

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT
CIVIL ACTION
NO. 10-04504

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION
WILLIAM TIMPERLEY

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to G. L. c. 30A, § 14, the plaintiff, William Timperley ("Timperley") filed this appeal of a decision by the Civil Service Commission ("Commission"). The Commission affirmed a decision by the Burlington Public Schools ("School District"), which terminated Timperley's employment as a permanent, tenured senior custodian. The matter is before the court on Timperley's Motion for Judgment on the Pleadings. For the following reasons, the plaintiff's motion is **DENIED**.

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BACKGROUND

03.13.14 On March 31, 2000, the School District hired Timperley as a custodian. During his
DWR tenure for the School District, he was disciplined several times. A senior custodian reprimanded
GLRLP Timperley twice for not adequately performing his janitorial duties. On February 2, 2001, the
TBZ Director of Buildings and Grounds at the School District issued a letter of reprimand to
DRK Timperley for an alleged violation of the school sexual harassment policy. On December 22,
Ktqpc 2006, the superintendent reprimanded Timperley for behavioral outbursts that created a hostile
RLQ work environment for another custodian, and the superintendent recommended that Timperley
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(md)

¹ Burlington Public Schools.

attend a mandatory stress management program and see a counselor who was under contract with the School District.

In addition to the aforementioned instances of discipline, the School District suspended Timperley for two days without pay for his involvement in an altercation with the gymnastics coach on January 20, 2009. Timperley appealed the suspension to the Commission, which affirmed the School District's decision.

The incident related to the present appeal occurred on March 2, 2009. Timperley went to the Elk's Club where he played cards and consumed beer. That evening, there was a snow storm, and Timperley fell while he was walking from the Elk's Club to his car. As a result of a stroke he suffered when he was seventeen, Timperley uses a cane to walk, is blind in one eye, and has impaired motor skills. He has difficulty walking in cold weather. When Timperley fell, he struck his head on the ground, suffered a severe laceration and was rendered unconscious. An ambulance transported Timperley to the Lahey Clinic ("the clinic").

Timperley testified before the Commission that when he awoke on the hospital gurney, he was disoriented and scared. While he remembers getting off the gurney and individuals placing him back on it, Timperley testified that he does not remember doing anything wrong while at the clinic.

Kevin Roche, a medical technician, and Albert Fitzgibbons, a security guard at the clinic, submitted written statements to the police and testified before the Commission regarding the events that occurred at the clinic on March 2, 2009. Roche testified that Timperley became unruly and combative in the emergency room of the clinic. Timperley stood up from the gurney, and clinic staff instructed him to lay back down so they could treat his head laceration. Roche detected a strong odor of alcohol emanating from Timperley. Security officers, including

Fitzgibbons, reported to the room. Timperley attempted to leave the room by pushing Fitzgibbons, who was positioned between him and the exit door. Roche and Fitzgibbons restrained Timperley and returned him to the gurney. Timperley was swinging his fists at both of them. Additional staff attempted to restrain Timperley by anchoring him to the gurney with four-point restraints. Roche observed Timperley spitting blood at him and a nurse. Timperley freed his left leg and kicked Fitzgibbons in the back of the head causing him to stumble backwards. The hospital staff was eventually able to restrain Timperley to the gurney, and the clinic called the Burlington Police Department. Timperley was not arrested as his head laceration still required medical attention. A copy of the police report was forwarded the Superintendent of Schools.

The School District placed Timperley on paid administrative leave pending a hearing which was held on April 1, 2009. After reviewing his prior disciplinary history, the School District terminated Timperley on April 3, 2009. He filed an appeal with the Commission on April 9, 2009. The appeal was stayed pending the determination of the criminal charges. Thereafter, Timperley was found not guilty of Assault and Battery with a Dangerous Weapon.

The hearing before the Commission was held on June 2, 2010. Timperley testified that he never struck Fitzgibbons or anyone in his life. The School District called Josh Hofferty, a provisional junior custodian at Burlington High School, *as a rebuttal witness*. Hofferty testified that in February 2009, while he was working the night shift, Timperley, who was not scheduled to work that night, came into the bathroom that he was cleaning. Timperley smelt of alcohol and voiced his disapproval of the way Hofferty was cleaning. Hofferty testified that without provocation, Timperley picked up rolls of paper towels and shoved them into Hofferty's stomach. A fight ensued and Hofferty managed to hold Timperley down on the floor. When he

released him, Timperley struck Hofferty in the eye with his fist, and Hofferty suffered a black eye. Hofferty did not report the event. The School District did not learn of this incident until two days after deciding to terminate Timperley when Hofferty disclosed the incident while being interviewed after Timperley's termination. The School District decided to hold further discipline for this incident in abeyance until Timperley's appeal regarding his termination was decided.

The Commission found that there was just cause for dismissing Timperley given his record of past discipline and his behavior in striking Fitzgibbons with a boot at the clinic. The Commission credited the testimony of Roche and Fitzgibbons and their account of the incident at the clinic as opposed to Timperley's testimony regarding that incident. The Commission further credited the testimony of Hofferty with respect to his encounter with Timperley. The Commission held that Timperley's violent behavior extends to the workplace, and the School District was reasonably justified in terminating Timperley to ensure the safety of its students and staff. Timperley filed his appeal of the Commission's decision on November 18, 2010.

DISCUSSION

I. Standard of Review

Under G. L. c. 30A, § 14, any person aggrieved by the final decision of an agency in an adjudicatory proceeding may appeal the decision to the Superior Court. In reviewing the agency's decision, the court "shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The decision may only be set aside if the court determines that it is unsupported by substantial evidence, arbitrary or capricious, based upon an error of law, made upon unlawful procedure, unwarranted by the facts, constitutes an abuse of discretion, or is in violation of constitutional provisions. G. L. c. 30A, § 14(7). The party appealing the

administrative decision bears the burden of demonstrating the decision's invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989).

The Commission is responsible for determining "whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). At the Commission hearing, the School District had the burden of proving, by a preponderance of the evidence, that it had just cause for terminating Timperley. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004). Just cause requires the appointing authority to determine whether the employee's misconduct "adversely affects the public interest by impairing the efficiency of the public service." Cambridge v. Baldasaro, 50 Mass. App. Ct. 1, 3 (2000). This court reviews the Commission's decision "to determine if it violates any of the standards set forth in G. L. c. 30A, § 14 (7), and cases construing those standards." Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 242 (2006) (internal citations omitted); see also G. L. c. 31, § 44 ("Any party aggrieved by a final order or decision of the commission following a hearing . . . may institute proceedings for judicial review in the superior court . . . [such proceedings shall] be governed by the provisions of section fourteen of chapter thirty A.").

Timperley contends that the Commission committed errors of law by (1) affirming the School District's decision to terminate him based on conduct which occurred while he was off-duty and (2) relying on Hofferty's testimony when the School District failed to provide him with notice and an opportunity to be heard on Hofferty's allegations.

II. Off-Duty Misconduct

Timperley argues that the Commission's decision is based on an error of law because it sustained discipline against Timperley for off-duty misconduct which did not implicate his work as a custodian. The School District contends that, considering the several prior incidents showing Timperley's propensity for violence and aggression, it was reasonable to conclude that a sufficient connection existed between Timperley's conduct at the clinic and his fitness to perform his job. The court agrees with the School District.

Off-duty misconduct can be considered if a sufficient nexus exists between the conduct and the employee's fitness to perform his job. See Baldasaro, 50 Mass. App. Ct. at 4; School Comm. v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 491 (1997). However, if an employee establishes that the appointing authority's action was based "upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained." G. L. c. 31, § 43.

It was not an error of law for the Commission, in this case, to consider Timperley's off-duty conduct. The Commission determined that Timperley's conduct at the clinic, "highlights [his] on-going difficulties with aggression and violence." The Commission cited Timperley's prior disciplinary history, including the incident at work, which resulted in Timperley receiving a two-day suspension and the testimony of Hofferty regarding Timperley's violent outburst, and found that "it is clear that [Timperley's] violent behavior also extends to the workplace." Furthermore, the Commission found that Timperley's continued employment would undermine the School District's justified measures in taking steps to ensure the safety of its students. Because the Commission properly determined that the evidence before the School District showed that Timperley's aggressive off-duty misconduct had a sufficient nexus with his ability

to perform his job, the Commission was justified in upholding the termination. See McIsaac v. Civil Serv. Comm'n., 38 Mass. App. Ct. 473, 476 (1995); Baldasaro, 50 Mass. App. Ct. at 4-5.

III. Testimony of Hofferty

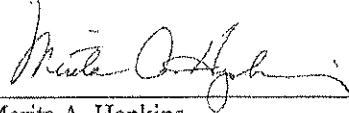
Timperley also argues that the Commission erred in relying on Hofferty's testimony when sustaining the termination. According to Timperley, the School District did not provide him with the statutorily required procedural safeguards in G. L. c. 31, §§ 41 through 43 to allow him to defend himself against Hofferty's charges.² The School District argues that because Hofferty was called to rebut Timperley's statement that he had never stuck anyone, his testimony was appropriate and admissible.

According to the administrative record, at the Commission hearing, the School District called Hofferty to impeach Timperley's credibility. In making its decision regarding whether there was just cause for Timperley's dismissal, the Commission recognized that the incident Hofferty described was not reported to the School District until after it made the decision to terminate Timperley and thus, it was not a factor in the School District's decision. Accordingly, the Commission did not rely on the testimony in making its determination of whether the School District had just cause to terminate Timperley. Rather, the Commission relied on the circumstances of the incident at the clinic as well as Timperley's record of past discipline. Because the incident with Hofferty was not considered as a factor for the School District's decision to terminate Timperley, the Commission's acceptance of Hofferty's testimony to impeach Timperley's credibility did not violate his rights of notice and an opportunity to be heard and defend charges against him.

² General Laws c. 31, §§ 41 through 43 provide that an employee must be given notice of the action contemplated by the appointing authority, the reasons for such an action, an opportunity to answer to any charges, and a full hearing before the appointing authority or an officer designated by the authority.

ORDER

For the foregoing reasons, the plaintiff's motion for judgment on the pleadings is DENIED. The decision by the Commission is AFFIRMED.



Merita A. Hopkins
Justice of the Superior Court

DATED: March 10, 2014

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