

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
617.727.2293

JERRY PAONE,
Appellant,

v.

D1-12-270

CITY OF LYNN,
Respondent

Appearance for Appellant:

Wayne Soini, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

Procedural History

Pursuant to G.L. c. 31, § 43, the Appellant, Jerry Paone (Mr. Paone), filed a timely appeal with the Civil Service Commission (Commission) on September 25, 2012, contesting the decision of the City of Lynn (City) to terminate him as a junior building custodian from the City's Inspectional Services Department (ISD or Department). A pre-hearing conference was held at the offices of the Commission on October 23, 2012. A full hearing was held at the Lynn City Hall on March 1, 2013. Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the parties were provided with a CD of

the hearing. The parties submitted post-hearing briefs on March 28, 2013 (Mr. Paone) and April 17, 2013 (City).

Summary

By a preponderance of the evidence, the City has shown that there was just cause to discipline Mr. Paone from his position as a junior custodian for being absent for work after calling in and attempting to use the one (1) “emergency vacation day” that he had already utilized months earlier. This incident provided just cause for discipline and Mr. Paone’s lengthy record of discipline for similar offenses provided the City with just cause to terminate his employment.

FINDINGS OF FACT

Based on the twenty-seven (27) exhibits entered into evidence¹, the stipulations of the parties, the testimony of:

Called by the City:

- Michael Donovan, Building Commissioner and ISD Director, City of Lynn;
- Richard Connick, ISD Supervisor of Custodians, City of Lynn;

Called by Mr. Paone:

- Jerry Paone, Appellant;
- Joseph Martin, Storekeeper Lynn School Department; President of AFSCME Local 1736;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies as well as two prior Commission decisions regarding Mr. Paone (Prior Commission Decisions)², and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

¹ At the full hearing, Mr. Paone sought to introduce an undated document that he stated was from his grandmother’s medical provider in order to corroborate a portion of his testimony. I left the record open for Mr. Paone to obtain a signed and dated document. He did not do so.

² Paone v. Lynn, D-12-189 (2013) & Paone v. Lynn, D-12-226 (2012) (upholding a 3-day and a 5-day suspension).

1. Mr. Paone was appointed by the City as a permanent junior building custodian in February 2006. (Stipulated Fact)

Prior Disciplinary History

2. On January 16, 2007, Mr. Paone was issued a written warning relative to his excessive use of sick time from July 1, 2006 to December 31, 2006. (Prior Commission Decisions)
3. On March 27, 2007, Mr. Paone was issued a notice of a one-day suspension for being absent for work without sick leave on March 23, 2007. (Prior Commission Decisions)
4. On August 8, 2008, Mr. Paone was issued a verbal warning for failing to clean specific areas of a building on July 29, 2008. (Prior Commission Decisions)
5. On January 21, 2009, Mr. Paone was suspended for one (1) day for failing to appear for an overtime assignment on January 19, 2009 that he accepted and that he did not contact the attendance line or notify the Supervisor that he would not appear. (Prior Commission Decisions)
6. On February 10, 2009, Mr. Paone's one-day suspension for failing to report to work for an overtime assignment on January 29, 2009 was reduced to a written warning. (Prior Commission Decisions)
7. On September 15, 2009, Mr. Paone was issued a written warning for failing to appear for work at the Lynn Public Library on September 12, 2009, failing to call a supervisor to report that he would not attend, and having assured a senior custodian the night before that he would attend. (Prior Commission Decisions)
8. On May 27, 2010, Mr. Paone was issued a notice of verbal warning for leaving the building to which he was assigned on May 20, 2010 and finishing his shift at another building without contacting a supervisor in violation of department policy. (Prior Commission Decisions)

9. On June 1, 2010, Mr. Paone was issued a written warning for calling out sick to the attendance line on May 28, 2010 when the department requires that a custodian who is sick is to notify his department head or supervisor by phone at specific times for each shift. (Prior Commission Decisions)
10. On June 3, 2010, Mr. Paone was notified that the verbal warning given to Mr. Paone for his conduct on May 20, 2010 was rescinded and replaced by a one-day suspension. (Prior Commission Decisions)
11. On September 20, 2010, Mr. Paone was suspended for one (1) day for calling in sick in an untimely manner on September 17, 2010. (Prior Commission Decisions)
12. On May 25, 2011, Mr. Paone was issued a written warning for calling the attendance line on May 5, 2011, stating that he was using a personal day without the required permission. (Prior Commission Decisions)
13. On May 15, 2012, the City upheld a three (3)-day suspension imposed on Mr. Paone for changing his shift and work location the day before Thanksgiving 2012 without authorization. (Prior Commission Decisions)
14. On June 11, 2012, Mr. Paone was issued a written warning for substandard performance and insubordination. (Exhibit 13)
15. In August 2012, the City upheld a five (5)-day suspension imposed on Mr. Paone for using an emergency personal day to extend a vacation. (Prior Commission Decisions)

Facts Related to Most Recent Incident Pertaining to this Appeal

16. The collective bargaining agreement between the City and Local 1736 provides that employees may utilize ten (10) vacation days per year provided that the employee gives the City three (3) working days' notice prior to such utilization and they receive approval from

the Director of ISD. In the case of an emergency, an employee may utilize only one (1) single vacation day per year without the aforesaid notification. (Exhibit 21)

17. On January 19, 2012, Mr. Paone submitted a request to the City to utilize four (4) vacation days on:

Tuesday, February 21, 2012;
Wednesday, February 22, 2012;
Thursday, February 23, 2012; and
Friday, February 24, 2012;

The above request was approved by Richard Connick, Supervisor of Custodians, on January 20, 2012. (Exhibit 15)

18. On or about Tuesday, February 28, 2012, Mr. Paone submitted a request to the City to utilize an additional four (4) vacation days on:

Friday, March 9, 2012;
Friday, March 16, 2012;
Friday, March 23, 2012; and
Friday, March 30, 2012;

There was no request to utilize Friday, March 2, 2012 as a vacation day.

The above request for the four (4) Fridays listed above was approved by Mr. Connick on Tuesday, February 28, 2012.
(Exhibit 15)

19. Mr. Paone subsequently received authorization to take vacation time or utilized holiday time on:

Friday, April 6, 2012; (holiday)
Friday, April 13, 2012;
Friday, April 20, 2012;
Friday, April 27, 2012;
Friday, May 4, 2012;
Friday, May 11, 2012; and
Friday, May 18, 2012.

(Exhibit 14)

20. If a non-scheduled absence from work is necessary, custodians must call an “attendance line” and leave a message on the voicemail system. (Testimony of Mr. Donovan and Exhibit 7)
21. Messages left on the attendance line voice mail are monitored throughout the day by one (1) of the two (2) Assistant Supervisor of Custodians and by an administrative employee in Mr. Donovan’s office, resulting in what was heard on the recording being documented by two (2) separate individuals. (Testimony of Mr. Donovan)
22. Documents maintained by Judith Lewin-Callahan, an administrative employee in the office of Mr. Donovan, show that Ms. Lewin-Callahan, after listening to the attendance line voice mail, documented that Mr. Paone called and indicated that he was taking an emergency vacation day on Friday, March 2, 2012. (Exhibit 8)
23. Documents maintained by one (1) of the Assistant Supervisors of Custodians, show that, after listening to the attendance line voice mail, the Assistant Supervisor of Custodians documented that Mr. Paone called and indicated that he was taking an emergency vacation day on Friday, March 2, 2012. (Exhibit 12A, Page 2)
24. Time records show that Mr. Paone did not punch in for work on Friday, March 2, 2012. The time records for March 2, 2012 do show that the other employees assigned to the Connery School that day did punch in for work. (Exhibit 24) Based on this information, I infer that there were no problems with the time punch system on Friday, March 2, 2012. (Inference)
25. Mr. Paone maintains a personal calendar that shows what he did on each day, including whether or not he worked. (Testimony of Mr. Paone)
26. Mr. Paone refused to produce his personal calendar to show that he worked on Friday, March 2, 2012. (Testimony of Mr. Paone) Based on his refusal to produce the calendar, I infer that

the calendar shows that Mr. Paone did not work on Friday, March 2, 2012. (Adverse Inference)

27. It is undisputed that, on Friday, June 8, 2012, Mr. Paone called the attendance line voice mail and stated that he was going to utilize an emergency vacation day for that Friday. (Testimony of Mr. Paone, Exhibits 12 and 12B)

LEGAL STANDARD

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). 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." School Comm. v. Civil Service Comm’n, 43 Mass. App.Ct.486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence 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).

ANALYSIS

It is undisputed that Mr. Paone was only entitled to utilize one "emergency vacation day" per year. It is also undisputed that Mr. Paone called the attendance line voicemail on Friday, June 8, 2012 and indicated that he was taking an emergency vacation day that day.

The City argues that since Mr. Paone had already utilized his one emergency vacation day on Friday, March 2, 2012, he violated City rules by calling in and utilizing a second emergency day, and, therefore, discipline is justified.

Mr. Paone argues that he did not utilize an emergency vacation day on Friday, March 2, 2012; that the Friday, June 8, 2012 emergency day was the first time that year that he used an emergency vacation day; and therefore, he did not violate City rules and discipline is not justified.

The documentary evidence shows that Mr. Paone did take an emergency vacation day on Friday, March 2, 2012. Messages left on the attendance line voice mail system are monitored by two separate City employees. The documents show that both of these employees listened to the voicemail system on Friday, March 2, 2012 and each independently documented that Mr. Paone stated on the voicemail that he was utilizing an emergency vacation day on Friday, March 2, 2012.

Mr. Paone's testimony regarding what occurred on Friday, March 2, 2012 was not credible. First, he testified that "to his knowledge", he actually worked on Friday, March 2nd. Asked

during cross-examination why there would be no record of him punching in that day, Mr. Paone suggested that there may have been a problem with the time clock that day. There was not. Records show that the other employees assigned to the Connery School on Friday, March 2, 2012 had no problem punching in and having their time recorded. Mr. Paone then stated that his personal calendar supports his contention that he worked that day, but then refused to produce the calendar, for which I drew an adverse inference.

Faced with the documentary evidence showing that he did not work on Friday, March 2, 2012, Mr. Paone then offered an alternative scenario, stating that, even if he didn't work that day, he did not call that day and utilize an emergency vacation day. This is not credible. As referenced above, the documentary evidence, which I have found to be reliable, shows that two separate City employees listened to the voicemail that day and recorded that Mr. Paone stated that he was using an emergency vacation day. Further, the documents submitted show that Mr. Paone did not request a regular (non-emergency) vacation day for Friday, March 2, 2012 when he submitted his requests for the other Fridays before and after March 2, 2012.

Mr. Paone also sought to put forth a third, alternate scenario which would clear him of any wrongdoing. For the first time, Mr. Paone testified before the Commission that the reason he was unable to come to work on Friday, June 8, 2012, was that he needed to take his grandmother to a medical appointment, suggesting that the state's "Small Necessities Act" was applicable. Asked why he never stated this before the City's hearing officer, Mr. Paone stated that he wanted to "keep his cards close to the vest." He produced an undated letter that he testified he had obtained days before the Commission hearing from his grandmother's medical provider, showing that she had an appointment on Friday, June 8, 2012. I found the undated document to be

unreliable and kept the record open for Mr. Paone to secure a reliable document from the medical provider. He was unable to do so.

Based on the documentary evidence and crediting testimony from the City's witnesses, weighed against Mr. Paone's repeatedly unreliable testimony and the inferences I drew from that testimony, I have concluded that Mr. Paone violated City rules by being absent from work on June 8, 2012 and seeking to use a second emergency vacation day in the same year, which is a violation of City rules.

Having determined that it was appropriate to discipline Mr. Paone for this incident, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was termination.

The Commission is guided by "the principle of uniformity and the equitable treatment of similarly situated individuals" [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system ... to guard against political considerations, favoritism and bias in governmental employment decisions." Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee's discipline to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The ... power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority." Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different

way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.” E.g., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

Here, after a de novo hearing before the Commission in which I reviewed all of the documentary evidence and listened to the testimony of Mr. Paone and others, my findings and conclusions do not differ significantly from those reported by the City. Moreover, Mr. Paone’s atrocious disciplinary history more than justifies the City’s decision to terminate his employment.

For all of the above reasons, Mr. Paone’s appeal under Docket No. D1-12-270 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein) on May 30, 2013.

A True Record. Attest:

Commissioner

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:
Wayne Soini, Esq. (for Appellant)
David Grunebaum, Esq. (for Respondent)