead, especially if one is unfamiliar with the equipment.

Moreover, this is not the first time the Appellant has shown carelessness in his operation of a Town vehicle. Considering the totality of the circumstances here, I find that the Town was reasonably justified to conclude that, while a lack of training may have contributed to the accident, the Appellant is not the prudent operator he should be. His lack of familiarity with the backhoe is as much a signal for him to use extra care as it is an excuse. Also, his previous history of incidents with Town vehicles suggests that progressive discipline is appropriate.

The Department has met its burden and proven by a preponderance of the evidence that there was just cause to suspend the Appellant. Moreover, I find that there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him.

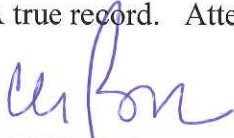
For all of the above reasons, the Appellant's appeal filed under Docket No. D-09-295 is hereby *dismissed*.



Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell, and Stein, Commissioners) on December 16, 2010.

A true record. Attest: .



Commissioner

Commissioner McDowell was
absent on December 16, 2010.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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 to:

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