

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

Decision mailed: 8/18/08  
Civil Service Commission

CS

**JOSEPH SCHIAVONE,**  
*Appellant*

v.

**Case No.: D-05-178**

**CITY OF MEDFORD,**  
*Respondent*

**DECISION**

After careful review and consideration, the Civil Service Commission voted at an executive session on August 7, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated March 19, 2008 and the comments received from the Appellant on April 11, 2008. By a 4-0 vote, the Commission voted to adopt the findings of fact of the Magistrate.

The majority of the Commission concurs with the Magistrate's conclusion that the City of Medford had reasonable justification for imposing a one-year suspension against the Appellant. We reach that conclusion based on the fact that the Appellant's egregious conduct in this case, which occurred off-duty, was a continuation of the same egregious on duty conduct for which the Appointing Authority had already severely punished the Appellant and put him on notice that failure to control his anger would result in further discipline.

*Prior Related Discipline*

On or about December 11, 1995, the Appellant was suspended for ninety (90) days for threatening and/or harassing co-workers on five (5) separate occasions. Finding of Fact #3, Exhibit 16.

On or about August 26, 1997, the Appellant, while employed with the City of Medford's Cemetery Division, engaged in a loud and profane argument with a coworker, hurling the crudest of vulgarities at his co-worker within earshot of mourners in a funeral procession. When a private citizen who was part of the funeral procession objected to his outburst, the Appellant then unleashed vulgarities on her. He was disciplined with a one hundred and eighty (180) day suspension. (Finding of Fact #4, Exhibit 17)

The Commission takes administrative notice that the Appellant appealed that 1997 suspension to the Commission. The Commission dismissed his appeal and held that "...there is just cause to discipline the Appellant for swearing loud enough so that a funeral procession could hear his argument with a co-worker. The Commission further finds that there is just cause to discipline the Appellant for swearing at one of the attendees of the McMillan funeral." (Schiavone v. Medford, 12 MCSR 124, 125 (1999).

As part of his discipline, the City ordered the Appellant to participate in a nine (9) session course on anger management with a licensed psychologist.

#### *Misconduct in the Instant Appeal*

In 2005, as found by the Magistrate, the Appellant engaged in the same type of angry, vulgarity-laced tirade for which he was suspended for one hundred and eighty (180) days in 1997. In the instant matter, the Appellant turned his sights on another private citizen, twice referring to him as a "fucking faggot," and challenging him to a physical confrontation at a local Dunkin Donuts. The Appellant crossed paths with that same private citizen on two later occasions. In one of those incidents, the Appellant in the presence of his fellow employees - again taunted the private citizen - repeating the same repulsive comments referenced above. It is clear that the anger management sessions ordered by the City back in 1997 did not have the desired effect.

The 2005 incident appropriately warranted further disciplinary action by the employer for the Appellant's continued intolerable behavior and harassment. The Commission does not believe that, in these circumstances, Medford was obliged to ignore the incident and wait until it happened again at work before taking further disciplinary action.

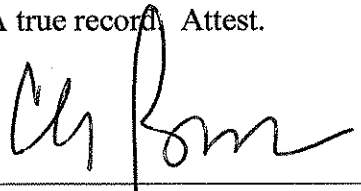
While the egregious conduct in 2005 occurred while the Appellant was off-duty, it was a continuation of the same bad workplace related behavior for which he was disciplined in the past: the City was more than justified in imposing the additional discipline of a one (1) year suspension. In fact, based on the Appellant's continued problems with anger management, termination would have been a reasonable and appropriate remedy.

The Commission bases its conclusion on all of the above reasons and does not rely on c. 12 §11H and 11I, cited in the Magistrate's findings. This statute provides for the protection of rights within the laws of the United States or Massachusetts, enforced by the Attorney General or a harmed individual, and specifies relief within jurisdiction of the Superior Court, not the Commission.

The Appellant's appeal is hereby *dismissed*.

By a 4-0 vote of the Civil Service Commission (Bowman, Chairman – Yes; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; Taylor, Commissioner – Yes; [Henderson, Commissioner – absent]) on August 14, 2008.

A true record. Attest.

  
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Christopher C. Bowman  
Chairman

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 to:

F. Robert Houlihan, Esq. (for Appellant)

Mark Rumley, Esq. (for Appointing Authority)

Joan Freiman Fink, Esq. (DALA)



COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

98 North Washington Street, 4th Floor

Boston, MA 02114

[www.mass.gov/dala](http://www.mass.gov/dala)

Tel: 617-727-7060  
Fax: 617-727-7248

March 19, 2008

Christopher Bowman, Chairman  
Civil Service Commission  
One Ashburton Place  
Boston, Ma. 02108

F. Robert Houlihan, Esq.  
Heavy, Houlihan, Kraft & Cardinal  
229 Harvard Street  
Brookline, Ma. 02446

Mark Rumley, Esq.  
City of Medford  
85 George P. Hassett Drive  
Medford, Ma. 02155

RE: *Joseph Schiavone v. City of Medford*, D-05-178, CS-07-712

Dear Chairman Bowman, Attorneys Houlihan and Rumley:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that pursuant to 801 CMR 1.01(11)(c), they have thirty (30) days to file written objections to the decision to the Civil Service Commission which may be accompanied by supporting briefs.

Very truly yours,

A handwritten signature in cursive script that reads "Joan Freiman Fink".

Joan Freiman Fink, Esq.  
Administrative Magistrate

Encl.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Joseph Schiavone,  
Appellant

Docket No. D-05-178  
DALA No. CS-07-712

v.

City of Medford,  
Appointing Authority

Appearance for Appellant:

F. Robert Houlihan, Esq.  
Heavy, Houlihan, Kraft & Cardinal  
229 Harvard Street  
Brookline, Ma. 02446

Appearance for Appointing  
Authority:

Mark Rumley, Esq.  
City of Medford  
85 George P. Hassett Drive  
Medford, Ma. 02155

Administrative Magistrate:

Joan Freiman Fink, Esq.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31 §43, the Appellant, Joseph Schiavone, is appealing the May 4, 2005 decision of the Appointing Authority, the City of Medford, suspending him for the period of one year from his position as an Motor Equipment Operator 2 (MEO 2)/Laborer with the City of Medford Department of Public Works (DPW) (Exhibit 3). The Appellant filed a timely appeal of this decision with the Civil Service Commission (Exhibit 3A).

A hearing in this matter was held on October 4, 2007 at the offices of the Division of Administrative Law Appeals, 98 N. Washington Street, Boston, Ma. As no written request was received from either party, the hearing was declared to be private. Various documents were entered into evidence at the hearing (Exhibits 1 – 20).

The following witnesses testified on behalf of the Appointing Authority: Alfred Gill, an office manager/paralegal at Office Depot, and Brian Kerins, Deputy Commissioner of the Medford DPW. The Appellant testified in his own behalf.

The record in this case was left open until December 7, 2007 for the filing of written closing memoranda.

The Appointing Authority maintains that just cause exists to suspend the Appellant for a period of one year from his position with the City of Medford DPW on the grounds that he conducted himself in a manner unbecoming a municipal employee. Specifically, the City alleges that in that on or about February 18, 2005 and at various times during the preceding months, he verbally harassed and acted in an assaulting manner towards a Mr. Albert Gill. The Appointing Authority further maintains that the Appellant's conduct was in violation of the sexual harassment policy of the City of Medford<sup>1</sup> as well as a violation of G.L. c. 12 §11H-1<sup>2</sup>.

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<sup>1</sup> The sexual harassment policy issued by the City of Medford on July 7, 2004 provides in pertinent part that: "This policy applies to every aspect of employment including the recruitment, hiring, terms and conditions of service of all full and part time municipal employees ... The City of Medford believes in the dignity of the individual and recognizes the right of all people to equal opportunities" (Exhibit 4).

<sup>2</sup> G.L. c. 12 § 11H-1 provides in pertinent part that: "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section."

**FINDINGS OF FACT**

Based on the documents entered into evidence (Exhibits 1 - 20) and the testimony of Albert Gill, Brian Kerins, and Joseph Schiavone, I make the following findings of fact:

1. The Appellant, Joseph Schiavone, commenced employment as an MEO 2/Laborer with the City of Medford DPW in 1994 (stipulation of the parties).
2. His duties include driving heavy motor equipment as well as general maintenance and repair work for the City (testimony of the Petitioner).
3. On December 11, 1995, the Appellant was issued a ninety day suspension without pay for arguing with other city employees (Exhibit 16).
4. In 1997, the Appellant was given a one hundred eighty day suspension as a result of arguing with other city employees. He appealed this suspension to the Civil Service Commission and on May 29, 1999, the Commission upheld this suspension (Exhibit 17).
5. During the period of 1997 through 1998, the Appellant underwent a nine-session course of anger management training offered by Robert Montgomery, a licensed psychologist (stipulation of the parties).
6. From 1998 until the complaint issued by Mr. Gill in 2005, the Appellant has not been the subject of any anger-based warnings or allegations (stipulation of the parties).
7. On or about July 7, 2004, the Appellant received a copy of the City of Medford's Equal Employment Opportunity & Sexual Harassment Policy Statement ("Policy") dated July 7, 2004 (stipulation of the parties).



8. In addition, all City employees including the Appellant attended a mandatory training session with the Human Resource Division designed to explain the Sexual Harassment Policy (testimony of Brian Kerins).
9. During the early winter of 2005, the Appellant was assigned to work the 4:00 p.m. to midnight shift (testimony of the Appellant).
10. On a morning in January of 2005, Mr. Albert Gill, a manager at Office Depot, drove to the Dunkin' Donuts located at Mystic Avenue in Medford, approximately five hundred yards from his home (testimony of Albert Gill).
11. While standing in line awaiting his turn at the counter, Mr. Gill looked out through the glass window of the Dunkin' Donuts store to check on his dog, who he had left in his vehicle (testimony of Albert Gill).
12. Upon exiting Dunkin' Donuts, Mr. Gill entered his car and mumbled to his dog. At this juncture, the Appellant, who was off duty from the DPW and whom Mr. Gill had never previously met, approached the vehicle and said "do you want to go a couple of rounds around the corner, you fucking faggot?" (testimony of Albert Gill).
13. Mr. Gill replied "what are you talking about?" (testimony of Albert Gill).
14. The Appellant then said "You like to stare. I will give you something to look at, let's go around the corner" (testimony of Albert Gill).
15. Mr. Gill proceeded to drive away from the scene. As he was driving home, Mr. Gill heard the Appellant shout "you fucking faggot" (testimony of Albert Gill).

16. Approximately one month later, Mr. Gill went to a different Dunkin' Donuts, also located in Medford, for his morning coffee. He had avoided the Dunkin' Donuts near his home for fear of encountering the Appellant (testimony of Albert Gill).
17. Upon entering the Dunkin' Donuts, Mr. Gill observed the Appellant sitting with other City of Medford DPW workers who were wearing DPW shirts. As Mr. Gill entered the establishment, he heard the Appellant mumbling "here's the faggot now. Here's the pussy" (testimony of Albert Gill).
18. Mr. Gill felt embarrassed, berated, and upset. He chose not to respond and immediately left the restaurant (testimony of Albert Gill).
19. On February 18, 2005, Mr. Gill went back to the first Dunkin' Donuts located on Mystic Avenue near his home. After positioning himself in the coffee line, Mr. Gill recognized the Appellant, who was ahead of him in line (testimony of Albert Gill).
20. The Appellant immediately motioned towards Mr. Gill and muttered to the other patrons, stating: "This guy is a pussy. He's a troublemaker. He's a faggot" (testimony of Albert Gill).
21. Mr. Gill was afraid that the Appellant would physically harm him (testimony of Albert Gill).
22. After Mr. Gill got his coffee, he left the restaurant. The Appellant also exited and said to Mr. Gill "let's go" (testimony of Albert Gill).
23. Mr. Gill did not respond but proceeded in his car to drive home. The Appellant then followed Mr. Gill in a City vehicle. Mr. Gill became very afraid and deliberately drove past his house as he did not want to exit his vehicle. The

Appellant eventually took another route and ceased following Mr. Gill (testimony of Albert Gill).

24. The next day, Mr. Gill sent an email to the City of Medford indicating that he thought that the individual who had harassed him was a City DPW worker as he (the Appellant) was talking to City DPW workers and also drove a City vehicle (Exhibit 1).

25. After conducting an investigation relative to the complaint filed by Mr. Gill, the City of Medford, on March 24, 2005, sent the Appellant a notice of contemplated action and on March 31, 2005, a hearing was held pursuant to G.L.c. 31 §41 (Exhibit 1).

26. On May 4, 2005, the Appointing Authority sent the Appellant written notice that he was suspended without pay for the period of one year from his position as an MEO2/Laborer with the City of Medford Department of Public Works (Ex. 3).

27. On May 11, 2005, the Appellant filed a timely appeal of this decision with the Civil Service Commission (stipulation of the parties).

### **CONCLUSION AND RECOMMENDATION**

After reviewing all the testimony and evidence in this case, I conclude that the Appointing Authority has demonstrated by a preponderance of the evidence that just cause exists to suspend the Appellant from his position as an MEO2/Laborer with the City of Medford Department of Public Works. The Civil Service Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects by 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). In reviewing an appeal brought pursuant to G.L. c. 31 §43, if the Civil Service 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 basis of my conclusion rests with my finding that the testimony of Mr. Gill was extremely credible. Mr. Gill gave compelling testimony to the effect that on three separate occasions in early 2005, the Appellant, without warning or provocation, verbally harassed and acted in an assaulting manner towards him. Mr. Gill described in detail the verbal taunts including derogatory sexual comments made by the Appellant. In addition, Mr. Gill related that the Appellant acted in an aggressive and hostile manner towards him. The Appellant’s conduct caused Mr. Gill to suffer embarrassment, humiliation, and fear.

Prior to the first encounter, Mr. Gill did not know the Appellant. His knowledge that the Appellant was a City of Medford DPW worker was derived from the fact that he observed Mr. Schiavone speaking with City DPW workers who were wearing identifying uniforms and from the fact that he observed the Appellant driving a City vehicle.

I found the testimony of Mr. Gill to be very persuasive and credited his testimony relating to the events that transpired on the three mornings in question. He had no discernible reason to fabricate his testimony relative to the Appellant’s conduct as prior to these three incidents, the Appellant was a stranger to him. See *Connor v.*

*Connor*, 77 A.2d 697 (Pa. 1951) where the court held that "opportunity to observe demeanor and appearance of witnesses in many instances becomes the very touchstone of credibility." See *School Committee of Wellesley v. Labor Relations Commission*, 376 Mass. 112, 120 (1978); *New England Canteen Service, Inc. v. Ashley*, 372 Mass. 671 (1977).

I did not credit the Appellant's testimony to the effect that Mr. Gill stalked him and instigated the contact which he (Schiavone) sought to avoid. The Appellant offered no motive or incentive for Mr. Gill to act in an aggressive and hostile manner towards him, especially in light of the fact that the two had not met prior to the first incident in early January of 2005.

The Appellant contends that even assuming, for argument's sake, that Mr. Gill's version of the events is credible, he should not be subject to disciplinary action.

The Appellant argues that the City of Medford's Sexual Harassment Policy is applicable only to its own employees. According to the Appellant, since Mr. Gill was a private citizen and not an employee of the City of Medford, he is not entitled to the protections afforded by the Policy. The Appellant also argues that even if he did make inappropriate comments to Mr. Gill, those comments were spoken in the early morning hours while he was off duty. In support of his position, the Appellant relies on the case of *Baldasoro v. Cambridge*, 733 N.E. 2d 572 (2000). In *Baldasoro*, the Appeals Court upheld the Civil Service Commission decision reversing the suspension of a heavy motor equipment operator who had used lewd, gross, and threatening language while off duty to a meter maid. The Court in *Baldasoro*, *supra*, noted that the employee had sustained his

burden of showing that there was no significant correlation between his conduct and his continuing fitness to perform his job.

Notwithstanding the Appellant's assertions, the current case may be distinguished from the *Baldasaro* case, *supra*. In *Baldasaro*, the court references no specific work rule or regulation promulgated by the City of Cambridge that the employee allegedly violated by his conduct towards the meter maid. In this instance, the City of Medford promulgated a Sexual Harassment Policy in July of 2004 that was fully explained to all employees including the Appellant during mandatory training sessions. The Policy states that it "applies to every aspect of employment including the recruitment, hiring, terms and conditions of service of all full and part time municipal employees..." In addition, the Policy states that it applies to actions "whether committed by supervisors, employees or non-employees." Since the prohibition against harassing behavior applies to non-city employees, those non-city employees are also entitled to be protected against such harassment by city employees. Furthermore, at the hearing, Deputy Commissioner Kerins gave uncontested testimony that the City intended the Policy be applied broadly in order to urge all City employees to conduct themselves in an appropriate manner during their interactions with others whether they were on duty or off the clock.

By verbally harassing and acting in an assaulting manner towards Mr. Gill, the Appellant violated the City of Medford's Sexual Harassment Policy. The fact that the Appellant's misconduct occurred while he was off duty did not preclude the Appointing Authority from imposing disciplinary action as he had violated an established policy of his employer. See *Baldasaro*, *supra* at 573. In addition, the Appellant, by his conduct


towards Mr. Gill, arguably violated the provisions of G.L. c. 12 §11H relating to the right of an individual to seek equitable relief from offensive and demeaning behavior.

In conclusion, the Appointing Authority has demonstrated by a preponderance of the evidence that the Appellant, by verbally assaulting and acting in a harassing manner towards Mr. Gill, engaged in conduct in violation of the rules and regulations of the City of Medford.

In determining the appropriateness of the discipline to be imposed, I reviewed the Appellant's prior disciplinary record which included two prior suspensions, one for ninety days, and one for one hundred eighty days. In addition, I carefully considered the Appellant's actions and behavior towards Mr. Gill during the three interactions in early 2005. Based on the foregoing, I conclude that a suspension for a period of one year was fully warranted by the facts and circumstances of this case.

Accordingly, I recommend that the Civil Service Commission affirm the action of the Appointing Authority suspending the Appellant for a period of one year from his position as an MEO 2/Laborer with the City of Medford.

DIVISION OF ADMINISTRATIVE LAW APPEALS

  
Joan Freiman Fink  
Administrative Magistrate

Dated: