COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss

Joseph Pano,
Appellant,

V. DOCKET NO. D1-08-63

Boston Housing Authority,
Appointing Authority

Appellant's Representative:	Anthony Pini Laborers Union 7 Laborers Way Hopkington, MA 01748
Respondent's Attorney:	Jay S. Koplove, Atty. Boston Housing Authority 52 Chauncy Street Boston, MA 02111 (617) 988-4185
Commissioner:	Daniel M. Henderson

DECISION

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Joseph Pano (hereinafter "Pano" or "Appellant") is appealing the decision of the Boston Housing Authority (hereinafter "BHA," or "Appointing Authority") by letter dated March 3, 2008, to terminate him, after a hearing on February 28, 2008, from his position as a Laborer. The appeal was timely filed. A hearing was held on June 16, 2008, of which one audio tape was made. Since there was no

request for a public hearing pursuant to G. L. c. 31 § 41 and §43, the hearing was declared private. Both parties submitted post-hearing proposed decisions.

FINDINGS OF FACT:

Thirteen (13) Exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

Called by the Appointing Authority:

- Daniel Casals; Chief Administrative Officer of the BHA.
- Judith Pralour; Housing Manager BHA.

Called By the Appellant:

- Joseph Pano; Appellant.

I make the following findings of fact:

1. The Appellant, Joseph Pano, was a tenured civil service employee of the Boston Housing Authority (BHA), serving in the position of Laborer. He had been employed by the BHA for approximately eleven (11) years before his termination. (Testimony of Appellant)
2. The Appellant was notified, by letter dated February 15, 2008, by the Authority, that he would be disciplined up to and including termination in keeping with the Authority's progressive discipline protocols. This letter notified that he had been on a progressive discipline plan since August, 2006 for poor job performance as it relates to 1) continued excessive absenteeism; 2) failure to provide adequate medical documentation to support your absences, as requested and required under your employment contract; and 3) failure to follow procedures for reporting absences and

abandoning your position with the Authority. (Exhibit 1, testimony of Casals and Pralour)

3. The Appellant was hired as a laborer, a position he held until he was terminated for cause by letter dated March 3, 2008. The termination letter had attached thereto a copy of the decision of the hearing officer, who conducted a G.L. c. 31, § 41 hearing held on February 28, 2008. and a copy of G.L. c. 31, §§ 41-45 (Exhibit 1)
4. At all relevant times, the Appellant has been a member of the Laborers International Union Local 267. The CBA calls for the following procedures when an employee is absent either for five (5) consecutive days or has been absent for five (5) or more intermittent days in a twelve (12)-month period. Article XVI, Section 3 of the CBA states:

> Section 3. For periods of absence of less than five (5) working days, the certification of the employees as to the reason for the absence will be accepted and a physician's certificate will not be required, except where the attendance record of prior absenteeism warrants a requirement for corroborating evidence. For sick leave of five (5) or more days, a physician's certificate or other evidence of an administratively acceptable nature may be required. The Authority may require a physician's certificate or other evidence of an administratively acceptable nature whenever an employee is absent on sick leave for five (5) days in a twelve (12) month period.

5. The Appellant has substantial prior discipline, which has demonstrated repeatedly that he failed to comply with the fundamental obligation of an employee, appearing for work. The BHA gave Pano two verbal warnings in August and November of

2006 for excessive absenteeism. Between the date of the second verbal and first written warnings (54 working days), Pano missed 19.5 days of work. Following these verbal warnings, during which 11 weeks passed (from November 2006 to January 2007); Pano missed almost four weeks of work due to alleged illness. This equaled an absentee rate of 36%. Pano received a written warning on January 24, 2007, for excessive use of sick leave and failure to provide adequate medical documentation to substantiate such leave. This pattern continued in February, 2007 during which he was absent for 13 of 18 work days and failed to call in for 2 of those days and failed to provide medical documentation for any of the absences. He was away from the work site, without authorization on several occasions in March, 2007 and was docked pay accordingly. He was notified, pursuant to the CBA that he was ordered in for emergency overtime for snow removal due to a snow storm on Friday, March 16th and Saturday March 17th. ; For which the Appellant failed to respond. He received a one-day suspension on April 23, 2007, for: excessive absenteeism, failure to provide adequate medical documentation, failure to follow procedures for reporting absences, unauthorized absences and leaving the site without authorization and failure to report for emergency snow removal. The Appellant continued the pattern of substantial numbers of undocumented absences from April through August, 2007 The one-day April suspension was followed by a three-day suspension on October 23, 2007, for: continued excessive absenteeism, failure to provide adequate medical documentation for absences, as requested and required and failure to follow procedures for reporting absences. He was scheduled to return to work on

October 29, 2007 following the three-day suspension. (Testimony of Casals and Pralour and Exhibits 1-6)

6. Judith Pralour, a BHA Housing Manager has been employed at the BHA since 1994. She was the Appellant's direct supervisor, at the Archdale Housing Complex during the relevant period. The Appellant worked as one of five Laborers in her area. Their duties were: trash removal, snow removal, cleaning, vacant unit clean-outs and special projects. During much of this period she had only four instead of the five Laborers available and with the Appellant out so much, she was usually down to only three. It seemed to her that the Appellant "was out more than he was in". She also received constant complaints from residents and fellow Laborers, regarding the poor quality of work or non-performance by the Appellant. She never had any attendance, medical documentation, and insubordination or any performance problems with any of the other Laborers she supervised. (Testimony of Pralour)
7. The Appellant's poor performance or non-performance and constant absences caused the other Laborers to do his work, or calling in Laborers from other locations, which affected morale, was disruptive to scheduling and made Pralour's job more difficult. Federal funding required a continually low vacancy rate, which was conditioned in part on the timely availability of cleaned and ready units. There was always a waiting list for apartments. The Appellant's persistent absences made the goal of low vacancy rates difficult to meet. Various Federal statues and court orders established certain minimal standards for the protection of the health, safety and welfare of the residents. Meeting these standards required regular scheduled

maintenance and cleaning, which the Appellant's absences exacerbated. Pralour was accused of favoring the Appellant, by the other Laborers. (Testimony of Pralour)

8. Pralour testified that the Appellant would call in 2-3 times a week on average, saying he was not coming in. After the Appellant received his first verbal warning for excessive sick leave, she verbally requested for each absence, that he bring in the proper medical documentation. The Appellant failed to bring in the documentation, despite her repeated requests. Instead of claiming to be ill, the Appellant's usual excuse for an absence was; "I didn't feel like coming in". She repeatedly told the Appellant that he was obligated to call in between 6-7 AM, if he was going to be absent. However most of the time the Appellant either didn't call at all or called in between 3:30-5:30 AM. She tried to help the Appellant in the beginning and at one point offered him the EAP program, but he refused. She counseled him many times, one on one in the hope of straightening him out but he remained recalcitrant. She even had the Appellant drug tested believing that it might be the cause of the problem. However, the drug test came back negative. The Appellant never produced any medical documentation to her nor claimed to her that he had any chronic medical condition(s) that caused his repeated absences from work. (Testimony of Pralour)
9. Pralour was shown a packet of medical documents by the Appellant's representative, while she was on the stand. She was then asked if she had seen any of the documents before. She answered that she had not, and affirmed that the Appellant had never produced any medical documents to her regarding any of the absences for which he had been disciplined for. (Testimony of Pralour)

10. Daniel Casals is the Chief Administrative Officer for the BHA. He is the Keeper and Overseer of personnel and disciplinary records. He testified that the Appellant claimed a work-related injury in December 2007. While the claim went through the workers compensation process, the BHA allowed him, by letter dated January 18, 2008 to go on F.M.L.A. leave through January 28, 2008. That letter also notified the Appellant to return to work on January 29, 2008 or notify the BHA, Director of Human Resources, before that date of being unable to return and to request an extension in writing. (Testimony of Casals and Exhibit 7).
11. The Appellant failed to contact the BHA or provide medical documentation before January 29, 2008. The BHA then notified the Appellant, by letter dated January 31, 2008 that he was due to return to work on Monday, February 4, 2008, with the appropriate medical documentation to substantiate his absence or he would be considered to have abandoned his position. The Appellant failed to contact the BHA or provide medical documentation by February 4, 2008. (Testimony of Casals and Exhibit 7).
12. On or about February 6, 2008, the Appellant faxed BHA a physical therapy note, (Body Works Physical Therapy), which provided no medical certification or opinion of condition, disability or need for further leave time. Since the documentation was insufficient and tardy, the BHA went forward with a disciplinary hearing in contemplation of his termination. (Testimony of Casals and Exhibit 8).
13. The appellant did not provide an MD or doctor's note or certificate stating that he was unable to perform his duties or needed time off for any medical reason, at any time before the date of his termination hearing. Chief Admin. Officer Casals

testified that to his knowledge, a physical therapy letter had never been accepted by the BHA as medical documentation for an absence; an M.D.'s letter had always been required.(Exhibits and testimony)

14. Aside from the afore-mentioned physical therapy note of February 6, 2008, BHA had no contact with the Appellant until it sent him notice of a G.L. c. 31, § 41 hearing on February 15, 2008. (Exhibits and testimony)
15. The Appellant testified that while he was on FMLA (from about December 22 – January 28, 2008), he failed to draw on his sick pay, personal and vacation pay, which is a requirement of those on FMLA at the BHA, because he wanted to save it for the summer. He did not think that it was "fair" that he have to use up his sick and vacation time. (Testimony of the Appellant and Casals).
16. Both Daniel Casals and Judith Pralour presented themselves as professional witnesses. Their dress, demeanor and responses were appropriate. They made good eye contact while testifying. They answered promptly and without hesitation. They did not volunteer extraneous or advantageous material to their answers. Their answers were corroborated by or in conformity with other evidence. Their answers rang true. I find them both to be credible and reliable witnesses. (Testimony and demeanor of Casals and Pralour)
17. The Appellant testified that he had been attending physical therapy sessions two times per week for approximately one hour per session. This very limited schedule afforded him sufficient opportunity to procure and present the appropriate medical documentation to the BHA, in a timely fashion. (Testimony of the Appellant, reasonable inference)

18. The Appellant arrived for this hearing late, at 9:45AM, 15 minutes late. When asked by this hearing officer why he was late; he answered that the MBTA red line was late from South Boston. He claimed that he was "stuck" at Broadway station, then South Station, then Downtown crossing, from which he walked to One Ashburton Place. The Appellant is well tanned and appeared relaxed and self-confident. He spoke softly and slowly, weighing the question well, before answering. When pressed for an answer that would indicate his repeated, ineffectual or dilatory efforts to obtain proper medical documentation; he would smile slyly while conjuring up an excuse. One such excuse: "It's difficult to see a doctor." He seemed cavalier or indifferent to the fact that this was a job termination appeal. He presents himself as a confident, street-wise person. He was dressed in a Hawaiian shirt open at the neck, with the demeanor of someone departing for or returning from vacation. His memory for detail was poor and he needed to refer to his own paper work to refresh his memory. His answers did not ring true or reliable. He is found not to be a credible or reliable witness. (Testimony and demeanor of Appellant)

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 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).

"The purpose of civil service legislation was to protect efficient public employees from partisan political control … and not to prevent the removal of those who have proved to be incompetent or unworthy to continue in the public service [.]" Murray v. Justices of the Second District Court of Eastern Middlesex Co., 389 Mass. 508, 514 (1983) (*internal citations and quotation marks omitted*).

To carry out the purpose of the civil service law, "...the appropriate inquiry is whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Police Comm'r. of Boston v. Civil Service Comm'n., 39 Mass.App.Ct. 594, 599 (Mass.App.Ct. 1996)(*internal quotation marks and citations omitted*).

The Appellant placed an immense supervisory, administrative and disciplinary burden on the BHA due to his persistent if not intractable insubordination. The BHA should not have had to waste its time and resources on someone so cavalier or indifferent about his own employment status. He demonstrated his indifference over several years, by repeatedly refusing to comply with fundamental documentation or reporting requirements. He repeatedly refused to provide appropriate medical documentation for numerous absences. He also left the work site, without authority on several occasions and failed to show for mandatory overtime snow-removal. He repeatedly refused to call in for absences between 6:00-7:00 AM, but chose to call in earlier or not at all. When finally confronted on the witness stand for these omissions; he offered weak excuses

Excessive absenteeism and unauthorized absences from work are examples of misconduct that impair the efficiency of public service. Here, it has been found that the Appellant's excessive absences were unjustified, unauthorized and exceedingly disruptive to the BHA's business and duties. Thus, an appointing authority may discharge an employee who has engaged in such misconduct. Murray, *supra*, 389 Mass. at 514-515.

The purpose of civil service protection was to protect "… *efficient* public employees [from] partisan political control", not to protect "unworthy or incompetent" public employees from discharge. Murray, *supra.*

"When there are overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the Civil Service Commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Randall & Douglas, 18 Mass. Practice Series § 11.10 (2007), *citing*, Boston Police Dept. v. Collins, 48 Mass.App.Ct. 408 (Mass.App.Ct. 2000) and Cambridge v. Civil Service Com'n., 43 Mass.App.Ct. 300, 304 (Mass.App.Ct. 1997). There is absolutely no evidence that suggests that the Appellant's discharge was motivated by partisan political control or unfair in any way. Instead, the evidence shows clearly that BHA discharged Pano for the more than sufficient reasons, as stated in its notice of contemplation of termination and affirmed by the Commission's findings of fact.

The Appellant is a member of the union which represents him and his collective bargaining rights; he is expected to be familiar with the terms of the CBA. His claimed ignorance of the CBA's terms and his obligations under it, is not believed. Additionally, the Appellant here had received ample prior notice as to the requirements for using sick leave and sufficiently

documenting same. He had received substantial prior and recent discipline for excessive absenteeism and failure to provide sufficient medical proof when required. He received a long series of written disciplinary letters, specifying his numerous violations and the proper documentation required for its remedy.

His immediate supervisor, Judith Pralour had repeatedly given him verbal orders and requests to properly document his absences, with doctor's certifications, which he refused to do. He also had written notice three weeks before his termination hearing that he was to provide sufficient medical proof to justify a continuance of his FMLA leave. He simply ignored his obligation to his employer and in so doing, acted in a manner wholly detrimental to the public interest.

It is obvious to anyone who has performed household cleaning chores, that failure to perform those duties, on a routine basis could have severe deleterious effects on the residents. The Appellant's repeated unauthorized absences and insubordination had a significant and material impact on the BHA's legal duties (statutory and contractual) to provide its tenants with clean and safe buildings and sites.

WHEREFORE, based on the foregoing, the BHA has shown by a preponderance of the credible evidence in the record that it had reasonable justification to terminate the Appellant from employment.

For all the reasons stated above, the Appellant's appeal under Docket No. D1-08-63, is ***dismissed***.

Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Taylor, Stein and Marquis Commissioners) on April 2, 2009.

A true record. Attest

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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:
Anthony Pini, Laborers Union
Jay S. Kaplove, Atty. BHA