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Civil Service Commission CS

The Commonwealth of Massachusetts

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
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JOSEPH SCHIAVONE,
Appellant

v.

CITY OF MEDFORD,
Respondent

Case No.: D-05-178

DECISION

Upon remand to the Civil Service Commission (hereinafter "Commission") following the June 19, 2009, decision of the Suffolk Superior Court (Kenton-Walker, J.), the Commission voted on a revised Decision at executive session on November 12, 2009. The Commission again acknowledged receipt of the report of the Administrative Law Magistrate dated March 19, 2008, and the comments of the Appellant received by the Commission on April 14, 2008. The Commission again voted to adopt in their entirety the findings of fact and the recommended decision of the Magistrate. A copy of the Magistrate's report is enclosed herewith.

INTRODUCTION

Pursuant to G.L. c. 31, § 43, the appellant, Joseph Schiavone (the "Appellant" or "Schiavone"), appealed the May 4, 2005 decision of the respondent appointing authority, the City of Medford, suspending him for the period of one year from his position as a Motor Equipment Operator 2 (MEO 2)/Laborer with the City of Medford Department of Public Works (DPW). Recommended Decision, Exhibit 3. The Appellant filed a timely appeal of this

decision with the Commission. Recommended Decision, Exhibit 3A. The matter was heard by the Division of Administrative Law Appeals, which issued a Recommended Decision recommending that the Commission affirm the action of the Appointing Authority.

The Commission was presented with two issues: (1) whether the Appellant could be identified by a Medford resident as a Medford employee engaged in substantial misconduct that could impair the efficiency of public service (identified by the Magistrate as "conduct unbecoming"); and (2) if so, what constitutes a proper measure of discipline based on the Appellant's current and past misconduct.

The Appointing Authority maintains that just cause exists to suspend the Appellant for a period of one year on the grounds that he conducted himself in a manner unbecoming a municipal employee. Specifically, the City of Medford (hereinafter "the City") alleges that on or about February 18, 2005, and at various times during the preceding months, Appellant verbally harassed and acted in an assaultive manner towards a Medford resident named 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, as well as a violation of G.L. c. 12, §§11H and 11I. The Commission finds that there was indeed just cause to suspend the Appellant due to his conduct in and of itself and due to his violation of the City's sexual harassment policy. It is, however, outside the Commission's jurisdiction to hear a claim brought under G.L. c. 12, §§11H and 11I. These statutes provide for the protection of civil rights within the United States or Massachusetts by the Attorney General or a harmed individual, and permit an aggrieved individual to seek relief in the Superior Court.

JUST CAUSE

Substantial Misconduct

The Appellant, being tenured, could not be suspended except for "just cause." School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). After reviewing all the testimony and evidence in this case, the Magistrate was obligated to determine whether or not the Appointing Authority had sustained its burden of proving just cause for suspending the Appellant from his employment for one year. Id. In reviewing an appeal brought pursuant to 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. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004). 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. of Brockton at 488. "The question before the Commission is not whether it would have acted as the appointing authority 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." Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 408, 411 n. 5 (2000); Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

The Commission has the duty here to apply the facts found by the Magistrate to determine 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). In the instant matter, the Magistrate concluded that the Appointing Authority had indeed demonstrated

by a preponderance of the evidence that just cause existed. The Magistrate found that Albert Gill's testimony was highly credible. 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 a sexually assaultive manner towards him. Gill described in detail the Appellant's aggressive and hostile manner, verbal taunts, and homophobic and derogatory sexual comments. Recommended Decision, Findings of Fact 10-23. The Appellant's conduct caused Gill to suffer embarrassment, humiliation, and fear. Testimony of Albert Gill.

Before the pattern of harassment, Gill did not know the Appellant. He deduced that the Appellant was a DPW worker when Schiavone harassed him on one occasion in the presence of coworkers, who were wearing DPW-identifying uniforms. On one occasion, Gill also observed the Appellant driving a City vehicle.

The Appellant's appalling conduct, as described by the Magistrate, qualifies as substantial misconduct. The nature of his behavior, the harassment, sexual comments, and derogatory and homophobic remarks only served to diminish the reputation of the DPW and the City in general. His behavior harmed the good name of the City, and his actions belied the City's reputation as a progressive employer of a civilized, nondiscriminatory work force. Appellant's public behavior adversely affected the public interest in that it is unlikely that the residents of Medford would choose to have their tax dollars spent to pay the salary of someone who acts like an uncouth bigot. The Appellant's behavior failed to meet the standard of acceptable, as opposed to criminal, behavior in today's society; behavior that comports with the City's norms of conducting business or, more broadly, any standard of decency.

The Appointing Authority has demonstrated by a preponderance of the evidence that the Appellant, by verbally assaulting and acting in a harassing manner towards Albert Gill, engaged in substantial misconduct, which provided a reasonable justification for its action to suspend him.

Off-duty conduct

All of the events in question took place when the Appellant was off duty. Generally, when a civil service employee is off duty, his actions cannot be the subject of discipline unless they are work related. If an employee establishes that his appointing authority's disciplinary action was based "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[.]" School Comm. of Brockton, at 491. Hence, there must be a nexus between the Appellant's conduct and his employment with the DPW.

In School Comm. of Brockton, the appellant, a school employee, was apprehended while engaged in sexual conduct in a public park. Id at 487. The appellant was off-duty, not on school property, with a consenting adult, and found not to be a threat to the children attending the public schools. Id. There was no "significant correlation between ... [his] ... conduct ... and his employment ..., nor that this conduct impairs the efficiency of the public service." Id. However, his arrest led to an unexcused absence from work, which taken in conjunction with his past attendance problems, constituted just cause to discipline him. Id.

The Appellant relies heavily on Baldasaro v. Cambridge, arguing that he could not be disciplined for his off-duty conduct. 10 MSCR 134 (1997). In Baldasaro, the appellant, an off-duty DPW employee, screamed profanity at an on-duty parking meter maid when she approached him about moving his vehicle. Id. at 135. The Commission held that off-duty conduct cannot be punished by an employer unless the conduct is work related. Id. The Appeals

Court affirmed. The Court 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.

The conduct in Baldasaro differs significantly from the conduct of the Appellant in this case. Here, Albert Gill knew that the Appellant was a DPW employee, and indicated this when he emailed a complaint to the Commissioner of Public Works. The Appellant was in the presence of uniformed, on-duty DPW workers when he taunted Gill, and he encouraged them to join him in the harassment. On all the reported occasions of harassment, the Appellant was in a place where his actions were observable by the public. Thus his comments and actions could have been construed as representative of the DPW's culture and mores. There is no way to gauge how many people witnessed the Appellant's conduct (and realized that he was a DPW employee), and further how many of those same witnesses relayed a report of that conduct, while identifying Appellant as a DPW employee, to others. The Appellant's conduct could only cause a diminishment of respect, confidence, and trust for the DPW and City employees in general.

The combination of the victim's ability to identify the Appellant as a DPW employee and the Appellant's behavior in the presence of on-duty coworkers created a nexus between the Appellant's off-duty conduct and his employment. Given the direct impact on a person whom the DPW was charged with serving, *i.e.* Albert Gill, the Appellant's conduct is work related and the DPW is able to discipline him.

Furthermore, off-duty conduct that may be prosecuted, but is not, may still serve as appropriate grounds for discipline. In Yukl v. Montague, the appellant, an off-duty police officer, struck a fellow police officer's car with his own motor vehicle twice, punched the colleague in the mouth, and then used a crowbar to knock a bottle of milk out of the colleague's

hand. 14 MCSR 131, 132 (2001). No charges were filed against either party, but the appellant was terminated and the other officer demoted to patrolman. Id. The Commission held that since the appellant's behavior could have led to criminal charges, the appointing authority was justified in terminating him. Id.

Schiavone's conduct in this case is similar to the appellant's in Yukl in that his actions could have been criminally prosecuted. General Laws c. 265, § 43A, defines criminal harassment in relevant part as:

> "Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment[.]"

Schiavone deliberately elected to engage in a pattern of abusive behavior directed toward Gill. These actions alarmed Gill, and could have caused a reasonable person to suffer substantial emotional distress. Since the Appellant is not a police officer, he would not be held to that expected higher standard of conduct. However, his behavior could have been prosecuted, and thus would serve as a justifiable reason for discipline.

The Commission finds that there was a substantial correlation or nexus between the Appellant's conduct and his employment, thus enabling the City to discipline him for the off-duty misconduct, the Magistrate found, he perpetrated.

Violation of the City's Sexual Harassment Policy

On or about July 7, 2004, the Appellant received a copy of the DPW's Equal Employment Opportunity Policy Statement and Sexual Harassment Policy Statement, which defined both policies and warned employees not to engage in that type of conduct. Recommended Decision,

Stipulation of Parties, Finding of Fact #7. Employees, including the Appellant, also attended a mandatory training session explaining the Sexual Harassment Policy.

The Appellant chose to initiate contact with Albert Gill: harassing him about his sexual orientation on at least three separate occasions. Testimony of Gill. Mr. Gill was able to identify the Appellant as a DPW worker since he had seen him in the department's vehicles. Recommended Decision, Exhibit 1, Finding of Fact #24, Testimony of Gill. The first occasion was at the Dunkin Donuts nearest to Gill's house. Testimony of Gill and Appellant. On this occasion, the Appellant approached Gill after Gill got his coffee and, out of the blue, asked if he wanted to go a few rounds, and then Appellant proceeded to use homophobic language in taunting Gill. Testimony of Gill. The second time, Gill was in a different Dunkin Donuts restaurant, but the Appellant appeared there, too. Testimony of Gill. On this occasion, the Appellant was off-duty and was seated with fellow DPW employees who were on-duty and in uniform. Testimony of Appellant, Gill, and Gray. The Appellant began to make sexually derogatory comments about Gill and got those workers on duty to join him. Testimony of Gill. One of the other DPW workers there testified that he did not hear anything the two said but that words were exchanged and they began "pointing fingers" at each other. Testimony of Gray. Gill testified that he was most upset about this incident because he felt like he was being ganged up on and thought that those kinds of experiences would have ended after high school. On the third occasion, which occurred at the original Dunkin Donuts, the Appellant continued to make the same homophobic and sexually derogatory remarks. Testimony of Gill. After the third incident, Gill complained of all three incidents to the Commissioner of Public Works, asking that he do something to stop the Appellant's harassment. Exhibit 1, Finding of Fact #24, Testimony of Gill.

The Appellant argues that the City's Sexual Harassment Policy is intended only to protect the City's own employees. According to the Appellant, since Gill was a private citizen and not an employee of the City of Medford, he is thus not entitled to this protection from sexual harassment by City employees. This argument makes no sense. It could lead to an absurd conclusion that City employees are protected from sexual harassment coming from other City employees, while remaining at liberty to sexually harass the public at will – without violating a rule or regulation of the City.

In Baldasaro, the court found that the Appointing Authority could not reference a specific work rule or regulation that the employee had allegedly violated. That is not the case here. In the instant matter there is a specific, applicable work rule or regulation: the City of Medford Sexual Harassment Policy. This policy 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, it follows that those non-city employees are also entitled to be protected against such harassment by city employees. Furthermore, at the hearing, Deputy Commissioner Kerins gave uncontroverted testimony that the City intended the policy to 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. Testimony of Kerins.

By verbally harassing and acting in an assaultive manner towards Albert Gill, the Appellant violated the City'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. Baldasaro, supra at 573.

Baldasaro may be further distinguished in that the appellant there yelled at the meter maid because he genuinely believed that she was wronging him. Here the Appellant was harassing Gill simply due to his perception of Gill's sexuality. His actions cannot be construed as defensive or justified in any manner. Harassment or violence solely due to a person's sexual orientation is reprehensible. This is acknowledged by the Legislature in its promulgation of laws against hate crimes, which include crimes committed against individuals due to their actual or perceived sexual orientation. *See* MGL c. 265 § 39; 18 U.S.C. § 245(b)(2); the Matthew Shepard and James Byrd, Jr. Hate Crimes Act, October 28, 2009.

The DPW is a taxpayer-funded agency supported by each citizen of Medford, including Mr. Gill. No citizen should be asked to contribute to the salary of the employee harassing and ridiculing him.

The Appointing Authority has demonstrated by a preponderance of the evidence that the Appellant, by verbally assaulting and acting in a harassing manner towards Albert Gill, engaged in conduct in violation of the Sexual Harassment Policy of the City of Medford.

The Extent of the Discipline Meted Out

The Appellant's substantial misconduct, his violation of the Sexual Harassment Policy, and the nexus between his conduct and his employment provided just cause for the City to discipline him. The Commission now turns to the issue of the proper extent of such discipline.

The Commission finds that the Appellant's unacceptable acts in the weeks leading up to February 18, 2005, were only the latest incidents in a longstanding pattern of misconduct that

resulted in the City implementing a course of progressive discipline directed at the Appellant. The Commission finds that the City based the one-year suspension here on a thorough review of the Appellant's entire disciplinary history.

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. Recommended Decision, 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 co-worker while a funeral was underway. When a mourner objected to his outburst, the Appellant cursed her as well. He was disciplined with a one hundred and eighty (180) day suspension. Recommended Decision, Finding of Fact #4, Exhibit 17. The Appellant appealed the 180-day suspension to the Commission. Schiavone v. Medford, Docket No. D-5901 (1999). 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." Id. The Appellant has been warned on numerous occasions by the City and this Commission that his conduct is inappropriate and exposes him to disciplinary action.

The Appellant has engaged in a pattern of harassing, intimidating, and denigrating others. This current suspension for one year, while greater than the Appellant's prior disciplines of ninety (90) days and one hundred and eighty (180) days, is entirely reasonable. The Commission finds that the City gave the Appellant the one year suspension in the course of implementing its policy of progressive discipline.

The Appointing Authority has demonstrated by a preponderance of the evidence that there was reasonable justification for the length of the suspension imposed by the City.

CONCLUSION

For all of the foregoing reasons, and those stated in the Magistrate's Recommended Decision, the Commission affirms 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. The appeal filed under Docket Number D-05-178 is hereby *dismissed.*

By a 3- 0–1 vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, and Stein [Taylor- absent; Henderson - Abstaining], Commissioners) on November 12, 2009.

A true record. Attest.

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)(l), 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)