COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

GERALD OUILLETTE

Appellant

v.

D-03-123

CITY OF CAMBRIDGE

Respondent

Appellant's Representative:

Pro Se
Gerald Ouillette, Jr.
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Respondent's Attorney:

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Commissioners:

Christopher C. Bowman

DECISION

The Appellant, Gerald Ouillette, Jr. (hereafter "Ouillette" or "Appellant"), pursuant to G.L. c. 31, §§42 and 43, filed an appeal with the Commission on February 3, 2003 claiming that the City of Cambridge (hereafter "City" or "Appointing Authority") did not

have just cause (Section 43 appeal) to suspend him for five (5) days from the Water Department for insubordination and that the City failed to issue him a timely decision, provide proper notice or provide him with a fair hearing (Section 42 appeal) regarding the disciplinary action.

The appeal was timely filed. A hearing was held on August 4, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Both parties declined the option to have witnesses sequestered.

Two tapes were made of the hearing and both parties subsequently submitted post-hearing briefs in the form of proposed decisions. The Appellant also filed a "Motion to Submit Newly Discovered Evidence" on September 11, 2006, evidence which he alleges was intentionally not made available to him until after the time of the hearing. The document in question, a settlement agreement regarding a Labor Relations Commission case, was signed and dated by the Appellant on July 25, 2006, more than one week prior to the hearing before the Commission. Moreover, the proposed exhibit would not alter the Commission's decision on this appeal, which, at its core, involves the principle of "obey now, grieve later".

FINDINGS OF FACT:

21 Exhibits were entered into evidence (Appointing Authority: 1-3; 5-7; 12-14; Appellant: 4; 8-9; 15-21; Joint: 10-11). Based upon the documents entered into evidence and the testimony of:

For the City of Cambridge:

- Steven S. Corda, Managing Director of Cambridge Water Department;

For the Appellant:

- Gerald Ouillette, Appellant;

I make the following findings of fact:

1. The Appellant, Gerald Ouillette, is a tenured civil service employee of the City of Cambridge in the position of Water Treatment Plant Operator within the Water Department. He had been employed by the City for approximately 2 years when he was suspended for five (5) days on November 13, 2002. (Testimony of Appellant and Exhibit 1)
2. The Appellant has also served as the local union steward for Teamsters Local 25 since October 7, 2001. (Testimony of Appellant)
3. Steven "Sam" Corda is the Managing Director of the Cambridge Water Department and has held that position for the past six years. He held other management and engineer positions with the City of Cambridge and Town of Holliston during the prior nine (9) years. (Testimony of Corda)
4. As Managing Director, Corda is responsible for the operation of five divisions within the Water Department including eight (8) water treatment plant operations. (Testimony of Corda)
5. On March 9, 2001, the newest water treatment plant went on-line, the Walter J. Sullivan Water Purification Facility, and the intent was to make it a "fully-automated" facility which could eventually be operated remotely. Although that option was available, Corda initially continued the normal staffing coverage of two treatment plant operators for each shift. (Testimony of Corda)

6. On September 10, 2002, Corda issued a memorandum to treatment plant operators stating that, effective September 7, 2002, the Sullivan Facility would be operated by a single treatment plant operator on certain weekend and holiday shifts. (Testimony of Corda and Exhibit 12)
7. Corda testified that the local union was adamantly opposed to this plan to operate a plant with only one treatment plant operator. (Testimony of Corda)
8. Prior to the new staffing plan, treatment plant operators were allowed to swap shifts with each other as long as they notified management of the schedule change. If, for some reason, the person who agreed to cover the shift was subsequently unavailable, the person initially assigned to the shift was required to work the shift. (Testimony of Corda and Appellant)
9. After the start of the single treatment plant operator coverage on weekends and holidays, problems developed with the informal system of swapping shifts among treatment plant operators and a lot of shifts ended up not being filled. (Testimony of Corda)
10. On October 11, 2002, Corda issued a memorandum to all treatment plant operators which stated in part, " …the Water Department's intent to continue to enforce its rule that Water Department Plant Operators must arrange for coverage before receiving approval to take planned time off." Corda's memorandum further stated in part, "…we will regard any continuation of inability to arrange for coverage, and/or threats not to report to work if denied use of vacation time, as insubordinate behavior and as a withholding of services to the public. These actions violate the City of Cambridge

Standards of Conduct and any future repeat of such conduct may result in disciplinary action up to an including long-term suspension or discharge." (Exhibit 13)

11. Corda testified before the Commission that his October 11, 2002 memorandum didn't "fix the problem" and problems regarding unfilled shifts persisted. (Testimony of Corda)
12. On November 4, 2002, Corda issued another memorandum eliminating the informal system of shift-swapping among treatment plant operators and stated in part, "Effective immediately, management, typically through Jim Rita, will be scheduling all operator work shifts (emphasis added)…As always, in an emergency the Department will require individuals to work as needed to make it through the particular situation with minimal impact to individuals and the City." (Exhibit 14)
13. On November 4, 2002, Bob Luthe, a treatment plant operator, called in sick and indicated that he would be unable to work a shift which began at 7:30 P.M. on November 6, 2002. (Testimony of Corda and Appellant)
14. Mr. Luthe, the employee who called in sick, was scheduled to work on November 6, 2002 as a result of agreeing to a previous shift-swap request of Corey Bonfati, another treatment plant operator who was originally scheduled to work the November 6, 2002 shift but wanted to take vacation time. (Testimony of Corda and Appellant)
15. Approximately six weeks prior to November 4, 2002, Corda had written a memorandum to Bonfati expressing his concern that Bonfati failed to cover his originally-scheduled shift after the employee who agreed to his request for a shift-swap was subsequently unavailable. (Exhibit 16)

16. Consistent with Corda's November 4, 2002 memorandum, Jim Rita, Water Department supervisor, was now faced with the responsibility of insuring coverage for the November 6, 2002 shift for which Luthe called in sick.
17. Jim Rita determined that two treatment plant operators, Bob Cashman and the Appellant, each had a shift off immediately prior to the 7:30 P.M. shift on November 6, 2002 and therefore were the best people to work the shift. Since Cashman had already worked overtime recently, Rita opted to require the Appellant to work the November 6, 2002 shift. (Testimony of Corda)
18. Under cross-examination by the Appellant, Corda was unable to explain why Rita did not rescind the vacation time of Bonfati, who was originally scheduled to work the shift, and require him (Bonfati) to cover the November 6, 2002 shift. During re-direct, he reiterated that, as of November 4, 2002, he had issued a memorandum explaining that management would now be responsible for making decisions regarding shift coverage. (Testimony of Corda)
19. The Appellant was working at the water plant on the morning of November 5, 20002 and his shift was scheduled to end at 8:50 A.M. that morning. (Testimony of Appellant)
20. Sometime during the morning of November 5, 2002, a meeting took place which was attended by Corda, at least two other treatment plant operators and the Appellant. The Appellant testified that Corda told the employees that he (Corda) needed to gain control. The Appellant, at the time of the meeting, responded by telling Corda, "you have to do what you have to do." (Testimony of Appellant)

21. Either during or after that meeting on the morning on November 5, 2002, Supervisor Jim Rita told the Appellant that Luthe had called in sick for the November 6, 2002 shift, scheduled to begin at 7:30 P.M. on November 6th, and that he (the Appellant) was required to cover the shift. (Testimony of Appellant)
22. The Appellant testified that he told Jim Rita, "I can't work it; I have a school commitment with my daughter." (Testimony of Appellant)
23. Exhibit 21 is a letter from the Appellant's daughter's teacher indicating that a parent-teacher conference was scheduled for 2:40 P.M. on November 6, 2002. (Exhibit 21)
24. The Appellant returned to the Water Department that night (November 5, 2002), to work a pre-scheduled shift beginning at 7:30 P.M. on the night of November 5, 2002 and ending at 8:50 A.M. on the morning of November 6, 2002. (Testimony of Appellant)
25. On the morning of November 6, 2002, Managing Director Corda told the Appellant that he was required to work the shift beginning at 7:30 P.M. that night (November 6, 2002), as previously ordered by Supervisor Jim Rita. (Testimony of Appellant)
26. The Appellant told Corda that he couldn't work and indicated a need to utilize the Small Necessities Leave Act. (Testimony of Appellant)
27. Corda told the Appellant that he would research the Small Necessities Leave Act further and get back to him. (Testimony of Corda)
28. The Appellant's shift concluded at 8:50 A.M. (on November 6, 2002), but he stayed at the plant for approximately one hour to talk with his co-workers. (Testimony of Appellant)

29. The Appellant's commute to his home in Linwood is approximately one hour. He testified that he arrived home at approximately 11:00 A.M. and went to bed after setting the alarm clock for 12:00 Noon. (Testimony of Appellant)
30. The Appellant testified that he got out of bed at 12:00 Noon that day (November 6, 2002), took a shower, and then went to pick up his daughter at 2:00 P.M. (Testimony of Appellant)
31. The Appellant testified that he attended the parent-teacher conference from 2:40 P.M. – 3:40 P.M. that afternoon, arrived home at approximately 4:00 P.M. and went back to bed. (Testimony of Appellant)
32. The Appellant submitted as Exhibit 20 a purportedly verbatim copy of the voice mail message, as transcribed by him, that Corda left on his cell phone voice mail at 12:59 P.M. that afternoon (November 6, 2002). (Exhibit 20)
33. Exhibit 20, as written by the Appellant, states that Corda, in a voice mail message left on the Appellant's cell phone, told the Appellant that: 1) the Appellant is required to get permission in order to take time under the Small Necessities Leave Act; 2) he (Corda) would be willing to waive this requirement if the Appellant faxed a copy of the school appointment letter to him; 3) the Appellant would still be required to return to work after the appointment was concluded; and 4) absent hearing from him prior to 3:00 P.M., the Appellant would not be authorized to take the leave and would be disciplined accordingly. (Exhibit 20)
34. The Appellant testified that he didn't become aware of the voice mail message until 6:00 P.M. that night when his wife came home from work, removed the cell phone from the charger and told him that his cell phone was beeping, indicating a voice mail

message. The Appellant testified that, at the time, he was regularly encountering problems related to cell phone coverage at his home. (Testimony of Appellant)

35. Under cross-examination, the Appellant was unable to explain how the cell phone coverage was apparently no longer a problem at 6:00 P.M, as evidenced by his wife noticing that he had received a voice mail message. (Testimony of Appellant)

36. The Appellant acknowledged during his testimony before the Commission that, even at 6:00 P.M., he still had sufficient time to arrive at work for the 7:30 P.M. shift that night. The Appellant, upon getting the message, did not return Corda's phone call. (Testimony of Appellant)

37. The Appellant testified at the Commission that it was his understanding that only one operator (in this case, himself) was assigned to the shift scheduled to begin that night (November 6, 2002) and that his lack of sleep would prevent him from working the shift. The Appellant testified that he had worked double shifts before, stretching 26 hours, but had been able to do so because he took a nap during part of the shift, as there were two people working the shift. (Testimony of Appellant)

38. The Appellant testified that he believes he was suspended in retaliation for a complaint he filed with the Massachusetts Department of Environmental Protection shortly before this incident alleging that the City of Cambridge was operating a water treatment plant without a "primary operator". (Testimony of Appellant)

39. The Appellant represented himself at the hearing before the Commission --- and put in a respectable performance, including his probing questions of Mr. Corda, his employer. He also did well during his own testimony in response to this Commissioner's series of questions. Under cross-examination, however, the

Appellant became combative. He was cavalier and dismissive and revealed his contempt for the management of the Cambridge Water Department. Asked to explain how he could retrieve messages from a cell phone that was allegedly not working, Mr. Ouillette sarcastically replied to counsel, "c'mon, you're a big boy, you can call your cell phone from your regular phone" and later stated, "I'm not a phone technician" on the same subject. When asked about his contention that he lacked enough sleep to work the shift in question, Mr. Ouillette responded, "You know what? We can get a thousand different studies on sleep deprivation if you want." In response to another straightforward question during cross examination, Mr. Ouillette proclaimed, "If this doesn't get resolved here, we're bringing it to the Attorney General; it's criminal". (Testimony, Demeanor of Appellant)

40. The collective bargaining agreement between the City of Cambridge and Teamsters Local 25 signed on August 7, 2003 and effective for the period July 1, 2002 through June 30, 2005 was submitted as Joint Exhibit 10 and the Employee Manual for all City of Cambridge employees was submitted as Joint Exhibit 11. (Exhibits 10 and 11)
41. The Appellant, who introduced the collective bargaining agreement as an exhibit, did not identify to the Commission, during his opening statement or his testimony, which section of the collective bargaining agreement, if any, he believed the City violated. (Testimony of Appellant)
42. Under cross-examination, the Appellant testified that he is familiar with the labor principle of "obey now and grieve later" and understood that, in this case, it would mean working the shift in question and then filing a grievance. (Testimony of Appellant)

43. On November 13, 2002, the City of Cambridge informed the Appellant in writing that he was being suspended for five days for failing to work as scheduled on November 6, 2002. The letter informed the Appellant of his rights to request a hearing before the Appointing Authority within 48 hours and included G.L. c. 31, §§ 41 – 45 as an attachment. (Exhibit 1)
44. On January 10, 2003, an Appointing Authority's disciplinary hearing was conducted by Cindy Ramsey, Employee Relations Manager for the City of Cambridge. (Exhibit 2)
45. On January 14, 2003, Ms. Ramsey forwarded her findings and recommendation to uphold the five-day suspension to Cambridge City Manager Robert Healy. (Exhibit 2)
46. On January 15, 2003, the City Manager notified the Appellant in writing that he concurred with the hearing officer's conclusions and upheld the five-day suspension. (Exhibit 3)
47. The Appellant filed a timely appeal with the Civil Service Commission. (Civil Service Commission Appeal Form)
48. The Appellant subsequently filed a complaint with the Labor Relations Commission on August 27, 2003 alleging, among other things, that the City of Cambridge had violated provisions of G.L. c. 150E by imposing the 5-day suspension for a total of 66.5 hours rather than 40 hours. (Exhibit 6)
49. The Appellant testified that he had a conversation with then-Civil Service Commissioner Daniel Harrington who told him that a five-day suspension must be carried out over 5 consecutive days and can not exceed 40 hours. (Testimony of Appellant)

50. The Labor Relations Commission dismissed Ouillette's appeal based on it being untimely, but not before writing, "the parties' written submissions establish that the regular workday for an operator is 13.33 hours. Ouillette's November 8, 2001 letter and his September 6, 2002 settlement agreement demonstrate that he was aware the regular workday consisted of a 13.33-hour shift." (Exhibit 6)

CONCLUSION

Section 42 Appeal

G.L. c. 31, § 41 requires the Appellant to be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of the request – in this case, that appears to be November 20, 2002. The Appointing Authority's disciplinary hearing was held on January 10, 2003, approximately six weeks later, one of the procedural issues raised by the Appellant in his Section 42 appeal to the Commission. Further, the Appellant testified before the Commission that he never received written notification of the hearing and was only given a verbal notice by his supervisor two days prior to the hearing.

Counsel for the Appointing Authority argued before the Commission that while there is no evidence of when and how the Appellant was notified of the Appointing Authority's disciplinary hearing, neither the Appellant, nor the attorney who represented him at the Appointing Authority's hearing, objected at the time of the hearing. In regard to the six-week delay, counsel for the Appointing Authority argued that there were ongoing talks between the union and the City, of which the Appellant was aware, that had the potential to obviate the need for a hearing.

G.L. c. 31, §42, requires that the Commission also find that the rights of the Appellant have been prejudiced by the City's failure to meet these procedural requirements before it rescinds the disciplinary action. In this case, the Appellant has failed to demonstrate that he was prejudiced by the six-week delay in scheduling the hearing. In fact, the delay was the result of ongoing talks between the parties. In regard to the lack of written notice of the hearing, it is clear that the Appellant had sufficient time to contact a private attorney who represented him at the Appointing Authority's disciplinary hearing and she did not raise any of these procedurals issues at the time nor did she seek a continuance nor was there any demonstrated prejudice.

For these reasons, the Appellant's appeal under Section 42 is hereby ***dismissed***.

Section 43 Appeal

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 established "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).

In 2002, management of the Cambridge Water Department decided to implement a single operator coverage plan during certain shifts at a recently-automated treatment facility. That decision, which would result in less available shifts for plant operators, was

understandably met with resistance by the local union and its members. The local union – and its members – had every right to grieve the policy and/or the manner in which it was implemented through avenues allowed under the collective bargaining process and complaints to the Massachusetts Labor Relations Commission. They also have a right to file grievances and complaints in other appropriate forums if they believe they have not been afforded their rights under the Family and Medical Leave Act or the state's Small Necessities Leave Act. In this case, however, the Appellant has mistaken that well-established right as permission to willfully disobey an order to report to work for an assigned shift on November 6, 2002.

There is no dispute that an unfilled shift needed to be covered by management as a result of treatment plant operator Bob Luthe calling in sick. There is also no dispute that Mr. Ouilette was ordered to cover that shift. Mr. Ouillette argued that he shouldn't be required to work the shift in question for two reasons. First, consistent with past practice, the Appellant asserts that Corey Bonfati, a treatment plant operator who was originally scheduled to work the shift, but swapped with Luthe, should have been required to forego his vacation day and cover the shift. Second, Mr. Ouillette argued that he shouldn't be required to work the shift in question, which began at 7:30 P.M. on November 6, 2002, because he was scheduled to attend a parent-teacher conference at 2:40 P.M. earlier that day. Ouilette argued that the conference would prevent him from getting enough sleep in between shifts.

While ordering Ouillette, instead of Bonfati, to cover the shift in question, may have been perceived by Ouillette as unfair, it did not justify insubordination by failing to report to work. Any question of whether Ouillette's actions represented insubordination were

put to rest by his own testimony. Mr. Ouillette testified that he was well aware of the order to report to work. Further, the Commission concludes that Mr. Ouillette's contention that he wasn't aware of the 12:59 P.M. voice mail message that day until 6:00 P.M. is nonsense. Even accepting Ouillette's testimony (which the Commission does not) that he didn't get Corda's voice mail message until 6:00 P.M., the message simply *confirmed* the prior order to report to work. Further, Ouillette himself testified that, even at 6:00 P.M. that evening, he had sufficient time to travel to Cambridge and arrive on time for the 7:30 P.M. shift. He did not. In fact, he failed to even call Corda back and let him know that he wouldn't be reporting to work.

That leads to Mr. Ouillette's second argument, regarding the Small Necessities Leave Act, which Mr. Ouillette argues the City violated, and his assertion that a parent-teacher conference during off-hours would prevent him from getting enough sleep between shifts. First, the Commission is the wrong forum to determine if the City fully complied with the letter and spirit of the Small Necessities Leave Act. As noted above, employees have a right to grieve such issues through the collective bargaining process or pursue a complaint in other venues. However, the Commission does conclude that Mr. Ouillette's assertion about lack of sleep rings hollow. First, when his prior shift concluded at 8:50 A.M. on November 6, 2002, Mr. Ouillette, fully aware that he had been ordered to work a shift at 7:30 P.M. the same night, remained at the treatment facility for at least an hour to chat with his co-workers, before going home at 10:00 A.M. Furthermore, Ouillette has previously worked double shifts that last more than 26 hours. Put simply, the Appellant's argument that he had no time for sleep appears to be a red herring.

Ouillette was angry about the change to single operator coverage. In response, he refused to cover a shift as ordered by management. Ouillette refused to comply with the order and put the operation of a water treatment facility at risk. As a result, he was suspended for five days for insubordination. The City has established by a preponderance of the evidence that there is just cause for discipline against Mr. Ouillette and there is no evidence of inappropriate motivations or objectives that would warrant the Commission overturning the 5-day suspension imposed upon the Appellant.

Finally, the Appellant argues that the five-day suspension should be served over five consecutive calendar days, whether he is working or not, and should only be for forty hours, as opposed to 66.5 hours (5 x 13.3 hours). (Treatment plant operators work 13.3 hour shifts.) G.L. c.31, § 41 and related sections are silent as to the actual number of work hours in the work day of a civil service employee. Instead, the statute appears to speak to "calendar" work days, be it 8 hours or, in this case, 13.3 hours. (See 10 MSCR 134, Baldasaro v. City of Cambridge). Therefore, the Commission concludes that a modification of the discipline, as implemented, is not warranted.

For all of the above-reasons, the Appellant's appeal under Docket No. D-03-123 is hereby ***dismissed***.

Civil Service Commission

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Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman, Bowman, Guerin, and Taylor, Commissioners [Marquis – Absent]) on September 14, 2006.

A true record. Attest:

_____
Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

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:
Daniel Brown, Esq.
Gerald Ouillette