

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RONALD RYAN,
Appellant

v.

D-13-63

TOWN OF MILTON,
Respondent

Appearance for Appellant:

June A. Harris, Esq.
Harris Associates
80 Flanders Road, Suite 101
Westborough, MA 01581

Appearance for Respondent:

Andrew J. Waugh Esq.
Michael J. Maccaro, Esq.
Murphy, Hesse, Toomey & Lehane, LLP
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Quincy, MA 02169

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

The Appellant, Ronald Ryan (hereinafter “Appellant” or “Mr. Ryan”), pursuant to G.L. c. 31, §§ 42 and 43, duly appealed to the Civil Service Commission (“Commission”) on March 11, 2013, opposing the decision of the Town of Milton (“the Town” or “Respondent”) to suspend him for five (5) days. A prehearing conference was held on May 14, 2013 and the Respondent filed a Motion for Summary Decision (“Motion”) as to the section 42 appeal. On May 28, 2013, the Appellant filed an Opposition to the Motion for Summary Decision (“Opposition”). A hearing was held on the Motion on June 3, 2013. The Commission provided a qualified American Sign Language Interpreter for the June 3 Commission hearing. The hearing was

¹ The Commission acknowledges the assistance of Law Clerk Hannah Filkins in the drafting of this decision.

recorded and the Commission sent copies of the recording to the parties' counsel. For the reasons stated herein, Respondent's Motion is granted and a hearing on the Appellant's section 43 appeal shall be scheduled as soon as possible.

Based on the Motion, Opposition, oral argument at the hearing, and reasonable inferences therefrom, and taking administrative notice of pertinent statutes, case law, regulations and policies; a preponderance of the evidence establishes as follows:

1. Mr. Ryan has been employed by the Town since October 22, 2002 with the Department of Public Works (hereinafter "DPW"). Mr. Ryan has been employed in the position of W4(5) Maintenance Craftsman at the DPW since February 20, 2012. (*Motion*)
2. Mr. Ryan is deaf and lacks the ability to proficiently communicate via reading and writing; he relies on his spouse to translate complicated work correspondence. At work, Mr. Ryan generally relies on sign language, gestures, or simple written notes to communicate, though he relies primarily on simple handwritten notes or gestures to communicate at work. (*Opposition*)
3. On October 29, 2012, in response to Hurricane Sandy, the DPW went into emergency response mode. That day, Mr. Ryan was assigned to work as a laborer on Crew 41, which included Foreman McGrath, Gary Brown, and laborer James Henwood. (*Motion Exhibit 7*)
4. The Respondent asserts that on occasions during the October 29, 2012 shift, Mr. Ryan refused to work. (*Motion Exhibits 4 and 7*)
5. By letter dated November 5, 2012, DPW Director Lynch wrote to Mr. Ryan informing him that he had received reports regarding Mr. Ryan's performance on October 29 and that he would conduct an investigation in these regards, including a meeting with Mr.

Ryan and meetings with crew members who were with Mr. Ryan on October 29. Mr. Lynch indicated that Mr. Ryan may be represented at the meeting and that the Town would provide an American Sign Language Interpreter at the meeting at its own expense. (*Motion Exhibit 2*)

6. By letter dated December 13, 2012, DPW Director Lynch wrote to Mr. Ryan stating that he conducted an investigation and that, as a result thereof, he decided to issue Mr. Ryan a five (5) day suspension. The letter stated, *inter alia*, that:
 - a. Mr. Ryan acted in a “grossly insubordinate manner” by refusing orders to work during several of the emergency clean-up operations on October 29;
 - b. Mr. Ryan’s actions on October 29 compromised the mission of the DPW in providing emergency response to the public and the safety of fellow crew members;
 - c. Mr. Ryan met with a witness after the October 29 incidents, which was an attempt to interfere with, and change statements that witness had made in connection with the October 29 incidents;
 - d. a five (5) day suspension does not require a just cause hearing prior to implementing the discipline but he recommended a just cause hearing prior to discipline and putting Mr. Ryan on paid administrative leave; and
 - e. while on leave, Mr. Ryan was not to report to work, to be present at any workplace property in the Town, that he was allowed to “conduct official business at Town Hall as it may relate to [his] defense” but that “[c]onduct of said official business shall only be permitted with prior written approval provided by only either Annemarie Fagan or [Director Lynch][]” ... and that while he was on paid

leave, Mr. Ryan was “ ... not to have any contact whatsoever with any employee of the [DPW]. If there is any need to contact any employee as it may relate to [Mr. Ryan’s] defense of these charges, said contact shall only be permitted with prior written approval provided by only either Annemarie Fagan or [Director Lynch]. Requests to conduct business upon Town property and contact with current DPW employees shall not be unreasonably withheld.” This letter further provides, “[e]nclosed please find a copy of Massachusetts General Laws, Chapter 31, Sections 41 thru 45, under which you may have rights. [Mr. Ryan] may also wish to review [his] rights under the Collective Bargaining Agreement by and between the Town of Milton and the Milton Public Employee’s Association (MPEA). (*Motion Exhibit 4*)

7. By letter dated January 4, 2013, DPW Director Lynch notified Mr. Ryan that a just cause hearing would be held on January 22, 2013 regarding Mr. Ryan’s five (5) day suspension without pay, that Mr. Ryan may have representation at the hearing, and that the Town would provide an American Sign Language Interpreter at the hearing at its own expense.

(*Motion Exhibit 5*)

8. By letter dated January 29, 2013, from Interim Town Administrator Fagan to Thomas Hurley, Chair of the Milton Board of Selectmen, Ms. Fagan informed the Selectmen that she presided over the January 22 hearing as the Selectmen’s designee. This detailed letter states, *inter alia*, that Ms. Fagan found that,

- a. Mr. Ryan was represented at the local hearing by Attorney June Harris² at the hearing;

² Attorney Harris also represented Mr. Ryan at the hearing in this case before the Commission.

- b. Milton provided a Certified Legal American Sign Language interpreter for the hearing;
- c. Mr. Ryan testified on his own behalf at the hearing;
- d. DPW Director Lynch conducted an investigation after the October 29 incidents, interviewing members of Mr. Ryan's crew, including Mr. Ryan³, as well as others with knowledge of the incident⁴,
- e. the five (5) day suspension of Mr. Ryan was warranted.

(Motion Exhibits 4 and 7)

9. By letter dated February 22, 2013, Ms. Fagan wrote to Mr. Ryan informing him that, following the January 22 just cause hearing, a review of his disciplinary action was on the Board of Selectmen's agenda for the executive session scheduled for Friday, March 1, 2013. The February 22 letter advised Mr. Ryan of his right to be present at such executive decision during discussion of his discipline, to have an attorney or other representative attend for the purpose of advising Mr. Ryan, "to speak on [his] on behalf" and to obtain "an audio-recording or transcription" at Mr. Ryan's expense. The same letter also indicated that Milton had scheduled a "legal interpreter" on his behalf for the Selectmen's meeting. *(Motion Exhibit 6)*
10. By letter dated March 4, 2013, Mr. Hurley wrote to Mr. Ryan informing him that, based on Ms. Fagan's findings, the Selectmen were suspending Mr. Ryan for five (5) days without pay effective March 11, 2013 as a result of his conduct on October 29, 2012,

³ During the investigation interview of Mr. Ryan, he was represented by Attorney Harris and Attorney Fondo (from the Mass. Commission for the Deaf and Hard of Hearing). In addition, the Town provided a Certified Legal American Sign Language interpreter for Mr. Ryan at his interview. (Motion Exhibit 4)

⁴ DPW Director Lynch conducted the investigation, which included re-interview of other witnesses following Mr. Ryan's interview. (*Id.*)

during Hurricane Sandy, and included a reference to G.L. c. 31, §§ 41-45. (*Motion Exhibit 8*)

11. Mr. Ryan filed a timely appeal with the Commission on March 12, 2013. (*Administrative Notice*)

DISCUSSION

Summary Decision Standard

Section 1.01(7)(h) of the applicable standard adjudication Rules of Practice and Procedure at 801 CMR provides that, “When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues”. 801 CMR 1.01(7)(h). The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. See Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980).

Civil Service Law

Section 41 of G.L. c. 31, provides, in pertinent part,

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of **more than five days** ... Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The

appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof

A civil service employee may be **suspended for just cause for a period of five days or less without a hearing prior to such suspension** (emphasis added)

Section 42 of G.L. c. 31 provides, in pertinent part,

Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.

Sign Language Interpreter Statute

G.L. c. 221, § 92(a) provides, in pertinent part:

In any proceeding in any court in which a deaf or hearing-impaired person is a party or a witness ... or in any proceeding before an executive or legislative board, commission, agency, bureau committee or other body of the state or political subdivisions involving a hearing-impaired person, such court or body shall appoint a qualified interpreter to interpret the proceedings, unless such deaf or hearing-impaired person knowingly, voluntarily, and intelligently waives, in writing the appointment of such interpreter

If, at any time during the proceeding, it is determined that the interpreter is no longer able to provide effective communication between the parties, the person conducting such proceeding shall appoint another qualified interpreter or an intermediary interpreter in accordance with the provisions of this section.

This statute provides the following definitions:

“Intermediary interpreter”, a person who, because of an intimate acquaintance with deaf or hearing-impaired persons who use mainly natural or unusual gestures for communicating, can act as a mediator between the hearing-impaired person and the qualified interpreter.

“Qualified interpreter”, a person skilled in sign language or oral interpretation and transliteration, has the ability to communicate accurately with a deaf or hearing-impaired person and is able to translate information to and from such hearing-impaired person, an interpreter shall be deemed qualified or intermediary as determined by the Office of Deafness, based upon the recommendations of the Massachusetts Registry of the Deaf, the Massachusetts State Association of the Deaf and other appropriate agencies. Said office of deafness shall coordinate all requests for qualified interpreters and shall maintain a list of all such interpreters from which it shall fill such requests.

The Parties' Arguments

The Appellant argues that the Town failed to comply with the requirements established in G.L. c. 31, § 42 by inadequately accommodating Mr. Ryan's communication needs as well as obstructing Mr. Ryan's ability to call witnesses in his defense. First, the Appellant argues that the Town stifled Mr. Ryan's ability to produce witnesses to testify on his behalf at the local hearing. The Appellant specifically cites to the letter from DPW Director Lynch to Mr. Ryan limiting his contact with public employees regarding his defense while he was on paid leave. The Appellant argues this made it virtually impossible for Mr. Ryan to contact the employees he worked with on the day in question.⁵ The Appellant further argues that DPW Director Lynch created such a hostile work environment that fellow co-workers were afraid of retaliation if they were to testify on his behalf.

Second, the Appellant argues that the Town did not provide Mr. Ryan with adequate accommodations for his hearing under G.L. c. 221, § 92(a). The Appellant argues that only one interpreter was present at each hearing when in fact two interpreters were necessary in order to ensure Mr. Ryan was adequately accommodated. The Appellant argues that an "intermediary" interpreter should have been provided to allow Mr. Ryan to communicate with his attorney. The Appellant argues further that the Respondent failed to supply Mr. Ryan with a reasonable means of communication. Specifically, the Appellant argues that given his limited ability to read, the letters the Town sent to him relating to his conduct and the pending disciplinary action were difficult to understand. The Appellant contends that the Respondent was aware of Mr. Ryan's difficulties and should have used an alternative means of communication in order to ensure that Mr. Ryan was fully aware of the actions being taken against him.

⁵ The Appellant admitted that he was in contact and spoke with Mr. Henwood regarding the possibility of testifying on his behalf.

The Respondent counters that not only did the Town provide Mr. Ryan with all of the necessary procedural requirements as established by G.L. c. 31, §41, it also provided Mr. Ryan more than section 41 requires since it provided him a hearing prior to the five (5) day suspension even though it is not required by law. Mr. Ryan was provided with timely written notice of the Town's decisions as well as his rights under M.G.L. c. 31 §41-45. The Respondent asserts further that Mr. Ryan was represented by counsel at all of the hearings and provided American Sign Language interpreters at the interview of Mr. Ryan during the investigation, at the hearing, and at the Board of Selectman meeting when Mr. Ryan's pending discipline was to be addressed. The Respondent also avers that there is no requirement under G.L. c. 31 that two interpreters be provided for hearings.

Finally, the Respondent maintains that Mr. Ryan was afforded the opportunity to cross-examine the Town's witnesses at the local hearing, and to call witnesses in his own defense. During the local hearing, the Appellant testified on his own behalf but he called no other witnesses. The Respondent further avers that the Appellant's argument at the Commission hearing on the Motion is the first time the Appellant has asserted that he was denied the ability to call witnesses.

Analysis

The Respondent has established, by a preponderance of the evidence, that it did not violate the procedural requirements of G.L. c. 31, § 42, that it did not prejudice the Appellant through its procedures relating to the local hearing, that there is no genuine issue of material fact in this regard, and that the Respondent is entitled to summary decision regarding the Appellant's section 42 appeal as a matter of law. The Town provided Mr. Ryan with timely and detailed letters explaining the disciplinary action being brought against him. It provided American Sign

Language interpreters at Director Lynch's interview of Mr. Ryan, at the local hearing, and at the Board of Selectmen meeting at which the proposed discipline was discussed. Mr. Ryan was able to testify at the local hearing and his counsel had the opportunity to cross-examine witnesses against him. Mr. Ryan had the opportunity to call his own witnesses at the local hearing but argues here that he was effectively prohibited from doing so because of Director Lynch's letter requiring him to obtain written approval prior to contacting fellow public employees. However, there is no indication that Mr. Ryan, and/or counsel, requested such approval and that such request was denied. Moreover, Director Lynch's letter in this regard was a response to Mr. Ryan's contacting of one witness, which witness told DPW that he believed Mr. Ryan was trying to persuade him to alter a statement that the witness had made to the DPW regarding Mr. Ryan's conduct on October 29, 2012.⁶ There is also no indication that Mr. Ryan sought an intermediary American Sign Language interpreter at the local hearing, that his request was denied, and/or that one was required. Finally, although Mr. Ryan is limited in his own abilities to read, given that he was represented by able counsel he was advised of the actions the Town was pursuing in response to the incidents on October 29, 2012. Given the number of detailed letters from the Town to the Appellant, the Appellant was on notice of the allegations against him and of the Town's impending actions.

Conclusion

Based on the findings and the applicable law noted herein, the Respondent's Motion is ***granted*** and the Appellant's appeal pursuant to G.L. c. 31, § 42 is hereby ***dismissed***. The parties

⁶ Apparently, Mr. Ryan does not deny that he spoke to the witness without prior written authorization, pursuant to Director Lynch's letter in this regard.

shall, within five (5) business days, contact Ms. Diaz at the Commission to schedule a hearing on the Appellant's appeal pursuant to G.L. c. 31, § 43.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners on March 6, 2014.

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 as stated below.

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 from the effective date specified in 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:

June A. Harris, Esq. (for Appellant)
Andrew J. Waugh, Esq. (for Respondent)
Michael J. Maccaro, Esq. (for Respondent)