

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MICHAEL SHEWCHUK,
Appellant

v.

D-05-271

CITY OF HOLYOKE,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Michael Shewchuk (hereinafter "Shewchuk" or "Appellant"), appealed the action taken by the Respondent, the City of Holyoke (hereinafter "City" or "Appointing Authority") suspending him for three days

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Prior to the leaving the Commission, however, Mr. Guerin authorized the drafting of this decision, including the referenced credibility assessments, which were made by Mr. Guerin. Pursuant to 801 CMR 1.01 (11)(e) of the Standard Adjudicatory Rules of Practice and Procedure, this case was reassigned to Chairman Bowman so that it may be brought before the full Commission for review and disposition.

without pay from his employment as a Heavy Motor Equipment Operator due to alleged insubordinate behavior on May 31, 2005.

The appeal was timely filed and a full hearing was held on September 11, 2007 at Holyoke City Hall. Since no written notice was received from either party, the hearing was declared private. Two (2) audiotapes were made of the hearing.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1-8) and the testimony of Appellant, William Fuqua, and Timothy Price, the hearing officer made the following findings of fact:

1. The Appellant, a tenured civil servant, was hired by the Holyoke Department of Public Works (hereinafter "DPW") in August 1990. He is employed as a Heavy Motor Equipment Operator. (Stipulations of Fact)
2. In May 2005 the Appellant's supervisor was Timothy Price, who had been recently appointed DPW Supervisor of Solid Waste and Recycling Coordinator. Before that Price had been a Heavy Motor Equipment Operator for ten years. (Testimony of Price)
3. On Tuesday, May 31, 2005, the day following Memorial Day, Price was supervising a work crew collecting trash. This work crew included Appellant, who was operating a refuse truck. (Testimony of Price)
4. Price testified that the crew was behind on trash pick-up. He called around to the employees stay until the trash was all picked up because the Mayor was unhappy with work constantly being left unfinished.. (Testimony of Price)

5. Price testified that he informed the whole crew that there was extra garbage that needed to be removed and that they would have to stay until it was all removed. He testified that in his estimation it would have taken no more than a half hour of additional time beyond the shift to complete the trash collection. (Testimony of Price)
6. The Collective Bargaining Agreement permits the Supervisor to request that the employees work overtime. (Joint Exhibit 1)
7. Price stated that he pursued Appellant, calling him on the radio and requesting that he pull the truck over three times before Appellant did so. Price testified that he believed his being a new supervisor was a factor in Appellant's not pulling over at first. (Testimony of Price)
8. Appellant testified that he was driving a ten wheel trash truck and pulled over the truck when he believed it was safe to do so, 60 to 70 yards down the road. He stated that he had completed his assigned route at this time and was heading towards the garage or "barn." (Testimony of Appellant)
9. Price testified that a worker is not necessarily done for the day when he has completed his route as there may be other tasks he is called on to assist with. (Testimony of Price)
10. Price testified that when he informed Appellant that he needed to remain on duty, Appellant replied by stating "no" and that he was done and had something to do. Appellant told Price that he wanted to speak with William Fuqua, DPW Superintendent, about an appointment he had scheduled. Appellant and Price proceeded to Fuqua's office. (Testimony of Price) Fuqua testified that he allowed

both men to “speak their piece” and that it was a heated exchange. (Testimony of Fuqua)

11. After the exchange, Fuqua asked Appellant if he wanted to return to work. Appellant agreed to do so. (Testimony of Appellant and Fuqua)

12. Appellant did not inform Price on May 31, 2005 that he had a doctor’s appointment, nor did Fuqua recall the Appellant telling him this. (Testimony of Price and Fuqua)

13. Price stated that it was his belief that the Appellant had purchased an item at auction and had received a call from the auction house to pick the item up that day.
(Testimony of Price)

14. Appellant testified that he had a scheduled appointment for allergy shots on May 31, 2005 and that he had had these appointments for five to six years every Monday and always tried to schedule the shots for after work, at 3:30. (Testimony of Appellant)

15. Price testified that all operations halted during the time that he was dealing with Appellant and that the completion of the trash collection was left until the next day.
(Testimony of Price)

16. A June 3, 2005 letter was sent to Appellant informing him that he was suspended without pay for three days for insubordinate behavior on May 31, 2005 when he refused to remain on his refuse route at the end of the shift in order to complete the day’s work as directed by Price. The letter stated that this behavior had a detrimental effect on the performance of the other crews and further delayed the completion of the day’s collections. (Joint Exhibit 4)

17. Fuqua testified that he believed a three-day suspension was appropriate given the magnitude of the disruption of the work to be done. (Testimony of Fuqua)

18. Holyoke DPW General Conduct Rules and Regulations, Section II (m) states that offenses including insubordination may be cause for up to a five day suspension or discharge. Insubordination is defined as refusal or failure to perform work assigned, or to comply with the instructions of a supervisor. (Joint Exhibit 3)
19. Appellant appealed his suspension to the Appointing Authority by letter dated June 3, 2005. (Stipulation of Fact)
20. The Appointing Authority met in Executive Session on July 18, 2005 and upheld Appellant's three-day suspension. (Stipulation of Fact)
21. A letter was sent to Appellant, dated July 22, 2005, notifying him of the Appointing Authority's decision. (Stipulation of Fact)
22. Appellant filed an appeal with the Commission on July 27, 2005.

CONCLUSION:

The role of the Civil Service 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." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v.

Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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." 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).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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). In reviewing an appeal under 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. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Here, there was reasonable justification for the action taken by the Appointing Authority given the circumstances. Specifically, the evidence showed that Price had the authority to direct the crew to remain beyond their shift to complete trash pick-up. Price testified credibly that Appellant was the only worker who refused to comply with his order. Credible testimony indicated that Appellant did not offer a reason to Price or Fuqua on May 31, 2005 for his refusal. Nor was there evidence that Price or Fuqua singled out Appellant to complete the trash removal. Moreover, if Appellant disputed Price's order, he should have complied with the request and then grieved it pursuant to the terms of the Collective Bargaining Agreement and a well entrenched rule of labor relations: obey now, grieve later. *See Beal, et. al. v. Boston Public Schools*, 18 MCSR 57 (2005); *Ouilllette v. City of Cambridge*, Civil Service Case No. D-03-123 (September 14, 2006) (citing concept of "obey now, grieve later").

Finally, the Appellant did not present any evidence of inappropriate motivations or objectives that would warrant reducing the three-day suspension imposed. Based on the above, the Appointing Authority has proven by a preponderance of the evidence that and there was just cause to suspend Appellant for three days.

For the above reasons, the Appellant's appeal under Docket No. D-05-271 is hereby ***dismissed.***

Civil Service Commission

Christopher C. Bowman
Chairman

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; and Taylor, Commissioner – Yes) on May 8, 2008.

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)(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:

Marshall T. Moriarty, Esq. (for Appellant)

Melissa Shea, Esq. (for Appointing Authority)