

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 12/11/09  
Civil Service Commission  
CB

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

ROBERT POMEROY,  
Appellant

v.

D-08-275

CITY OF PITTSFIELD,  
Respondent

Appellant's Attorney:

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Egan, Flanagan and Cohen, P.C.  
67 Market Street: P.O. Box 9035  
Springfield, MA 01102

Respondent's Attorney:

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P.O. Box 373  
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Commissioner:

Christopher C. Bowman

**DECISION**

The Appellant, Robert Pomeroy (hereinafter "Pomeroy" or "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the City of Pittsfield (hereinafter "City" or "Appointing Authority") to suspend him for three (3) days for leaving his work area without permission on October 10, 2008.

The Appellant filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on November 6, 2008. A pre-hearing conference was conducted on December 12, 2008. As a result of two requests for continuances by the parties, the full

hearing did not take place until July 22, 2009 at the Springfield State Building in Springfield, MA. The hearing was declared private and witnesses were sequestered. The hearing was digitally recorded. The parties submitted post-hearing briefs on August 14, 2009 (Appointing Authority) and August 26, 2009 (Appellant).

**FINDINGS OF FACT:**

Twenty-one (21) exhibits were entered into evidence at the hearing. Based on the documents submitted and the testimony of the following witnesses:

*For the Appointing Authority:*

- James Carpenter, Foreman, Maintenance Garage / DPW;
- Kevin Liebenow, Motor Equipment Repairman;
- Peter Bruneau, Working Foreman;
- Joseph Cimini, Highway Foreman / Craftsman;
- Thomas Foody, Superintendent of Highways;
- Karin Decker, Personnel Technician;
- Kathy Fletcher, Personnel Technician;
- Bruce Collingwood, Commissioner of Public Work and Utilities;

*For the Appellant:*

- Robert Pomeroy, Appellant;
- Jeffrey Ferrin, Highway Craftstman;

I make the following findings of fact:

1. The Appellant, Robert Pomeroy, is a tenured civil service employee in the City of Pittsfield in the position of highway craftsman. He has been employed by the City since 2003. (Stipulated Facts and Testimony of Appellant)

*Prior Discipline*

2. On February 28, 2005, the Appellant received a written warning for failure to meet work standards. (Exhibit 9)
3. On March 6, 2006, the Appellant received a verbal warning for failure to meet work standards. (Exhibit 8)
4. On April 11, 2006, the Appellant received a written warning for failure to meet work standards. (Exhibit 7)
5. On July 27, 2007, the Appellant received a written reprimand for insubordination. (Exhibit 3)
6. On February 13, 2008, the Appellant received a verbal warning for dereliction of duty and insubordination. (Exhibit 6)
7. On March 20, 2008, the Appellant received a written reprimand for harassing behavior and dereliction of duty. (Exhibit 5)
8. On April 15, 2008, the Appellant received a verbal warning for using a city vehicle for personal business during the work day. (Exhibit 4)

*Disciplinary Appeal currently before the Commission*

9. The Appellant testified before the Commission. He was dressed in casual shorts that were not appropriate for the setting. Just prior to his testimony, he inappropriately asked if he could speak to me privately, which I declined. Almost every aspect of his testimony was directly contradicted by other credible witnesses and the Appellant's

testimony struck me as being wildly untrue. His testimony fell far short of what is expected of individuals under oath. For these reasons, I do not credit his testimony.

(Testimony, demeanor of Appellant)

10. On October 10, 2008, Joseph Cimini, a highway foreman, assigned the Appellant to a curb job on Brookside Drive, which required the use of a City truck. Approximately two to three highway department trucks did not have GPS and eight to ten trucks did have GPS. (Testimony of Joseph Cimini)

11. Mr. Cimini was a good witness. He answered the questions posed to him in a direct, forthright manner and did not seek to overreach in his answers. He did not appear to have any ulterior motive for testifying against the Appellant. I credit his testimony.

(Testimony, demeanor of Cimini)

12. After being assigned to the curb job, the Appellant asked James Carpenter, a foreman in the maintenance garage, for the keys to Truck #1148, a truck that does not have GPS. Mr. Carpenter informed the Appellant that Tom Foody, Superintendent of Highways did not want Truck #1148 going out. There were approximately six other trucks with GPS that were available for the Appellant to take that morning.

(Testimony of Carpenter)

13. When Mr. Carpenter informed the Appellant about Truck #1148, the Appellant responded by asking, "Who is Tom Foody not to let me have that truck?" to which Carpenter responded, "He's your boss, that's who he is." (Testimony of Carpenter)

14. Mr. Carpenter was also a good witness. He had a good recollection of the events that occurred and he also answered the questions in a straightforward manner. His

testimony rang true to me and I credit his testimony. (Testimony, demeanor of Carpenter)

15. Rather than using a truck with GPS, the Appellant walked back to the lunch room, punched out and went home. While the Appellant was walking to the lunch room, Kevin Liebenow, a motor equipment operator, heard the Appellant say, "If he aint got a truck, I might as well go home." (Testimony of Liebenow) After the Appellant punched out, the Appellant looked at Peter Bruneau, a working foreman, and said, "If you find out who the boss is today, tell him I went home." (Testimony of Bruneau)
16. Kevin Liebenow and Peter Bruneau offered brief, but credible testimony. They had no ulterior motive for testifying against the Appellant and their version of events was plausible. (Testimony, demeanor of Liebenow and Bruneau)
17. After leaving the lunch room and walking toward the garage, the Appellant walked by Highway Foreman Joseph Cimini and stated, "I will see you Tuesday". The Appellant then walked to his vehicle and left. (Testimony of Cimini)
18. Approximately one hour later, Mr. Cimini called the Appellant at home and asked him what was going on to which the Appellant told him he was "sick and tired of it". (Testimony of Cimini)
19. Thomas Foody has been the Superintendent of Highways for the City for approximately 17 years. He was working on October 10, 2008 and was in his office from 7:30 A.M. to 12:00 Noon. He is the consummate professional who appears to have a strong focus on running an efficient operation for the City. I credit his testimony. (Testimony, demeanor of Foody)

20. The Appellant never came into Mr. Foody's office that day and never called him.  
(Testimony of Foody)
21. The Appellant never informed Mr. Foody or Mr. Cimini that day that he had any medical condition that required him to go home. (Testimony of Foody and Cimini)
22. The Department's emergency sick policy and procedure is for the employee to inform the foreman, and then the employee is to report to Mr. Foody's office to fill out the leave request form so that Mr. Foody can sign it. If Mr. Foody is out in the field, then the employee notifies the foreman and the slip is left on his desk and the foreman informs Mr. Foody when he returns to the office. (Testimony of Foody)
23. Karin Decker has been the Personnel Technician for the City for just over two years and her office is located at City Hall. (Testimony of Decker)
24. Ms. Decker was working on October 10, 2008. According to Ms. Decker, the Appellant never came to the personnel office on October 10, 2008, she did not receive any phone calls from the Appellant that day and neither she nor her colleague in the office ever stamped an employee leave request form on that day for the Appellant.  
(Testimony of Decker)
25. On October 14, 2008, four days after he left his place of work on October 10, 2008, the Appellant entered the personnel department at City Hall. The Appellant gave Ms. Decker an employee leave request form. Ms. Decker told him that she would stamp the form and put it in his file, but that the form was not really a valid document because it was not signed by his supervisor. That leave form, with a date-stamp of October 14, 2008, is in the Appellant's personnel record. (Testimony of Decker)

26. I credit the testimony of Karin Decker. She had a clear recollection of events that occurred and she appeared genuinely upset that the Appellant may have used inappropriate means to produce a document that has a date-stamp from her office of October 10, 2008. (see Finding 27 below) (Testimony, demeanor of Decker)
27. As part of the hearing before the Commission, the Appellant produced a document that is labeled as Exhibit 17 with a Department of Personnel date stamp of October 10, 2008. (Exhibit 17) There is strong circumstantial evidence that the Appellant obtained this document through inappropriate means on one of the many occasions that he visited the personnel office prior to the Commission hearing to review his personnel file. Even if this document is authentic, which I do not believe it is, I give it no weight as it lacks the signature of a supervisor and, as referenced above, the Appellant failed to request such a signature prior to leaving for home on October 10, 2008.
28. As referenced above, I did not find the Appellant to be a credible witness and I do not credit his testimony, including his statements that he left work to get pills at home after experiencing an anxiety attack; that he verbally informed Mr. Cimini that he was going home sick; or that he went to City Hall with an employee leave request form on October 10, 2008. (Testimony, demeanor of Appellant)
29. I also did not find the testimony of Jeffrey Ferrin to be credible and I do not credit his testimony that he heard the Appellant tell Mr. Cimini he was going home sick on October 10<sup>th</sup>. (Testimony, demeanor of Ferrin)

## **CONCLUSION**

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, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (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, 133 N.E.2d 489 (1956).



“The commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the 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 Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

For all of the reasons referenced in the findings, I conclude that the Appellant left his work area without permission on October 10, 2008 after being informed that he could not drive a truck without a GPS. Further, I conclude that the Appellant did not properly notify his supervisors that he was going home due to medical-related reasons and he did not complete an employee leave request form and have it signed by a supervisor. I base this primarily on the credible testimony of the City's witnesses and, for the reasons, cited above, I do not credit the Appellant's testimony regarding the events of October 10<sup>th</sup>.

It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Department of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was a 3-day suspension.

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

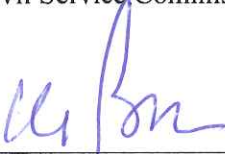
decisions.’ ” Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees’ suspensions to ensure perfect 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.*, Town of Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 823 (2006).

There is no evidence the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. Further, the Appellant’s three-day suspension appears to be consistent with progressive discipline given that he has previously received numerous verbal and written warning.

For all of the above reasons, the Appellant’s appeal under Docket No. D-08-275 is hereby *dismissed*.

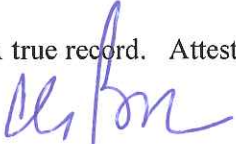
Civil Service Commission



Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on December 10, 2009.

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)(I), 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:

Thomas Donoghue, Esq. (for Appellant)

Fernand J. Dupere, Esq. (for Appointing Authority)