

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

THOMAS SYLVIA,
Appellant

v.

CASE NO: D-15-238

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Philip Brown, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
City of New Bedford Solicitor's Office
133 William Street, Room 203
New Bedford, MA 02740

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Thomas Sylvia, acting pursuant to G.L. c.31,§43, duly appealed to the Civil Service Commission (Commission) from the decision of the City of New Bedford (New Bedford), Appointing Authority, to suspend him for one day, for taking time and use of a city truck to contest a personal water bill while clocked in as a city employee. The Commission held a pre-hearing conference on January 22, 2016 and a full hearing on April 22, 2016, both at the UMass School of Law in Dartmouth.² The hearing was declared private as no party requested a public hearing. All witnesses were sequestered except for Mr. Sylvia. Thirty-two (32) exhibits were received in evidence (Exhs. 1-15, 21-25, 28-37, 39-40) and four (4) additional documents

¹ The Commission acknowledges the assistance of Law Clerk Brendan Rimetz in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

marked for identification (Exhs. 20ID, 26ID, 27ID & 38ID). The hearing was digitally recorded.³

Both parties submitted proposed decisions.

FINDINGS OF FACT

Based on the exhibits entered into evidence, the testimony of the following witnesses:

Called by the Appointing Authority:

- Euzebio Arruda, Deputy Commissioner, New Bedford Department of Public Infrastructure (DPI) (“Mr. Arruda”)
- Sharon Andrade, Account Clerk at DPI (“Ms. Andrade”)
- Jack Oliver (“Mr. Oliver”), Laborer at Department of Facilities and Fleet Maintenance (“DFFM”)
- Nicholas Pereira, Clerk of the Works (“Mr. Pereira”)
- Kenneth Blanchard, Director of DFFM (“Mr. Blanchard”)

Called by the Appellant:

- Thomas Sylvia, Appellant, Motor Equipment Operator (MEO) at DFFM

and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below:

1. The Appellant, Thomas Sylvia, has been employed by New Bedford in various capacities since December 17, 1986, currently as an MEO with the DFFM. He was a permanent, tenured employee at the time of his one (1) day suspension. In general, his supervisors have rated him over the years as a satisfactory employee who “meets expectations” in most categories of performance. (*Exhs. 1, 2 & 40; Testimony of Blanchard*)

2. Prior to the current incident, Mr. Sylvia had been disciplined a total of seventeen (17) times.⁴ Fifteen of these disciplines occurred from 1985 through 2004, and ranged from written warnings to suspension from one to three days for various reasons, including tardiness, absenteeism, insubordination, misuse of city property, leaving work without

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁴ Evidence of an additional alleged discipline in 1997 was excluded as unsubstantiated. (Exh. 20ID)

permission and substandard work. The most recent two instances occurred in 2012 (written warning for delayed handling of a water main break) and 2014 (five-day suspension for carelessness that resulted in damage to a city plow while operating a plow truck during a snowstorm). (*Exhs. 23 through 25*)

3. On December 2, 2015, Mr. Sylvia reported for work at around 7:20 a.m. for his shift on the Grounds Crew, which started at 7:30 a.m. and ended at 4 p.m. (*Testimony of Sylvia*)

4. At the beginning of his shift, as was the practice, Mr. Sylvia attended a meeting at which time he learned the work schedule for the day, prepared by his immediate supervisor, Nicholas Pereira, who holds the title of Clerk of the Works. The schedule set out in writing a sequence of tasks to be performed by the five-person (one SMEO and four MEOs) Grounds Crew at seven specific times and locations throughout the day, with a lunch break at noon. In addition, the crew routinely takes a ten-minute morning break from 9:30 AM to 9:40 AM

7:45 AM to 9:45 AM	Library Casa De Saude
9:45 AM to 11:30 AM	Ashley Park
11:30 AM to Noon	Howland Green
Noon to 12:30 PM	Lunch
12:45 PM to 1:45 PM	South End Police Station
1:45 PM to 2:30 PM	HazelWood Senior Center
2:30 PM to 3:00 PM	Cable Access
3:00 PM to 4:00 PM	Fort Tabor Area

(*Exh. 36; Testimony of Sylvia, Pereira & Blanchard*)

5. Mr. Pereira added two tasks to the printed scheduled to be performed first, which included moving a desk in the Treasurer's Office at City Hall and bringing some trash (recycle barrels and leaves) to the transfer station. Mr. Sylvia did not know prior to reporting for work each day exactly what his assignments would be for that day. (*Exh. 36; Testimony of Sylvia and Pereira*)

6. Mr. Sylvia drove in a city vehicle to pick up the trash and brought it to the transfer station. He was accompanied by Mr. Oliver. (*Testimony of Sylvia & Oliver*)

7. Mr. Oliver is a retired New Bedford employee who formerly held the supervisory position of Clerk of the Works and was rehired to work part-time. He was assigned on December 2, 2015 to work as one of the MEOs on the Grounds Crew. He was not assigned supervisory duties on December 2, 2015. (*Exh. 36; Testimony of Sylvia & Oliver*)

8. Mr. Sylvia had recently received a water bill that he believed showed an unusual increase. He brought the bill to work on December 2, 2015, and had it in the truck, intending to go to the Water Division at the Department of Public Infrastructure (DPI) during his lunch break. (*Exh. 39; Testimony of Sylvia*)

9. The transfer station shares a driveway with the DPI office. The two locations are approximately a minute driving distance apart. After dropping off the leaves, Mr. Sylvia drove with Mr. Oliver to the DPI office, exited the truck and went inside while Mr. Oliver waited in the truck. Mr. Sylvia did not know exactly how long he would be but if it was going to take more than a moment he would come back at lunch time. (*Exh. 29; Testimony of Andrade, Sylvia & Oliver*)

10. According to the video recording introduced in evidence, Mr. Sylvia entered the DPI office at approximately 8:42 a.m. and went up to the counter marked “Billing” in the DPI office. While at the DPI office, Mr. Sylvia was assisted by Ms. Andrade who is an account clerk at the DPI. While assisting Mr. Sylvia, Ms. Andrade showed him his water-usage history and explained possible reasons as to why Mr. Sylvia’s water bill may have been so high. (*Exhs. 29, 35, 39; Testimony of Andrade*)

11. While at the DPI office, Mr. Sylvia was acknowledged by DPI Commissioner Arruda who walked by while Mr. Sylvia was being helped at the counter by Ms. Andrade. (*Exhs. 27 & 35; Testimony of Arruda & Andrade*)

12. After speaking with Ms. Andrade, Mr. Sylvia left the DPI office. According to the video recording, Mr. Sylvia was in the office for approximately six (6) minutes. (*Exh. 29*)

13. After leaving the DPI office, Mr. Sylvia drove to the Library Casa De Saude where he joined the other members of the Grounds Crew, completing his assigned work for the rest of the day without incident. (*Exh. 36; Testimony of Sylvia, Oliver & Blanchard*)

14. After Mr. Sylvia left the DPI office, Ms. Andrade learned from a coworker that Mr. Sylvia was a New Bedford employee and was on City time because he had been seen getting into and out of a New Bedford City truck. As result, a report was made to DPI Commissioner Ronald Labelle, who, in turn, forwarded the report to DFFM Director Blanchard. (*Exh. 26ID; Testimony of Andrade & Blanchard*)

15. Mr. Blanchard met with Mr. Sylvia on December 5, 2015. Following his meeting with Mr. Sylvia, Mr. Blanchard requested and viewed the videotape recording of the encounter from DPI.⁵ He then instructed Mr. Pereira, to issue an Employee Warning Notice to Mr. Sylvia, informing him that he would be receiving a one-day suspension for Misuse of City Property and Leaving Work Area Without Permission, based on having “used city truck while on city time to go to the DPI to dispute personal water bill.” By letter dated December 7, 2015, Mr. Blanchard

⁵ One of Mr. Blanchard’s concerns was pinning down the time of the encounter which Mr. Sylvia had said was “just before lunch” whereas the DPI staff had placed it around 8:30 to 9:00 am. The video confirmed that Mr. Sylvia’s version was not accurate. (*Exhs. 26ID; 26ID, 29; Testimony of Blanchard*)

formally imposed the suspension, to be effective November 14, 2015. (*Exhs. 28 through 30; Testimony of Blanchard & Pereira*)⁶

16. DFFM employees know that they are required to be on duty and working at their assigned locations where their supervisors can find them at all times during the work day. Although there is some latitude granted to allow an employee time to take care of personal matters, as a general rule, the employee is expected to do so while on a scheduled break or during the lunch break using his personal vehicle. While exceptions can be made, they require notice and approval of the employee's supervisor. These rules are designed to ensure that supervisors can keep track of their personnel as well as to make efficient and proper use of city property. (*Exh. 37; Testimony of Blanchard, Pereira, Arruda, Oliver & Sylvia*)

17. Mr. Sylvia requested an appointing authority hearing on the suspension, which was held on December 16, 2015 before Mr. Blanchard as the hearing officer, who upheld the suspension. This appeal duly ensued on December 22, 2015. (*Exh. 31 through 33*)

APPLICABLE LEGAL STANDARD

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L. c. 31, §41 may appeal to the Commission under G.L. c. 31, §43, which provides, in part:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee

⁶ The report to DPI Director Labelle contained allegations that Mr. Sylvia had been rude and disrespectful during his encounter with Ms. Andrade, which Mr. Sylvia disputed. Mr. Blanchard considered these allegations and “took [Mr. Sylvia] at his word” that he had not been disruptive, finding that the evidence of rude behavior was inconclusive and those allegations did not form the basis for the discipline imposed and I, therefore, did not consider evidence of such alleged disruptive behavior. (*Exhs. 26ID, 27ID; 29; Testimony of Blanchard, Arruda, Andrade, Sylvia*)

to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. 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 Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). 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." School Comm. v. Civil Service Comm’n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983) The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing

authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of “merit principles” which govern civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L. c.31,§1.

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "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). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). The Commission is guided by, but is not obliged to follow strictly, the rules of evidence applied in a judicial proceeding, and may credit, in its sound discretion, reliable hearsay evidence that would be inadmissible in a court of law. See, e.g., Doe v. Sex Offender Registry Board, 459 Mass. 603 (2011); Costa v. Fall River Housing Auth., 453 Mass. 614, 627 (2009).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass.

130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

G.L. c.31, section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with “considerable discretion,” albeit “not without bounds,” to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. See Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification).

In deciding to exercise discretion to modify a penalty, the commission's task “is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L. c.31,§43. . . . Here, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether “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.’ ”

Id. See also Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority

ANALYSIS

Applying the applicable legal principles to the facts of this appeal, I conclude that New Bedford established just cause to discipline Mr. Sylvia for his misuse of city property and the impermissible leaving of a work area without permission.

In regards to conducting personal business while at work and using a city vehicle to do so, Mr. Sylvia is well aware of the DFFM's rules and policies regarding using city vehicles on city time to complete personal errands and business. He has been an employee for New Bedford for over 30 years and even has a warning in his file from 1989 in which he was told by his supervisor that he could not use city vehicles to get lunch during his lunch break.

In fact, Mr. Sylvia's explanation for his behavior infers that he knew these rules. He contended that he was planning to go to the DPI to dispute the water bill at lunch and only decided to stop earlier because he was close by and had the bill with him in the truck. Although he actually took only about ten minutes out of his work day to attend to the matter, at least initially, he seems to have known that it might take longer and he would need to return at lunch time. He also tacitly acknowledged that he knew he needed permission from his supervisor to interrupt his work day by falsely claiming that Mr. Oliver was his supervisor and had tacitly, if not overtly, granted that permission. These post-hoc efforts to make it appear that his conduct hewed to the rules actually reinforce the fact that he acted in knowing violation of those rules.

I also credit the testimony of Mr. Blanchard who explained the legitimate purpose for these rules. When employees of New Bedford conduct personal business on City time, they are essentially using tax money to take care of their own business. They are getting paid for personal business that does not fall within their duties as employees of New Bedford. Mr. Blanchard rightly has good reason to make sure that his budget and his personnel resources are spent wisely

and efficiently. The Commission is not empowered to intrude on legitimate management judgments directly affecting the public fisc.

Mr. Sylvia may well have a point that his brief detour from duty while in the vicinity of the DPI was actually a more efficient use of his time than having to bring the City truck back to the City Yard, drive his personal vehicle to the DPI at lunch, return to the City Yard and then drive the City vehicle to his next assignment. Ultimately, however, the decision to deviate from one's assigned responsibility is the prerogative of the supervisor, and management has good cause to discourage an employee from taking those decisions out of the hands of the supervisor unilaterally and without prior notice or permission. It was a simple matter for Mr. Sylvia to have reached out to Mr. Pereira and seek his approval to make such a stop and, had he done so, may well have avoided this dispute.

I find no basis on which to infer that Mr. Blanchard has singled out Mr. Sylvia or failed to make a fair assessment of the situation based on the facts as he found them. He actually showed deference to Mr. Sylvia when he took Mr. Sylvia at his word that he was not disruptive at the DPI office. Mr. Blanchard also found that the surveillance video did not reveal enough to find that Mr. Sylvia was disruptive in the office. He also was candid in acknowledging that, despite considering Mr. Sylvia's lengthy prior disciplinary record, he agreed that Mr. Sylvia had generally matured and was considered a "good" employee. I find nothing in the facts presented to the Commission that would warrant a modification of this one-day suspension, which, in effect, would require a conclusion that no suspension was warranted.

I do not credit Mr. Sylvia's contention that the rules requiring a supervisor's permission to take time or a company vehicle to run a personal errand were not clearly defined and had been loosely enforced in the past. In fact, the evidence indicated that another employee who had taken

time to get a haircut was suspended for three days by Mr. Blanchard, and eventually, terminated. Other examples that were proffered did not support any claim of disparate treatment and I do not credit them as comparable.

With all this taken into account, New Bedford had just cause to impose a one (1) day suspension in this matter.

CONCLUSION

For the reasons stated above, the appeal of the Appellant, Thomas Sylvia, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on July 21, 2016.

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:
Philip Brown, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Respondent)

.