

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

A. MARSHALL SOUZA,
Appellant

v.

D-06-282

TOWN OF BILLERICA,
Respondent

Appellant's Attorney:

James T. Dangora, Jr., Atty.
Shea, Dangora & Nelson
566 Boston Road
Billerica, MA 01821

Respondent's Attorney:

Daniel C. Brown, Atty
Collins, Loughran & Peloquin, P.C.
320 Norwood Park
South Norwood, MA 02060

Commissioner:

Daniel M. Henderson

DECISION

The Appellant, A. Marshall The Appellant (hereinafter "Appellant"), pursuant to G.L. c.31 § 43, filed an appeal with the Civil Service Commission, (hereinafter "Commission") on October 27, 2006, claiming the Town of Billerica (hereinafter "Billerica" or "Appointing Authority") did not have just cause to suspend him, without pay for 30-days. The appeal was timely filed. A hearing was held on November 30, 2007 at the Commission. As no written notice

was received from either party, the hearing was declared private. The witnesses were not sequestered. Two (2) tapes were made of the hearing and are retained by the Commission.

FINDINGS OF FACT:

Based on the seven (7) joint Exhibits entered into evidence, and based on the testimony of Rocco Longo, John Sanguinet, Abdul Alkhatib, Judy Dunn, and the Appellant, I make the following findings of facts:

1. The Appellant is a tenured employee has been employed by Billerica as a Water Meter Reader/Repairman since May 28, 1977. (Testimony of Appellant and Exhibit 3)
2. As a water meter reader/repairman, the Appellant is charged with the responsibility of reading and repairing residential, commercial, and industrial water meters throughout Billerica. (Testimony of Appellant)
3. The Appellant has been supervised by three supervisors during his tenure at Billerica. (Testimony of Appellant)
4. William Doyle (hereinafter "Doyle") was the Appellant's first supervisor in 1977. Mr. Doyle was replaced by David Genereux (hereinafter "Genereux"), who did not testify at this hearing. Genereux stopped working for Billerica in January, 2006. Judy Dunn replaced Mr. Genereux and became the Appellant's supervisor on or about March 2006. (Testimony of Appellant, Alkatib and Dunn)
5. Rocco Longo (hereinafter "Longo") has been the Town Manager of Billerica since June 20, 2005. The Town Manager is the Appointing Authority for the Town of Billerica. (Testimony of Longo)
6. Prior to Longo's management, Richard Montouri was the Town Manager in Billerica. (Testimony of Appellant)

7. John Sanguinet was hired as the Assistant Town Manager in Billerica in April of 2006.
Sanguinet's main area of responsibility is in personnel; regarding hiring, firing and other discipline of employees. Sanguinet admitted that he had "very limited experience" in these areas prior to being hired by Billerica. (Testimony of Sanguinet)
8. Sanguinet was not aware of any problem with the Appellant's schedule or sick time use until it was brought to his attention by Judy Dunn, at about the time that this discipline was investigated by him. (Testimony of Sanguinet)
9. Sanguinet testified, as did all of the other Appointing Authority witnesses, that he did not have any evidence, at the time of the discipline or now, that the Appellant took sick time for any period that he was not actually sick. The parties orally stipulated to this during the hearing. (Exhibits and testimony; Stipulation)
10. Sanguinet did not speak with the Appellant during his investigation of this disciplinary matter, nor did he speak with him prior to completing his report and recommendation for discipline. Sanguinet did not even inform the Appellant that there was an issue or concern about his work hours or use of sick leave time. Sanguinet did not think that it was necessary to speak with the Appellant prior to writing his report and recommendation for discipline, dated September 22, 2006. (Testimony of Sanguinet)
11. Sanguinet clearly states in his report and recommendation for discipline, that the Appellant had in the past been using "sick time to attend to the health need of his girlfriend." Then Sanguinet follows up by stating; "This is an inappropriate use of sick leave and therefore will no longer be authorized. The misuse of time is not an issue since it was inappropriately allowed by [] The Appellant's supervisor." (Testimony of Sanguinet, Exhibit 5)

12. Sanguinet's report and recommendation for discipline, dated September 22, 2006 is addressed to Rocco Longo, Town Manager and Appointing Authority for Billerica. This report and recommendation is the basis, relied upon by Longo, to propose these disciplinary charges against the Appellant and to hold a disciplinary hearing for same. (Testimony of Sanguinet and Longo, Exhibits 1, 2, 3 &5)
13. Sanguinet also attached attachments 1 through 6 of Exhibit 5 to his report and recommendation for discipline, which he sent to Longo. Longo considered all factors contained in Sanguinet's report and recommendation in his determination and decision to issue the discipline of 30 days suspension against the Appellant. Longo considered the number of days and the pattern. He "looked at a calendar and felt that the number of Thursdays and Fridays were very unusual". Longo also considered the Appellant's prior discipline in issuing this discipline. Longo "spoke with Judy Dunn and others" prior to the Disciplinary Hearing and found that the Appellant "did not like to read meters." Longo also assumed that all of the time taken by the Appellant was designated, as he requested it to be. Longo did not check to see if there was any evidence that the Appellant was not sick for any of those days for which he took sick time. Longo did not consider any time taken off for the care of the Appellant's girlfriend as a basis for this discipline. Any alleged performance abuse was not considered by Longo as a basis for his decision to issue discipline in this matter. (Testimony of Longo)
14. Longo notified the Appellant by letter dated October 2, 2006 that he was being charged with a "pattern of sick-leave abuse" that had occurred during the first nine (9) months of 2006. Longo attached a copy of Sanguinet's report and recommendation to this letter of notice. This letter of notice also informed the Appellant that the disciplinary hearing was

scheduled for October 10, 2006 at 3:00 PM. (Testimony of Sanguinet and Longo, Exhibits 1, 2, 3 & 5)

15. Longo notified the Appellant by letter dated October 23, 2006 of his decision on the disciplinary charges as follows: "In my opinion, there is clear and substantial evidence that you have abused sick leave. In a nine (9) month period beginning January 1, 2006, you utilized sick leave on twenty (20) occasions and eleven (11) of those days were connected to weekends, holidays or vacation time. Seven (7) of the days were Thursdays, which I find unusual. On eleven (11) of the sick days you took anywhere from (2) to four (4) hours sick leave per day. Furthermore, several sick days were taken to care for a 'girlfriend', which is not permissible use of sick leave under the contract between the Town and BMEA." This letter also added a few "furthermores" which were not included as a basis for this discipline. The Appellant received an unpaid 30 day suspension as discipline. (Testimony of Longo and Exhibits 1, 2, 3 & 5)

16. The Appellant is a member of the Billerica Municipal Employees' Association (BMEA) which represents him and therefore subjects him to the terms and conditions of a Collective Bargaining Agreement (hereinafter "CBA"), between the union and Billerica. (Exhibit 4)

17. The regular work hours for employees covered under the CBA are 7:00 a.m. to 3:30 p.m. The CBA further provides that employees are granted two 15-minute breaks and a 30-minute lunch break per shift. The employees are also allowed 15-minute clean-up time and time plus time to return from field work to the place from which they started work, in order to clean-up. (Exhibit 4, Testimony of Appellant)

18. The Appellant has a domestic partner who suffers from significant and debilitating health issues. The Appellant and his partner have been together for 16 years. The Appellants care for and the medical needs of his partner are the circumstances prompting the Appellant's desire to modify his work schedule that allowed him to work a flexible schedule and take comp time as needed. (Testimony of Appellant)

Oral Agreement

19. An oral agreement (hereinafter "Agreement") permitted the Appellant to maintain a flexible work schedule in order to attend to the health needs of his domestic partner. This Agreement was made between the Appellant and Doyle, the Appellant's first supervisor. The exact date in which the Agreement was originally made is unknown. (Testimony of Appellant, Dunn, and Longo)
20. The terms of the Agreement are general in nature; although it appears that both parties understood that the Appellant would be permitted a flexible schedule and the use of comp time in order to accommodate caring for his domestic partner. (Testimony of Appellant, Dunn, and Longo)
21. Under the Agreement, the Appellant was permitted to occasionally interchange or 'cover' duties and responsibilities among himself, his supervisor, and other Meter Reader/Repairmen. Although he was not required to do so, the Appellant usually obtained permission and/or gave notice to his supervisors. The Appellant had a "flex time" arrangement with his supervisors, by which he worked through his lunch and break time and accumulated "comp time" for use when he needed to take time off for his partner's medical needs. He completed his assigned work by this arrangement or agreement and never charged Billerica for overtime pay, even when he was entitled to it.

Any time he took off to care for his partner, he took/requested flex time or comp time. He never requested sick time to care for his partner. (Testimony of Appellant)

22. The Appellant performed his duties as a Meter Reader/Repairman for Billerica under this oral Agreement, with Billerica's acquiescence and/or affirmation, for many years prior to this discipline. (Testimony of Appellant).

23. The Appellant's next supervisor, after Doyle, David Genereux (hereinafter "Genereux"), affirmed the general principles of this Agreement. Genereux permitted the Appellant to continue to combine comp-time earned from the flex schedule, and vacation-time in order to provide for his domestic partner. (Testimony of Appellant, Testimony of Longo).

24. Judy Dunn (hereinafter "Dunn") replaced Genereux as the Appellant's supervisor in March 2006. Dunn had previously been employed by Billerica as the computer systems administrator. She admitted that she had no prior supervisory experience before being appointed to this supervisor position. (Testimony of Dunn)

25. Dunn is familiar with the meter reader/repairman duties and responsibilities for Billerica. There are three meter reader/repairmen. Their respective schedules alternated, whereby one week is spent repairing meters, followed by two weeks reading meters. (Testimony of Dunn)

26. Dunn knew of the existence of an oral agreement regarding time-off made between her predecessors and the Appellant. (Testimony of Appellant, Dunn and Longo).

27. Ms. Dunn understood that part of that agreement allowed the Appellant to work a flexible work schedule and allowed him to take his lunch anytime between 9:30 AM. and 11:00 AM. She became aware of this aspect since she had to schedule repair appointments and enter them into the log. However Dunn was unaware of other aspects of the agreement

since that at the time she began as the Appellant's supervisor, "everybody was taking whatever they wanted for time off." (Testimony of Dunn)

28. In January, 2006, when Genereux left his employment with Billerica. At that time, Dunn was not aware of what was appropriate or inappropriate for designating time off for employees, since "everybody was taking whatever they wanted for time off." (Testimony of Dunn)

29. Dunn had no evidence that the Appellant had ever taken any sick time for any time that he was not actually sick. (Testimony of Dunn)

30. The Appellant understood that the oral Agreement permitted him to schedule his meter reading and repairing duties at and/or after 3:00 PM or at and/or before 7:00 AM., in order for the Appellant to care for his domestic partner as "comp time" when needed. This scheduling arrangement included the Appellant working through his lunch, break, travel and clean-up time. (Testimony of Appellant)

31. The CBA required that employees work between 7:00 AM. and 3:00 PM. The oral Agreement thus modified the times in which the Appellant could perform his responsibilities and duties to the Town of Billerica. (Testimony of Appellant and Exhibit 4)

32. The Appellant corroborated his understanding of the oral agreement by showing that he took early morning appointments and started work before the time established under the Collective Bargaining Agreement. He entered service orders into evidence indicating he worked early morning, (7:00 AM) appointments on 1/5/06, 1/19/06, 2/23/06 and 10/6/06 (Testimony of Appellant and Exhibit 6).

33. The Appellant also corroborated his understanding of the oral agreement by showing that he took late afternoon appointments; scheduled for a time he should have been through work. He produced evidence, (service orders) to show that he worked appointments scheduled for 3:00PM on 1/5/06, 1/6/06, 2/7/06, 2/21/06, 3/14/06, 5/4/06, 5/8/06, 5/16/06, 6/20/06, 6/23/06, 7/13/06 and 9/15/06. (Testimony of Appellant and Exhibit 7)
34. The Appellant never submitted requests for overtime pay from the Town, due to his numerous scheduled work-related appointments at either 7:00 AM or 3:00 PM, which would also include "clean up and travel" time. He would have normally been entitled to overtime pay for these appointments pursuant to the CBA. This is further corroboration of the Appellant's understanding of the "flex schedule" he worked to accumulate "comp time" off for caring for the medical needs of his girlfriend. (Testimony of Appellant, Exhibit 4)
35. At this hearing, Exhibits 1 through 7 were taken into evidence. However, Exhibit 5 was marked with six attachments. At the hearing, the Appellant objected to the introduction of Attachments 1, 2 and 3 to Exhibit 5 asserting that Billerica failed to authenticate said documents and further asserted that said documents were not relevant to the proceedings before the Commission. The objected to attachments were taken into evidence *de bene*, subject to a subsequent ruling after briefing. Attachments 1 and 2 relate to several instances of past discipline, a predicate issue that would be considered by this hearing officer on the issue of progressive discipline if a decision had been rendered in Billerica's favor on this present discipline. However, I did consider the two instances of prior discipline in this present appeal, but attributed them little weight; as one instance was remote in time and both provided little probative value on the present discipline.

Attachments 3 and 4 were identified by witness Dunn as having been created by her as notes. Attachments 3 and 4 are not admitted for the truth of their contents but merely as a refresher for the witness Dunn, to assist her in her testimony. After consideration of the arguments set forth in the Briefs, Attachments 1, 2 and 3 to Exhibit 5 are admitted only for the limited purposes and on the conditions stated here. (Testimony, Exhibit 5, administrative ruling)

36. Neither of these two instances of past discipline appears to relate to the terms or conditions of the oral Agreement previously entered into between the parties and described above. (Testimony, Exhibit 5)

37. Billerica introduced, as Exhibit 3, a schedule of sick time and vacation time earned and used by the Appellant for the 2006 fiscal year. Fiscal year 2006 began on July 1, 2005. When fiscal year began, the Appellant had accumulated a balance of 215.15 hours of unused sick leave. According to Exhibit 3, the appellant used no sick time for the first five months of fiscal year 2006. (See summary of time used for July, August, September, October and November of 2005 in Exhibit 3). The Appellant utilized three (3) hours of sick time in December of 2005 and in the beginning of January 2006, he had accumulated a balance of 272.15 hours of unused sick time (Exhibit 3).

38. According to Judy Dunn and Exhibit 5 – Attachment 5 introduced into evidence at the Hearing, Appellant asked for and was granted the following sick leave:

<u>Date</u>	<u>Day of Week</u>	<u>Hours of Sick Time Granted</u>
1/3/06	Tuesday	8 hours
1/24/06	Tuesday	4 hours
1/26/06	Thursday	3 hours
1/30/06	Monday	8 hours
2/2/06	Thursday	3 hours
3/30/06	Thursday	3 hours

4/20/06	Thursday	8 hours
5/18/06	Thursday	8 hours
5/19/06	Friday	8 hours
5/23/06	Tuesday	3 hours
9/22/06	Friday	8 hours

Total Hours Requested: 64 hours. (Exhibit 5-attach.5, Testimony of Dunn)

39. Billerica presented no evidence to show or infer that The Appellant was not sick or at home on the above referenced days. Billerica put forth no evidence to suggest that he violated any of the terms and conditions of the Collective Bargaining Agreement when he asked for and was granted the sick leave set forth above. By its own admission, Billerica has not and does not contest the amount of sick time taken as set forth above. (Exhibit 5-attach.5, Testimony of Dunn)
40. Billerica has failed to produce any evidence to show or infer that there is a peculiar pattern to the requested sick days listed above. Accordingly, Billerica has failed to produce any evidence to suggest that there is anything peculiar or unusual about the "quality" of the above referenced sick time(paragraph 38) taken by the Appellant. The above referenced sick days were authorized or approved by Billerica, at the time without even a request to the Appellant, for further medical documentation or explanation, either written or oral. (Testimony of Dunn and Appellant, Exhibit 5-attach 5)
41. Judy Dunn began keeping a log of notes on the Appellant's use of time off at least on August 16, 2002. Dunn's notes for that date indicate an unfavorable attitude toward the Appellant and some effort of documentation for the purpose of terminating his employment with Billerica, (Exhibit 5-attach 3)
42. Judy Dunn began, on March 30, 2006, keeping another log on the Appellant's use of time off which ended on June 16, 2006. The entries indicate that Dunn was trying to somehow

document the Appellant's inappropriate use of time off. However Dunn should have been up front with the Appellant during this time and told him how she was designating his time off for each occasion, so that there would not be any confusion or misunderstanding. (Exhibit 5-attach 4, Testimony of Dunn)

43. Unbeknownst to the Appellant, Judy Dunn began inappropriately charging him sick time for the time he used to attend to "Lisa's" medical needs. Charging sick time to the Appellant, without his knowledge, was inappropriate and contrary to the oral agreement between the Parties. (Testimony of Dunn and Appellant, Exhibit 5-attach 5)

44. The Appellant was inappropriately charged for the following sick time:

<u>Date</u>	<u>Hours of Inappropriately Charged Sick Time</u>
4/6/06	2 hours
5/11/06	4.5 hours
6/6/06	4 hours
9/21/06	8 hours

Total of Inappropriately Charged Sick Time: 18.5 hours (Testimony of Dunn and Appellant, Attachment 5 to Exhibit 5).

45. The Appellant never requested the sick time set forth above (Para. 44). The Appellant should not have been charged for the sick time set forth above as he honored his agreement to work early, stay late and combine break time in order to attend to his domestic partner's health needs. As a result of Judy Dunn's inexperience as a supervisor and as a result of her lack of knowledge regarding what constituted appropriate vs. inappropriate use of sick time, The Appellant was erroneously charged sick time on 4/6/06, 5/11/06, 6/6/06 and 9/21/06. (Testimony of Dunn and Appellant)

46. Abdul Alkhatib has been the Director of Public Works for the Town of Billerica since October 24, 2005. The Water Department for which the meter readers work is within the Public Works Division. Alkhatib testified that he spoke with the Appellant twice about his concerns regarding time off. Alkhatib claimed that when he spoke with the Appellant in February and May, 2006, Judy Dunn was present on both occasions. However Alkhatib described these meetings only in general terms; regarding counseling the Appellant to “pull his own weight” and being “fair to the other meter readers” by “picking up the slack”. Alkhatib expressed his concern about the Appellant taking time off when he was scheduled to read meters, to which the Appellant responded that he had been having a problem with his knee. (Testimony of Alkhatib)
47. At these two meetings, Alkhatib did not give the Appellant any written or oral notice that the oral agreement regarding the Appellant’s flexible hours and comp time arrangement had been modified or rescinded. Alkhatib also did not notify the Appellant that he was believed to be misusing sick time by taking sick time for the care of his girlfriend’s medical needs. Alkhatib could have taken this opportunity to clear up any confusion or to simply notify the Appellant that for the future, the Town was returning to a strict application of the terms of the CBA. Alkhatib did not even follow-up these two meetings with any written warnings or directives to either the Appellant or Dunn. Alkhatib also admitted that the period from January, 2006, supervisor Genereux’s departure and March, 2006 when Dunn replaced him as supervisor, was an “indefinite period” for the Appellant. (Testimony of Alkhatib)

Disciplinary Decision

48. Around September of 2006, Rocco Longo, Billerica Town Manager learned of the oral Agreement between the Appellant and the previous supervisors and managers. Dunn had notified Longo of this Agreement (Testimony of Longo and Dunn.)
49. Neither Sanguinet nor Longo or any other Billerica official ever notified the Appellant that the oral agreement that he had been acting under was being modified or rescinded. The Appellant was entitled to fair notice of any changes being made in that oral agreement, prior to him being held accountable for the new circumstances. (Testimony of Dunn, Longo, Sanguinet, Alkhatib and Appellant)
50. In the normal course of business, the better and proper form of the notice of the rescission or modification of the long standing agreement should have been in writing. Longo admitted this during his testimony. (Exhibits, Testimony of Longo)
51. On October 2, 2006, Mr. Longo notified the Appellant to attend a Disciplinary Hearing on October 10, 2006. The Disciplinary Hearing was held on that day. (Testimony of Longo and Dunn, Exhibit 1)
52. At the time of the Disciplinary Hearing, the Appellant's supervisor, John Sanguinet (hereinafter "Sanguinet"), did not know the number of sick leave days the Appellant had accumulated in the previous few years. Sanguinet testified that the amount of sick time available was irrelevant and the fact that the Appellant often took sick time on Thursdays and/or Fridays was a pattern indicative of abuse. (Testimony of Sanguinet)
53. The CBA does not explicitly or implicitly state that sick leave must be used only for the (employee's) Appellant's sickness or injury. Neither Sanguinet nor the Appointing Authority's other witnesses make reference to the policy or rule which supports Sanguinet's interpretation. (Exhibit 4, Testimony of Sanguinet, Dunn and Longo)

54. On October 23, 2006, Mr. Longo notified the Appellant by letter that he was to be suspended, without pay, for thirty (30) days for abuse of sick leave. (Exhibit 2)

CONCLUSION

The role of the 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).

Billerica, the appointing authority, failed to show that any of the time-off, taken by the appellant, was improper or unapproved. Indeed, the Appellant maintained a surplus or accumulated balance of unused sick leave during the relevant period. The appointing authority erroneously designated some of the time-off taken by the Appellant as sick leave, when it had not been requested as so, by the Appellant. Billerica's management had been aware of the long-standing oral agreement that the Appellant had regarding time-off. This agreement allowed the Appellant a "flexible schedule" with accumulated comp time used to care for the medical needs of domestic partner. Despite having knowledge of this agreement, Billerica never tried to modify or rescind it by notification to the Appellant. Instead, Billerica began collecting and creating supposed evidence to be used against the Appellant, at a disciplinary hearing. However, the evidence produced at this hearing, by Billerica, fell far short of meeting its burden.

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). It appears in this matter that Longo relied on information that he had heard from Judy Dunn, outside the disciplinary hearing to form a basis for his decision to discipline the Appellant. It also appears that Judy Dunn may have held a strong unfavorable opinion of the Appellant prior to and during the initiation, investigation and issuance of the discipline against the Appellant.

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).

If the Commission decides to modify a penalty, it must provide explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dept., 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission, 39 Mass. App. Ct. 594, 602 (1996). When the Commission modifies an action taken by the Appointing Authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from partisan political control. Id. at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

The Appointing Authority failed to establish by a preponderance of the evidence that, in fact, the Appellant abused his sick leave. All of Billerica's witnesses testified that they had no evidence that the Appellant was not actually sick on any of the days for which he took sick leave. Longo based his decision to discipline the Appellant on the *pattern* of sick leave. While a pattern of absences may indicate an abuse of sick leave, said argument fails to take into account the pre-existing oral Agreement which permitted the Appellant to modify his work schedule. The usual

course of action to address such a suspected sick time abuse is to request an explanation or medical documentation. Billerica assiduously avoided this course of action.

The decision to discipline the Appellant was premised on an interpreted misuse or abuse of sick leave, without any consideration for the long-standing oral agreement that the Town has affirmed and/or acquiesced to. Although Longo assumed office as Town Manager of Billerica in June 2005, he did not learn of the Agreement until September 2006. Longo learned of the oral Agreement from Sanguinet and Dunn. Longo knew prior to issuing the discipline, that the Appellant had relied on the Agreement to justify his use of accumulated comp time as time off and to work a flexible schedule.

The Oral Agreement which provided the Appellant with a wide degree of latitude was approved by the Appellant's former supervisors many years earlier. Until the day of the disciplinary hearing, the Appointing Authority had not made an attempt to terminate the oral Agreement and instruct the Appellant to adhere to the CBA.

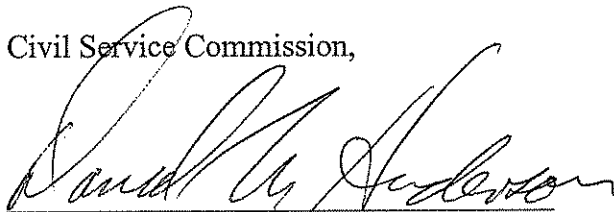
Absent notice to the Appellant that in the future, Billerica would be requiring his strict conformity to the CBA; he should not have been penalized or disciplined for relying on a valid oral Agreement.

WHEREFORE, the Appellant's Appeal, Docket No. D-06-282 is hereby *allowed*. The Appellant is to be returned to his position without any loss of pay or other benefits.

The Appellant made a request in his post-hearing filing for an award of attorney fees in the amount of two hundred dollars for the appointing authority disciplinary hearing and another two hundred dollars for the Commission hearing, pursuant to G.L. Chapter 31, §45.

The Appellant is directed to seek such reimbursement, by written application to the appointing authority, pursuant to the statute.

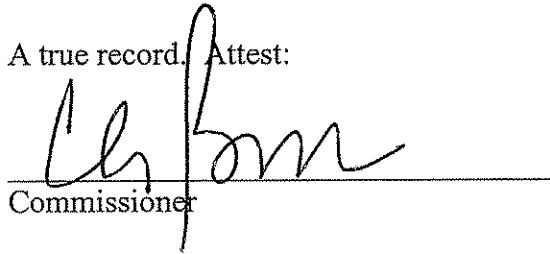
Civil Service Commission,



Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (3-2) (Bowman, Chairman voted No; Henderson voted Yes, Marquis voted No, Stein voted Yes and Taylor voted Yes, Commissioners) on July 10, 2008.

A true record. Attest:



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 sent to:
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