COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

JOHN STOCKMAN,
Appellant

V. Docket No. D-04-196

DIVISION OF MEDICAL ASSISTANCE,
Respondent

Appellant's Attorney:
Scott A. Lathrop, Esq.
Scott A. Lathrop & Associates
122 Old Ayer Road
Groton, MA 01450

Respondent's Attorney:
Lauren A. Cleary, Esq.
Assistant General Counsel
Executive Office of
Health and Human Services
Division of Medical Assistance
One Ashburton Place, 11th Floor
Boston, MA 02108

Commissioner: John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, § 41A, the Executive Office of Health and Human Services, a/k/a Division of Medical Assistance [hereinafter "DMA"], and the Appellant, John Stockman [hereinafter "Stockman"], jointly requested a pre-disciplinary hearing before a disinterested hearing officer designated by the chairman of the Civil

Service Commission (hereinafter "Commission"), in lieu of a hearing before the Appointing Authority.

The 41A hearing was prompted by a written notice of Contemplation of Termination issued to Stockman on March 24, 2003 by the Appointing Authority and signed by Bert Lourenço, the late DMA Director of Human Resources. The notice alleged that Mr. Stockman violated Article 28 of the Collective Bargaining Agreement (Technological Resources). On December 23, 2004, the Appointing Authority revised its contemplated discipline to a three-month unpaid suspension due to mitigating circumstances during the extended period following the contemplated termination of March 24, 2003. These circumstances included satisfactory job performance and lack of subsequent disciplinary charges in that interim period.

The Commission held a full hearing on March 2, 2005, and three (3) tapes of the hearing were made. Witnesses were not sequestered. As no notice was received from either party, the hearing was declared private. The parties filed post-hearing proposed decisions thereafter.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1 through 22) and the testimony of the Appellant, Dorothy Zamora [hereinafter "Zamora"], Elaine Leger, Andrea Pelczar, Jane Carney and Jeffrey Knopf, I make the following findings of fact:

1. Stockman has been employed by DMA or its predecessor agency since April 25, 1982. At the time of the incident, he was a tenured civil service employee in the position of Benefit, Eligibility and Referral Social Worker B. (Exhibit 1)

2. Stockman is also a member of Local 509, SEIU. At the time of the incident, Stockman was the DMA Chapter Vice President for the Springfield and Taunton offices. (Exhibit 1)

3. Dorothy Zamora is also an employee of DMA. She also is a member of Local 509, SEIU. At the time of the incident, Zamora was the DMA Chapter Vice President for the Revere and Tewksbury offices. (Exhibit 1).

4. During the times relevant to this incident, Stockman and Dorothy Zamora were union officers entitled to union leave. Union leave is paid leave during which union officers are permitted to take time off from their agency duties to work on grievances and other union functions. Pursuant to a Memorandum of Understanding (MOU) between Labor and Management, Local 509 Union officers received up to 50% paid leave per week to perform union functions. They had to request this time and indicate the purpose in advance, and they had to submit the request to John Reilly of Labor Relations and Cheryl Malone of the Human Resources Department/Office of Employee Relations (hereinafter "HRD/OER"), who would decide if the leave request met the terms of the MOU. If the request did not meet the terms of the MOU, the employee would not be paid for union leave. (Testimony of Zamora)

5. Stockman has not approved of some past actions taken by Local 509 and has not been afraid to voice his opposition. A personal and divisive battle ensued between Stockman and other Local 509 union leaders. Stockman and Zamora found themselves on opposite sides of these disputes. (Testimony of Stockman, Exhibit 19, Exhibit 20, Exhibit 22)

6. One bone of contention between the two factions involved a settlement agreement between DMA and the union in 1998 whereby some members received promotions and others did not. Stockman was the lead appellant for 47 union members who challenged this settlement agreement by filing an appeal with the Civil Service Commission. His appeal was unsuccessful. Stockman claims this is one of the reasons that DMA is singling him out for discipline in this case. (Testimony of Stockman)

7. On December 11, 2002, John Stockman filled out a union leave request that included a leave request for Dorothy Zamora. (Exhibit 14)

8. On previous occasions, Zamora had filled out similar union leave requests that included a leave request for Stockman. (Testimony of Stockman, Exhibits 10, 11, 12)

9. During the union meeting on December 11, 2002, for which the leave requests had been submitted, Zamora learned that Stockman had requested Union leave on her behalf. Zamora testified that she had already sent in her own union leave request, and she had not wanted Mr. Stockman to send in a request for her on December 11, 2002. (Testimony of Zamora, Exhibit 13)

10. After the union meeting, Zamora and other union officials went to lunch. They did not invite Stockman. (Testimony of Zamora and Stockman)

11. While at lunch, Zamora called and left a message on Stockman's Springfield office voice mail. This Hearing Officer listened to the message on the tape entered into evidence. The brief conversation that ensued between Zamora and her lunch companions, after she spoke the words "thank you", was clearly not meant to be part of the message. The additional conversation ended up on the voice mail message because Zamora has an old cell phone that is slow to shut off when the disconnect button is activated. (Exhibit 15)

12. I find that the message left on Stockman's Springfield office voice mail was as follows:

Zamora: "John. I just had an opportunity to read your union leave for me and Adrianne. Please don't do me any favors. I have already sent my union leave in. I don't need anyone to complicate it. So if I need you to do something, I will ask. Please next time have the courtesy to ask me. Thank you."

Zamora: "Pummeled?"

Other Union Official at Lunch: "Yes, loved it. Heh, heh, heh."

Zamora: "Ha, ha, ha!"

(Exhibit 15)

13. Using a tape recorder after calling his Springfield office voicemail from home, Mr. Stockman made a tape recording of the voicemail message from Ms. Zamora. Immediately after Zamora's final animated words of "Ha, ha, ha!", Stockman inserted his own words of "Ha, ha, ha!", in what appears to be an attempt to either mock Zamora's finale, or to simply accentuate his own

recorded version of Zamora's message. (Exhibits 1 and 21 and Testimony of Stockman)

14. Stockman brought Zamora up on a charge at the Union Trial Board because of her message to him but the Board took no action. (Exhibit 8 and Testimony)

15. On February 15, 2003, over two months after having received Zamora's message, Stockman, frustrated that the Union Trial Board had taken no action against Zamora, called the Tewksbury MassHealth Enrollment Center (MEC) from his home on a Saturday. Using the tape recording he had made of the message, he forwarded Zamora's voicemail - individually - to over thirty-five (35) Tewksbury MEC employees. He did this on a Saturday because the office was closed and he knew the message would get through to each intended voicemail without disruption and, also, because he would have the time to send thirty-five (35) separate phone messages. These employees received the recorded voicemail on Monday February 19, 2003 and were confused by their receipt of the message, as well as the identity of the individual named "John" to whom Zamora had directed the message. They discussed their confusion and whether, based on the message being directed to a person named John, Zamora was having a disagreement with their MEC Director, John *Ricci*. (Exhibit 1, Exhibit 21, and Testimony of Stockman, Pelczar, Leger and Carney)

16. When asked at the hearing why he forwarded the message, Stockman testified that he was very hurt by the "scathing" message and that he "wanted to pay the person that hurt me back." (Testimony of Stockman)

17. Throughout his testimony, Stockman gave no indication that he regretted taking this action. Rather, he spoke with pride about his technological prowess and the "cute little thing" (recording device) he used to pull it off. (Testimony, demeanor of Stockman)

18. On March 24, 2003, Stockman was issued a Contemplation of Termination which charged him with violating Article 28 of the Collective Bargaining Agreement (Technological Resources). The written notice signed by Bert Lourenço alleged as follows:

> On February 15, 2003, you inappropriately utilized Division technological resources (telephone system) to transmit a taped message to Workers in the Tewksbury MassHealth Enrollment Center which hurt, embarrassed, and humiliated a co-worker. This is a violation of Article 28 of the Collective Bargaining Agreement (Technological Resources).
> (Exhibits 1 and Exhibit 4)

19. Article 28 of the Collective Bargaining Agreement (Technological Resources) reads as follows:

> "The parties specifically agree that all hardware, software, databases, communication networks, peripherals, and all other electronic technology, whether networked or free-standing, is the property of the Commonwealth and is expected to be used only as it has in the past for official Commonwealth business. Use by employees of the Commonwealth's technological resources constitutes express consent for the Commonwealth and its Departments/Agencies to monitor and/or inspect any data that users create or receive, any electronic mail messages that they send or receive, and any web sites that they may access. The Commonwealth retains and through its Departments/Agencies may exercise the right to inspect and randomly monitor any user's computer, any data contained in it, and any data sent or received by that computer.
> Notwithstanding the above, unless such use is reasonably related to any employee's job, it is unacceptable for any person to intentionally use the Commonwealth's electronic technology:
>
> 1. in furtherance of any illegal act, including violation of any criminal or civil laws or regulations, whether state or federal;

2. for any political purpose;
3. for any commercial purpose;
4. to send threatening or harassing messages, whether sexual or otherwise;
5. to access or share sexually explicit, obscene, or otherwise inappropriate materials;
6. to infringe upon any intellectual property rights;
7. to gain or attempt to gain unauthorized access to any computer or network;
8. for any use that causes interference with or disruption of network users or resources, including propagation of computer viruses or other harmful programs;
9. to misrepresent either the Agency or a person's role at the Agency;
10. to intercept communications intended for other persons;
11. to distribute chain letters;
12. to libel or otherwise defame any person; or
13. to access online gambling sites.

The terms of this section do not alter current practice regarding employee use of telephones.

The parties agree that the foregoing list and policy are not all-inclusive and will meet as needed to make appropriate modifications thereto.
The Department/Agency will disseminate this section to its employees on an annual basis as part of the employee's performance evaluation and afford said employees the opportunity to request clarification should it be necessary.
This shall not infringe on any rights within M.G.L. 150E or any other rights legally granted to employees." (Exhibit 5)

20. Jeffrey Knopf, a union member who was part of the bargaining committee that negotiated Article 28, testified that the parties to those negotiations agreed that this language was not intended to change the existing practice or rules as it applied to telephone usage and voice mail. Knopf also testified that the Respondent had no specific practice or rule governing employees who were off duty and who made telephone calls into the workplace from their homes. (Testimony of Knopf)

21. On December 23, 2004, the Contemplated Termination was amended to a Contemplation of a three-month unpaid suspension. (Exhibit 6)

22. As part of the discovery process, counsel for Stockman asked DMA to produce information related to other individuals who have been disciplined in the last five years for violating Article 28. DMA provided the following information:

a) An employee was accused of improper use of agency computers to access Internet chat rooms. The employee had no prior disciplinary action and received a formal warning in permanent personnel file. Mitigating factors included the employee's honesty and forthrightness in addressing the issue.
b) An employee was accused of accessing agency computer system MA21 to change entries on family members' eligibility. Employee resigned while criminal fraud investigation was being pursued.
c) An employee was accused by a member of inappropriately accessing MassHealth eligibility information as the member was a neighbor. Employee accused of improper use of agency computer system MA21. Employee indicated being harassed by member / neighbor. Employee reported anxiety with medical documentation to support it and resigned position. No discipline due to resignation.
d) Several employees have received verbal warnings for being caught on Internet for personal use during business hours. (Exhibit 7)

23. An unknown employee faxed a document entitled "Stockman and His Sheep" to all of DMA's offices and no discipline resulted.

24. DMA employees who were officers of Local 509 have, on occasion, faxed material intended to be insulting to Stockman to other employees of DMA and they have not been disciplined. (Exhibit 20)

CONCLUSION

A tenured Civil Service employee may be suspended from his or her employment for "just cause", G.L. c. 31, § 41, a phrase judicially defined as "substantial misconduct

which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second District Court of E. Middlesex, 389 Mass. 508, 514, 451 N.E.2d 408 (1983). The role of the Commission is to determine whether the Appointing Authority proved, by a preponderance of evidence, just cause for the action taken. G.L. c. 31, § 43; School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620 (1997). "In making that analysis, the commission 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. When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923 (1997).

It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. 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. 214 (1971). A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established

that the reasons assigned . . . were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991).

The mission of DMA is to help the financially needy obtain high-quality health care. The Commission is hard-pressed to find how the actions of John Stockman on February 15, 2003 contributed to that mission. Quite the contrary, Stockman's decision to call more than 35 fellow employees at the MassHealth Enrollment Center and leave a recorded message on their voice mail confused dozens of DMA employees; distracted them from their jobs; and brought unwanted attention and suspicion upon Ms. Zamora. Most disturbingly, that is exactly what Mr. Stockman, a 23-year veteran of the agency, intended to do.

The Appellant asserted that misbehavior conducted via the MassHealth agency telephone system and office staff voicemails is not a violation of Article 28. The Commission disagrees. Under Article 28, electronic technology may not be used to send harassing messages. The terms of Article 28 expressly do not alter existing practice as to employees' use of telephones. However, there can be no doubt that no telephone policy would *permit* employees to harass co-workers using the telephone and voicemail systems.

During the hearing before the Civil Service Commission, both parties stipulated that if the Commission issued a finding of just cause, the proposed discipline would be held in abeyance until three other pending suspensions were resolved at the grievance level. The Commission unanimously voted on August 31, 2006 to reject that stipulation and table

this recommended decision. The Commission wished to learn of the disposition of the prior pending disciplinary actions *before* making a determination of just cause. Both parties were ordered to provide the Commission with a status update regarding the disposition of those disciplinary actions on September 18, 2006. Receiving no response to that Order, the Commission again ordered the parties, on August 3, 2007, to advise as to the disposition of the pending disciplines.

A response to the most recent Order was received on August 9, 2007 from Counsel for the Appellant advising that the Appellant had a one-day suspension in 2000, a three-day suspension that was grieved and reduced to a one-day suspension in 2000 and was issued another three-day suspension in 2002 that is heading for arbitration "in the not too distant future."

In consideration of the recently ascertained status of the Appellant's prior disciplines and the DMA's recommendation of a three-month suspension in the instant matter, the Commission, pursuant to G.L. c. 31, § 41A, declines to adopt the contemplated discipline as it is deemed arbitrary and capricious according to the principles of progressive discipline. Having made that determination, however, the Commission does find that the DMA has proven, by a preponderance of the credible evidence in this matter, that the Appellant violated Article 28. Specifically, the Appellant engaged in substantial misconduct which adversely affected the public interest by impairing the efficiency of the public service of the Tewksbury office employees.

Therefore, for all the reasons stated herein, the Commission finds that ***there is just cause for a thirty (30) calendar-day suspension of the Appellant.*** It is further ordered that this suspension shall take effect on a date to be determined by the Appointing Authority following receipt of this decision by both parties.

Civil Service Commission

_____
John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Guerin, Marquis and Henderson, Commissioners) on August 23, 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 GL c. 30A, s. 14(1) for the purpose of tolling the time for appeal.

Pursuant to GL c. 31, s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under GL c. 30A, s. 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:
Scott A. Lathrop, Esq.
Lauren A. Cleary, Esq.