

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

THOMAS F. SMITH,

Appellant

v.

D-03-1

BOSTON SCHOOL DEPARTMENT,

Respondent

Appellant's Attorney:

Pro Se
Thomas F. Smith
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Burlington, MA 01803
(781) 272-5348

Respondent's Attorney:

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Commissioners:

Christopher C. Bowman

DECISION

The Appellant, Thomas F. Smith (hereafter "Smith" or "Appellant"), pursuant to G.L. c. 31, §§42 and 43, filed an appeal with the Commission on December 19, 2002, claiming that the Boston School Department (hereafter "School Department" or "Appointing Authority") did not have just cause (Section 43 appeal) to suspend him for five (5) days as a Senior Custodian for poor job performance and excessive absenteeism and that the

City had failed to provide him with a copy of G.L. c. 31, §41 – 45 or issue him a timely decision (Section 42 appeal) regarding the disciplinary action.

The appeal was timely filed. A hearing was held on February 22, 2007, after repeated continuances requested by the parties, at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. The witnesses were not sequestered. Two tapes were made of the hearing.

FINDINGS OF FACT:

10 Exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Boston School Department:

- Dorian T. Howard, Area Manager, Boston School Department;
- Charles Cardillo, Assistant Director of Facilities Management, Boston School Department;

For the Appellant:

- Thomas F. Smith, Appellant;

I make the following findings of fact:

1. The Appellant, Thomas Smith, was a tenured civil service employee of the Boston School Department in the position of Senior Custodian. He had been employed by the School Department for approximately 19 years at the time of the 5-day suspension in 2002. (Testimony of Appellant)
2. Subsequent to the discipline which is the subject of this appeal, Mr. Smith retired from the Boston School Department on June 30, 2003. He has chosen to continue

with the instant appeal in order to recoup five days of back pay and “expunge” his record. (Testimony of Appellant)

3. The Appellant’s prior discipline includes a written reprimand for sexual harassment of a teacher; a three-day suspension for sexual harassment of a teacher and student; and a five-day suspension, which had just been issued in September 2002, for inappropriate conduct toward a secretary. (Exhibit 1)
4. After being disciplined in September 2002 for the above-referenced inappropriate conduct toward a secretary, the Appellant was transferred from the Warren-Prescott School to the Tobin School in Roxbury. (Testimony of Appellant)
5. Shortly after the Appellant began working at the Tobin School, Charles Cardillo, Assistant Director of Facilities Management for the Boston School Department, received two or three phone calls from the principal of the Tobin School in early October 2002 complaining about the cleanliness of the building since the Appellant was transferred there. Specifically, Cardillo was told by the principal of the Tobin School that the floors in the Kindergarten area were not being vacuumed; the cafeteria was not being cleaned; the classrooms were not being cleaned; and there was a smell of urine in the student bathrooms after they had been cleaned by the Appellant. (Testimony of Cardillo)
6. Assistant Director Cardillo is a 39-year veteran of the School Department and worked his way up the ranks from the position of Junior Custodian. He oversees more than 550 employees including Junior Custodians and Senior Custodians, such as the Appellant. Mr. Cardillo was a good witness. He takes obvious pride in his work and offered straightforward, credible testimony before the Commission. Even the

Appellant, during Mr. Cardillo's testimony, stated that, "Charlie knows his job."
(Testimony, Demeanor of Cardillo)

7. In response to the principal's above-referenced phone calls, Assistant Director Cardillo asked "day-time Area Manager" Richard Boly, who was responsible for overseeing custodians in various schools including the Tobin School, to visit the Tobin School and report back to him regarding the conditions at the school.
(Testimony of Cardillo)
8. After doing a walk-through of the Tobin School, Boly reported back to Assistant Director Cardillo that the principal's concerns were well-founded and corroborated the poor conditions in all of the areas referenced by the principal. (Testimony of Cardillo)
9. After receiving the above-referenced verbal report from the day-time Area Manager, Cardillo directed night-time Area Manager Dorian Howard to do a walk-through of the school and address the issue with the Appellant. (Testimony of Cardillo) Dorian Howard testified at the Commission hearing for the Appointing Authority.
10. On two separate occasions in October 2002, night-time Area Manager Dorian Howard did a walk-through of the Tobin School in response to the above-referenced request from Mr. Cardillo. (Testimony of Howard)
11. Mr. Howard is a 27-year veteran of the Boston School Department. Like Mr. Cardillo, he has worked his way up the ranks, starting as a Junior Custodian and eventually being promoted to Senior Custodian and then to his current position of Area Manager. He and another area manager directly oversee the custodians in 70 different schools and work directly with school principals and headmasters whenever

there is a concern regarding the job performance of the custodians. Mr. Howard was also a good witness. Notwithstanding the Appellant's contention that Mr. Howard was "antagonistic" toward him, purportedly as a result of a verbal disagreement several years ago, I found Mr. Howard's testimony to be credible and devoid of any animosity toward the Appellant. In fact, Mr. Howard, showing that he had no ill will toward the Appellant, testified that the Appellant's job performance was at one time up to par, albeit several years ago. Moreover, Mr. Howard showed admirable restraint while being cross-examined directly by this pro se Appellant. (Testimony, Demeanor of Howard)

12. Mr. Howard testified that, based on the request of Assistant Director Cardillo, he did a walk-through of the Tobin School on two occasions sometime in October 2002. Although he did not take any notes, he recounted each walk-through in detail. Of particular importance is Mr. Howard's recollection that after each walk-through, he immediately talked to the Appellant, who was on duty at the time of each walk-through. On both occasions, Mr. Howard testified that he found the Appellant sitting in the teachers' room reading the newspaper. (Testimony of Howard)
13. During his testimony, the Appellant, who acknowledged to this Commissioner that he has problems with his memory, denied that Mr. Howard spoke to him after doing the above-referenced walk-throughs. Moreover, the Appellant claims he either wasn't on duty or went home early on the day of each walk-through. (Testimony of Appellant)
14. Exhibit 7, the "Reported Time History", of the Appellant for the months of June through November 11, 2002, does not support the Appellant's contention that he went home early on any day in October 2002. (Exhibit 7) Moreover, I find the testimony

of Mr. Howard to be more credible than the Appellant. On this important point, I find that Mr. Howard did indeed conduct the walk-throughs in question and did indeed talk to the Appellant after each walk-through. (Testimony, Demeanor of Howard and Appellant)

15. During the first above-referenced walk-through in October 2002, Mr. Howard found the Tobin School to be in the same condition found by day-time Area Manager Boly. Specifically, the cafeteria floor was “tacky”, food was ground into the floor which needed to be swept and gummed; the bathrooms reeked of urine and the floors in the Kindergarten classrooms were not clean. Mr. Howard met with the Appellant immediately after the walk-through and told him to “step up” and perform his assigned tasks. (Testimony of Howard)
16. Two days later, in October 2002, Mr. Howard performed a second, follow-up, walk-through of the Tobin School. Again, the Appellant was on duty during the walk-through, which occurred at approximately 7:00 P.M. Mr. Howard found that the school was in the same poor condition, including tacky floors in the cafeteria, unvacuumed carpets and bathrooms that reeked of urine. Once again, Mr. Howard found the Appellant sitting in the teachers’ room after the walk-through. (Testimony of Howard)
17. During his testimony, the Appellant stated that cleaning the cafeteria was not his responsibility. Rather, he testified that the Senior Custodian from the day shift was responsible for cleaning the cafeteria. (Testimony of Appellant) Although the City did not produce a copy of the job duties of the night shift Senior Custodian, both Mr. Cardillo and Mr. Howard strongly refuted the Appellant on this point, stating that the

Appellant was indeed responsible for ensuring that the cafeteria was clean.

(Testimony of Cardillo and Howard) I find the testimony of Mr. Cardillo and Mr.

Howard to be more credible than the Appellant on this point.

18. The Appellant used 13 sick days between July and October 2002. (Exhibits 1 & 7)

After the Appointing Authority hearing, the Appellant was given two weeks to

produce medical documentation to substantiate his sick leave. (Exhibit 1) In

response, the Appellant provided one letter from a doctor which stated, "Mr. Thomas

F. Smith was seen by (me) on October 23, 2002." (Exhibit 6)

19. After hearing back from Area Manager Dorian Howard about the above-referenced

walk-throughs, Assistant Director Cardillo scheduled a hearing for October 24, 2002.

A notice, with a copy of G.L. c. 31, §§ 41-45 attached, was given to the Appellant in-

hand on or about October 16, 2002. The notice indicated that the hearing was to

discuss job performance and attendance and that disciplinary action may be issued up

to and including a 5-day suspension and/or a recommendation for termination.

(Exhibits 1 & 5)

20. The Appellant could not attend the scheduled hearing on October 24, 2002, so Mr.

Cardillo rescheduled the hearing to November 21, 2002. (Exhibits 1 & 3)

21. Mr. Cardillo gave Mr. Smith written notice of the November 21, 2002 hearing on or

about November 12, 2002 together with a copy of G.L. c. 31, §§ 41-45. (Exhibits 1 &

3)

22. The Appointing Authority disciplinary hearing took place on November 21, 2002.

The Appellant was accompanied by two officers of the custodians' union. (Exhibit 1)

23. As a result of the Appointing Authority disciplinary hearing, the Appellant was issued a five-day suspension on December 10, 2002. (Exhibit 1)

CONCLUSION

Section 42 Appeal

Prior to terminating a tenured civil service employee, G.L. c. 31, § 41 requires that the employee 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.”

“If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor.” Id.

Pursuant to Section 42, if the Commission finds that the Appointing Authority failed to follow the above-referenced Section 41 procedural 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.” G.L. c. 31, s.42.

In the instant case, the Appointing Authority has complied with the provisions of Section 41. In fact, the Appointing Authority sought to accommodate the Appellant in

this case by rescheduling the disciplinary hearing at his request. The Appellant's contention, as noted on his appeal form to the Commission, that he was not provided with a complete copy of G.L. c. 31, §§ 41-45 or that he was not issued a timely decision are not supported by the Findings of Fact.

For these reasons, the Appellant's appeal under Section 42 is denied.

Section 43 Appeal

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).

The Boston School Department has proven, by a preponderance of the evidence, that it had just cause to suspend the Appellant, Thomas Smith, for five days. While the Appellant was a veteran employee of the Boston School Department, and at one point performed his duties well, his final days prior to retirement were clearly not his best. Only weeks before the incident which is the subject of the instant appeal, the Appellant received a five-day suspension for inappropriate conduct toward a secretary. As a result of that incident, the Appellant was transferred to the Tobin School. Soon after his arrival, the principal of the Tobin School noticed that the cleanliness of the school had

deteriorated and immediately notified the Assistant Director of Facilities Management for the Boston School Department. Three walk-throughs by two Area Managers showed that the principal's concerns were well-founded. The cafeteria floor was "tacky", food was ground into the floor, classrooms were not cleaned, the carpets in the Kindergarten area were not vacuumed and the bathrooms reeked of urine. Area Manager Dorian Howard, who conducted two of the walk-throughs, testified that he wouldn't want his own children attending a school in such poor condition.

The Appellant offered various explanations for the condition of the school, first blaming the senior custodian from the day shift, then suggesting he wasn't responsible for cleaning the cafeteria and then denying that he was even on duty when the walk-throughs were completed. The Appellant has subsequently retired from the Boston School Department and acknowledges that he has memory problems. As such, this Commissioner will refrain from offering a detailed credibility assessment of the Appellant. That notwithstanding, there should be no doubt that I find the testimony of Assistant Director Cardillo and Area Manager Howard to be credible – and their testimony can not be reconciled with that of the Appellant. In light of the unsanitary conditions endured by the students and staff of the Tobin School and considering the Appellant's prior disciplinary record, the School Department exercised considerable restraint in limiting the discipline to five days.

For all of the above reasons, the Appellant's Appeal under Docket Number D-03-1 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Marquis and Guerin, Commissioners [Taylor, Commissioner – Absent]) on March 8, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Thomas F. Smith