COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108
(617) 979-1900

BONNIE SMITH,
Appellant

v.

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION,
Respondent

D1-22-037

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA) was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission and the parties had thirty days to provide written objections to the Commission. Albeit tardily, the Commission received written objections from the Appellant and a response in the form of a proposed decision from the Respondent.

After careful review and consideration, the Commission has voted not to accept the Magistrate's bottom-line recommendation to affirm the Respondent agency's termination of the Appellant's employment. The Commission accepts and adopts the Magistrate's Findings of Fact numbered one through twelve.[1] But the Commission does not agree that MassDOT had just cause to terminate the Appellant for the reasons given in a March 4, 2022 Notice of Termination.[2] A preponderance of the credible record evidence fails to establish that the

[1] The Commission does not adopt those findings (specifically, nos. 13-16) that "address the key disputes by way of a less conclusory, more evaluative analysis." Recommended Decision at 4 n.3. For reasons explained herein, the Commission cannot endorse the Magistrate's conclusion that the Appellant either "abetted a colleague's theft" of government property or uttered a "false statement regarding [her] official duties," as charged in the agency's termination notice.

[2] In short, that notice accused the Appellant of using a forklift to move a MassDOT-owned plow to a location on MassDOT property where a coworker, mechanic Matthew McLaughlin, could readily hook the plow up to his personal pickup truck and remove it from MassDOT's facility. "You knew that Mr. McLaughlin was not authorized to take the plow blade, and you were not

Appellant abetted the theft of MassDOT property perpetrated by a work colleague.[3]

The Tentative Decision of the Magistrate concludes that if one credits the testimony of the MassDOT supervisor, Christopher Tello, to the effect that he never granted anyone permission to remove the disused plow from MassDOT property, then all other witnesses, including the Appellant, who maintained that he condoned removal of the plow, must be lying. Such an all-or-nothing dichotomy is not supported by the record in this case. The first key matter in factual dispute is whether Tello gave McLaughlin permission to take a MassDOT plow blade that had not been used for over seven years. During the May or June 2021 conversation in question, Tello was discussing plans to clean up the garage and move certain equipment into a pile to send to auction. McLaughlin asked Tello what MassDOT intended to do with the plow that had been sitting unused for several years and mentioned that he (McLaughlin) had been looking for a plow like that (presumably for a side gig plowing snow in winter). Tello testified that he told McLaughlin the plow would go to auction and said, "if you want it, you can get it." McLaughlin, Patrick Sheehan,[4] and the Appellant all remember Tello saying, "if you want the plow, you can have it." In making this statement, Tello apparently meant that McLaughlin could buy the plow during the auction. However, McLaughlin, Sheehan, and the Appellant interpreted Tello's statement to mean that McLaughlin could simply take the plow from the garage. These conflicting accounts do not mean that one side is being untruthful; they could simply reflect a reasonable misunderstanding flowing from an unclear statement. A preponderance of the evidence supports the testimony of McLaughlin, Sheehan, and the Appellant that they heard

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authorized to assist him by making the plow blade accessible to him." Id. "[A]ssisting another to take MassDOT property without authorization [i]s prohibited" and could lead to termination. Id. "Your actions constitute violations of the MassDOT Anti-Fraud Policy[.]" Id. Referring to a statement the Appellant allegedly made that McLaughlin's supervisor "told" her that McLaughlin "could take the plow if he wanted it," the March 4, 2022 termination notice also cites a prohibition on employees "making false statements regarding their official duties" and a provision authorizing a "discharge for theft and for dishonesty".

[3] To establish any claim of aiding and abetting a theft, which is effectively what the Respondent here accused the Appellant of doing (along with alleged "dishonesty" regarding the Appellant's supposed "misrepresentation" that the supervisor had authorized the plow's removal) MassDOT was obliged to demonstrate "(1) that [a codefendant] committed the relevant tort; (2) that [the alleged abettor] knew [the defendant was] committing the relevant tort; and (3) that [the alleged abettor] actively participated in or substantially assisted in [the] commission of the tort." Massachusetts Port Auth. v. Turo Inc., 487 Mass. 235, 244 (2021), quoting Go-Best Assets, Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64 (2012). See Planned Parenthood League of Mass., Inc. v. Blake, 417 Mass. 467, 481, *cert. denied*, 513 U.S. 868 (1994), citing Kyte v. Philip Morris, Inc., 408 Mass. 162, 168-169 (1990) (charge of aiding and abetting requires proof that suspect knew of substantial, supporting role in unlawful enterprise).

[4] Sheehan was another mechanic under Tello's supervision at the time in question. The Magistrate explicitly found that Sheehan's testimony "was not self-serving in any obvious way." Recommended Decision at 5, n.5.

Tello tell McLaughlin he could have the plow.[5] Even crediting Tello's account, as the Magistrate does, the record does not sustain a conclusion that the Appellant made a "false statement regarding [her] official duties," as charged in the termination notice.

The next factual dispute concerns who was present during Tello's conversation about the plow. Tello recalled only McLaughlin being present, while McLaughlin, Sheehan, and the Appellant each testified that they were all in a position to hear or overhear Tello's statement. Sheehan and the Appellant each testified that they were a few feet away, talking on their own while also paying attention to Tello, which explains why Tello may not remember them being there. Again, this does not necessarily mean that one side is lying. Sheehan and the Appellant both recalled Tello's statement clearly, and (as explicitly acknowledged by the Magistrate) Sheehan is a neutral, third-party witness who has no reason to lie about being present for this conversation (or what he thought he heard). A preponderance of the evidence supports the consistent testimony of Sheehan, McLaughlin, and the Appellant that they were all present during Tello's conversation about the plow.

Subsequently, on July 24, 2021, the Appellant was bored at work and had nothing to do. The Appellant moved the plow to the auction pile because Tello had talked about cleaning up the garage and stated that the plow was going to auction. Nobody asked the Appellant to move the plow, but this was a reasonable thing to do given her job description. All of the witnesses, including Tello, agreed that the Appellant commonly moved equipment around the garage because that was part of her job. There is no evidence that McLaughlin was present when the Appellant moved the plow. A preponderance of the evidence does not support the conclusion that the Appellant moved the plow in furtherance of a conspiracy with McLaughlin a week later to commit a theft of MassDOT property.[6]

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[5] In any event, even if the Appellant were either mistaken about what she heard or consciously distorted Tello's statement as a favor to her friend (McLaughlin), there is nothing in this record that establishes that the Appellant benefited personally from the eventual removal of the disused plow from MassDOT property. The absence of any benefit whatsoever to the Appellant from a tort or crime committed by another, even if she were inadvertently complicit in the removal of this item of MassDOT property, undermines greatly any justification for imposing the harshest possible penalty of termination from employment.

[6] Nor does the Commission believe that the Appellant should be punished for simply moving the plow, even if she lacked explicit authorization to do so. "Just cause" for a disciplinary action means "*substantial misconduct* which adversely affects the public interest by impairing the efficiency of the public service." Doherty v. Civil Serv. Comm'n, 486 Mass. 487, 493 (2020) (emphasis in original). Furthermore, Massachusetts civil service law requires that discipline be progressive in nature and remedial, not punitive, "correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected . . . ." G.L. c. 31, § 1. The Appellant had no prior discipline in her fourteen years of employment at MassDOT. (*Stipulated fact*). The Respondent's decision to terminate her for the first alleged instance of misconduct that arose during her long, unblemished career contravenes principles of progressive discipline.

Similarly, a preponderance of the evidence does not prove that the Appellant acted with ill intent the following week when she moved her tow truck at McLaughlin's request. There was only one spot in the area of the auction pile in which to park a truck, and the Appellant was occupying it, so she had to move when McLaughlin made the request. The Appellant did not ask, nor did McLaughlin explain, why he needed to use the spot. It was reasonable for the Appellant to oblige a seemingly innocuous request from a coworker. This occurred at the end of the Appellant's shift and so, after moving the tow truck, she got into her personal vehicle and left work. This much is undisputed. There is nothing in the record to show that the Appellant actually saw McLaughlin remove the plow from MassDOT property, never mind that she knowingly aided or abetted him in doing so, consciously aware that McLaughlin was about to perpetrate a tort or a crime. On this record, *contra* the Recommended Decision at 7, the Commission cannot endorse a finding that the Appellant "abetted a theft of government property."

A preponderance of the evidence does not establish that there was just cause for the Appellant's termination. Accordingly, the appeal of Bonnie Smith is hereby ***allowed***. Her termination is vacated and all compensation and benefits to which she is entitled, retroactive to the date of her suspension, shall be restored forthwith to the Appellant.

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, and Tivnan, Commissioners) on March 9, 2023.

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.

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 after receipt of 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Joseph L. Sulman, Esq. (for Appellant)
Patrick J. Atwell, Esq. (for Respondent)
Erik F. Pike (for Respondent)
James Rooney, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **Division of Administrative Law Appeals**

Bonnie Smith,
Appellant,

v.

Massachusetts Department of Transportation,
Respondent.

No. CS-22-152 (D1-22-037)

Dated: September 15, 2022

Appearance for Appellant:
Joseph L. Sulman, Esq.
391 Totten Pond Road
Waltham, MA 02451

Appearance for Respondent:
Patrick Atwell
Erik Pike
10 Park Plaza
Boston, MA 02116

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF RECOMMENDED DECISION

A preponderance of the evidence established that the appellant abetted a colleague's theft of a plow blade owned by their employing agency. The agency's termination of the appellant's employment was therefore supported by just cause.

RECOMMENDED DECISION

The Department of Transportation (department) terminated appellant Bonnie Smith's employment. She appealed to the Civil Service Commission, which referred the appeal to the Division of Administrative Law Appeals.

An evidentiary hearing took place on July 14, 2022 (in person) and July 25, 2022 (by WebEx). The witnesses were: Ms. Smith; her former colleagues Matthew McLaughlin, Patrick Sheehan, Kristopher Pierce, and Christopher Tello; and department executives James Norton and

Shirley Gibson. I admitted into evidence exhibits marked 1-10, among which exhibit 4 consisted of six videos (marked 4a-4f).

After the hearing, the department moved for leave to submit rebuttal evidence. 801 C.M.R. § 1.01(10)(f). The motion was denied as to an affidavit from Mr. Norton.[7] It is hereby allowed as to the affidavit's exhibits, marked A and B.

Findings of Fact

I find the following facts.

Ms. Smith began working for the Commonwealth in 2007, and for the department upon its establishment in 2009. Her most recent functional job title was Incident Response Operator. Her primary responsibility was to remove debris from the scenes of car accidents, using a tow truck and other machinery. (Smith; Tello.[8])

Between towing assignments, Ms. Smith spent much of her time at a department garage on D Street in Boston. The staff of the D Street garage included approximately ten mechanics. It was common for Ms. Smith to move pieces of equipment around the garage at the mechanics' request. (Smith; McLaughlin; Sheehan; Pierce; Tello.)

Among the mechanics who worked at the D Street garage were Mr. McLaughlin, Mr. Sheehan, and Mr. Pierce. The supervising mechanic was Mr. Tello. Ms. Smith was professionally friendly with Mr. McLaughlin. Her relationship with Mr. Tello was less warm but still cordial. (Smith; McLaughlin; Sheehan; Pierce; Tello.)

[7] Mr. Norton testified first for the department. He was then excused from the commission's sequestration order. At the close of the hearing, the department noted its intention to move for leave to submit rebuttal evidence. Although Mr. Norton was present, the department did not seek to recall him for additional testimony in Ms. Smith's presence. Instead, the department attached an un-cross-examined affidavit from Mr. Norton to its subsequent written motion. In the circumstances, admitting the affidavit would be contrary to the spirit of the sequestration order, unfair, and arguably inconsistent with due process.

[8] Citations to the testimony, which has not been transcribed, are by witness name only.

Among the pieces of equipment stored at the D Street garage was a plow blade that had gone unused since approximately 2014. The plow blade lay between the garage's perimeter fence and several other pieces of equipment. (Smith; McLaughlin; Tello.)

Garage employees referred to a particular area in the garage as the "auction pile." Collected there were pieces of equipment that were no longer in use. The auction pile was located near the exit from the garage. (Smith; Tello.)

On July 24, 2021, Ms. Smith used a forklift to clear a path to the plow blade. Next, she relocated the plow blade to the auction pile. She then restored the pieces of equipment that had been obstructing the plow blade to their original spots. (Smith; Exhibit 4.)

On July 30, 2021, Mr. McLaughlin drove his personal pickup truck to the auction pile, attached the plow blade to his truck, took the plow blade home, and left it there. Ms. Smith was in the vicinity when Mr. McLaughlin was driving out of the garage. (Smith; McLaughlin; Exhibit 4.)

Mr. Tello was out from work both on July 24 and on July 30. Upon his return from the latter absence, Mr. Tello saw that the plow blade was missing. He notified his supervisor. The department investigated. Mr. Tello reviewed footage from the garage's security cameras, on which he saw Ms. Smith's maneuvers on July 24 and Mr. McLaughlin's departure with the plow blade on July 30. (Tello; Exhibit 4.)

The department opened disciplinary proceedings. Mr. Norton delivered notices of suspension to Ms. Smith and Mr. McLaughlin. They asked for an explanation. When Mr. Norton stated that the suspensions related to the missing plow blade, Ms. Smith and Mr. McLaughlin did not respond. After certain subsequent proceedings, the department terminated Ms. Smith's employment. (Norton; Smith; McLaughlin; Exhibits 1-3, 8.)

The parties and the various witnesses agree on the mechanics of the events of July 24 and 30.[9] Their dispute concerns the background to—and reasons for—Ms. Smith and Mr. McLaughlin's actions. The parties focus on an earlier conversation, in approximately May-June 2021, during which Mr. McLaughlin asked Mr. Tello what the department was planning to do with the plow blade. (Smith; McLaughlin; Sheehan; Tello.)

Ms. Smith, Mr. McLaughlin, and Mr. Sheehan provided roughly consistent descriptions of this conversation. They all claimed to have been present. On their account, Mr. Tello responded to Mr. McLaughlin by giving him permission to take the plow blade home. Ms. Smith added that, during the same conversation, Mr. Tello complained about the garage being littered with unused items, specifically including the plow blade. (Smith; McLaughlin; Sheehan.)

Mr. Tello told a different story. He testified that his response to Mr. McLaughlin was that the plow blade might be sold at an auction open to the public. Mr. Tello did not recall Ms. Smith or Mr. Sheehan being present. (Tello.)

On the pivotal question of whether Mr. Tello permitted Mr. McLaughlin to take the plow blade home, I accept Mr. Tello's account. This determination draws on my impressions of the various witnesses' credibility.[10] In addition, Mr. Tello's version of events is supported by the fact that he ultimately reported the plow blade missing, thereby prompting the department's investigation. This course of action would have made no sense if Mr. Tello had gifted the plow blade to Mr. McLaughlin. Also lending force to Mr. Tello's story is the fact that Ms. Smith and

[9] The remaining paragraphs of the findings of fact address the key disputes by way of a less conclusory, more evaluative analysis.

[10] I do not ascribe significance to Ms. Smith and Mr. McLaughlin's choice to remain silent once Mr. Norton explained the department's suspicions. It may be perfectly logical and appropriate for an innocent employee to seek advice from an attorney or union rep before speaking to management about explosive matters.

Mr. McLaughlin moved and removed the plow blade when they did—weeks or months after the discussion about the plow blade's future, on two weekends when Mr. Tello was absent. Finally, Mr. Tello had no realistic reason to lie.[11] (Smith; McLaughlin; Sheehan; Tello.)

Once Mr. Tello's account is accepted as fundamentally true, additional consequences follow. The various details of Ms. Smith's story lose credibility. In particular, I do not credit her testimony that she relocated the plow blade to the auction pile in an effort to clean the garage of unused junk. Rather, the most reasonable inference from the evidence is that she acted as she did in order to support Mr. McLaughlin's effort to take the plow blade home. (Tello; Smith.)

Further, at one or more pre-termination hearings, Ms. Smith told department officials that she heard Mr. Tello grant Mr. McLaughlin permission to take the plow blade home. The trueness of Mr. Tello's testimony means that these statements from Ms. Smith were false. It is reasonable to infer that their purpose was to protect Mr. McLaughlin from disciplinary consequences. (Norton; Tello.)

The department has previously failed to terminate employees who appropriated department property for personal use. Mr. Pierce took home a rotary mower for a period of time without incurring discipline. At least two other individuals received brief suspensions for performing household work with department equipment. Still, no other incidents established by the evidence are fairly characterized as attempts to permanently deprive the department of its property. The evidence also does not suggest that the department's disciplinary action against Ms. Smith was driven by political considerations, favoritism, or bias. (Pierce; Smith; Exhibits A, B.)

[11] Mr. Sheehan's testimony's also was not self-serving in any obvious way. But it is particularly hard to fathom a motive for Mr. Tello to have manufactured false testimony against Ms. Smith and Mr. McLaughlin.

Analysis

Ms. Smith is a "tenured employee" within the meaning of the civil service law. G.L. c. 31, § 1. Accordingly, the department may discharge her only for "just cause." *Id.* § 41.

Just cause exists where an employee has committed "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *Town of Brookline v. Alston*, 487 Mass. 278, 292-93 (2021) (quoting *Doherty v. Civil Serv. Comm'n*, 486 Mass. 487, 493 (2020)). Such misconduct often involves violations of relevant laws, rules, policies, or performance standards. *See Faria v. Third Bristol Div. of Dist. Ct. Dep't of Trial Ct.*, 14 Mass. App. Ct. 985, 985 (1982); *Board of Selectmen of Framingham v. Civil Serv. Comm'n*, 7 Mass. App. Ct. 398, 407 (1979); *Fierimonte v. Civil Serv. Comm'n*, 69 Mass. App. Ct. 1106 (2007) (unpublished memorandum opinion).

In proceedings before the commission, it is the department's burden to prove just cause by a preponderance of the evidence. *Boston Police Dep't v. Collins*, 48 Mass. App. Ct. 408, 411 (2000). The analysis of whether the department has carried that burden "must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." *Id.* at 412 (quoting *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997)).

The disagreement here concentrates on the facts. There is no real dispute about the manner in which the pertinent principles apply. The findings enumerated *supra* mean, in substance, that Ms. Smith abetted a theft of government property. Such conduct is illegal, injures the public interest, and impairs the efficiency of the public service. It amounts to just cause for termination. *See, e.g.*, *Kennedy v. City of Holyoke*, 312 Mass. 248, 249 (1942); *Connolly v. City of Quincy*, No. D1-11-287, at 25-26 (CSC Aug. 9, 2012).

Ms. Smith suggests that she may have been disciplined more harshly than other department employees who have misused department property. But the proven prior incidents of unpunished or lightly punished misconduct did not include attempted or actual thefts. Furthermore, the facts of Ms. Smith's conduct as proven at the hearing do not differ significantly from the facts on which the department relied in selecting a sanction. In these circumstances, "the absence of political considerations, favoritism, or bias . . . warrant[s] essentially the same penalty." *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824 (2006). A contrary approach "would create a paradoxical scenario where as long as an appointing authority failed to discipline one bad actor, future bad actors also could not be disciplined." *Desmond v. Town of W. Bridgewater*, 94 Mass. App. Ct. 1122, slip op. at 8 n.9 (2019) (unpublished memorandum opinion). *See also Collins*, 48 Mass. App. Ct. at 411-13; *White v. Wareham Police Dep't*, No. D-08-178, at 11 (CSC Jan. 8, 2009).

Conclusion

I report and recommend to the commission the findings and analysis described *supra*.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate