

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

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

**MICHAEL TOSCANO,**  
*Appellant*

v.

**CITY OF WORCESTER,**  
*Respondent*

**Case No.: D-12-149**

**DECISION**

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

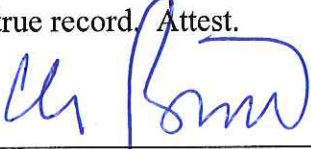
Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No written objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the City of Worcester to suspend the Appellant for twenty-five (25) days is affirmed and the Appellant's appeal is *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on January 9, 2014.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

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.

Notice to:

Gary S. Brackett, Esq. (for Appellant)

William R. Bagley, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**Michael Toscano,**  
Appellant

v.

**City of Worcester,**  
Appointing Authority

Docket No. D1-12-149  
DALA No. CS-12-484  
DATED: November 13, 2013

**Appearance for Appellant:**

Gary S. Brackett, Esquire  
Brackett & Lucas  
19 Cedar Street  
Worcester, MA 01609

**Appearance for Appointing Authority:**

William R. Bagley, Jr., Esquire  
Assistant City Solicitor  
455 Main Street, Room 109  
Worcester, MA 01604

**Administrative Magistrate:**

Judithann Burke

**CASE SUMMARY**

The Appointing Authority, City of Worcester, met its burden of proving that there was just cause to suspend the Petitioner for five (5) days without pay for violating the City's sexual harassment policy by making overt, unwelcome propositions of a sexual nature to a male co-worker and continuing to do so after the same co-worker had asked him to stop on several occasions. The Appointing Authority has also proven that there was just cause to suspend the Appellant for an additional period of twenty (20) days without pay for his violation of the retaliation policy after he attempted to intimidate the witnesses in the City's investigation of the sexual harassment charge against him.

### **TENTATIVE DECISION**

Pursuant to G. L. c. 31, §§ 41-45, the Appellant, Michel Toscano, is appealing from the March 30, 2012 action of the Appointing Authority, City of Worcester, suspending him for a period of five (5) days without pay for repeated violations of the City's sexual harassment policy and an additional twenty (20) days without pay for retaliation. (Exhibit 5.) The appeal was timely filed. A Section 43 hearing was held on August 15, 2012 in Room at Worcester City Hall, Worcester, MA.

At the hearing, eight (8) exhibits were marked. The Appointing Authority presented the testimony of the following witnesses: [Name Redacted] and Kenneth Spooner, employees in the Water Department of the City of Worcester's Department of Public Works; and, Pamela Callahan, the Training Coordinator for the City's Human Resources Department. The Appellant testified in his own behalf. The hearing was digitally recorded.

The record was left open for the filing by the parties of post-hearing memoranda of law and proposed findings of fact. The last of these was received on July 10, 2013, thereby closing the record.

### **FINDINGS OF FACT**

Based upon the testimony and documents submitted at the hearing in the above-entitled matter, I hereby render the following findings of fact:

1. The Appellant, Michael Toscano, is a 1975 graduate of Worcester Boys' Trade High School and a veteran of the United States Marine Corps. He began employment as a Laborer in the City of Worcester on or about October 30, 1995. (Appellant Testimony.)

2. The Appellant was assigned to the Water Division of the Department of Public Works (DPW) along with co-workers [Name Redacted], William Scott, and Kenneth E. Spooner. (All Testimony.)

3. Through late January 2012, it was customary for all four men to gather in the DPW garage at 7:30 AM prior to the start of their shift. (*Id.*)

4. Prior discipline includes a one (1) day suspension imposed on the Appellant on May 11, 2011 for conducting non-City business while on City time, failing to accurately answer his supervisor's inquiries about his work performance, and being away from his assigned work area without proper authorization. (Exhibit 8C.)

5. On June 13, 2011, the Appellant and Spooner attended the training sponsored by the Human Resource Department on what constitutes sexual harassment, sexual harassment law, what constitutes retaliation and what constitutes a hostile work environment. They each received a copy of the Sexual Harassment Policy. (Appellant Callahan and Spooner Testimony and Exhibits 6-8.)

6. Messrs. Scott and [Name Redacted] attended the same training on a different date. ([Name Redacted] and Callahan Testimony.)

7. Over an approximate six-month period prior to late January 2012, the Appellant made sexual comments to [Name Redacted] that included sexual innuendos. During one conversation, the Appellant asked [Name Redacted] for a "blow job." On another occasion, the Appellant told [Name Redacted] that the latter should have his life insurance paid up because the former was going to "bury" him. He told [Name Redacted] to give the jewelry that he was wearing back to Mrs. [Name Redacted]. The

Appellant was also seen grabbing [Name Redacted] by the earlobe, pulling on the earlobe, and calling him a “sweet little bitch.” ([Name Redacted] and Spooner Testimony.)

8. When the Appellant made the sexually suggestive comments, [Name Redacted] was heard to respond with comments such as “knock it off”, “that’s enough now”, or “I’m sick of hearing this.” On several occasions, [Name Redacted] told the Appellant to stop or he would file a complaint. The Appellant responded, “no one would believe you.” (*Id.*)

9. On January 26, 2012, the Appellant called [Name Redacted] a “fag”, and told him to “bend over so I can stick it up your ass.” The comment “suck my dick” was also made by the Appellant on that occasion. (*Id.*)

10. [Name Redacted] reported the incident to their supervisor, Konstantin (“Dino”) Eliadi, Director of Water and Sewer Operations. ([Name Redacted] Testimony.)

11. From and after January 26, 2012, the Appellant ceased making comments of a sexual nature while at work. (All Testimony.)

12. After learning of [Name Redacted]’ complaint, Pamela Callahan and another Human Resources employee, Sulma Rubert-Silva, conducted an investigation. Both Callahan and Rubert-Silva spoke with the Appellant and provided him the opportunity to ask questions. He denied [Name Redacted]’ version of the events on January 26. (*Id.*)

13. The Appellant identified witnesses to his side of the story during the investigation. Those individuals did not support the Appellant’s version of events. (Callahan Testimony.)

14. On January 30, 2012, at the conclusion of the investigation, Callahan met with the Appellant and informed him of her conclusions. At that time, she reminded him of the City's non-retaliation provision:

I am aware that retaliation against any individual for making a complaint or assisting in the investigation of such a complaint is illegal and will not be tolerated. A report of retaliation will be handled in the same manner as a report of hostile work environment or workplace harassment. I am also aware that any retaliation taken against me regarding this complaint is illegal and that I agree to immediately report any incidents that I perceive to be retaliatory conduct immediately.

The Appellant signed the acknowledgement signifying that he understood that he was prohibited from retaliating against [Name Redacted] and the other witnesses. (Exhibit 7.)

15. On or about February 21, 2012, the Appellant approached Spooner in a Dunkin Donuts parking lot while they were on a coffee break. He walked to the driver's side door of Spooner's truck and informed Spooner that he had hired an attorney. He added, "If any of you ([Name Redacted], Scoot or Spooner) said anything to "Dino" and this investigation goes any further, I'll take your houses and your truck." (Spooner Testimony.)

16. Spooner took the Appellant's comment seriously. He notified Callahan of what he perceived as a threat from the Appellant to sue him and the others. (*Id.*)

17. [Name Redacted] and Scott also called Ms. Callahan to report the threat. Callahan commenced a second investigation. (Callahan and [Name Redacted] Testimony.)

18. In a letter dated February 21, 2012, Kathleen G. Johnson, Human Resources Director in the City of Worcester, informed the Appellant:

On January 26, 2012, a complaint of sexual harassment was filed against you and an investigation was initiated. After review of the information from the investigation, evidence has established that you violated the City's Sexual Harassment Policy.

This matter has been referred to the Assistant Commissioner of DPW and the Director of Water Operations for further consideration.

You are reminded that retaliation against any individual for filing a complaint of sexual harassment or for cooperating in an investigation of any such complaint is against the law. The City of Worcester takes all such claims of retaliation seriously and implications of such behavior can result in disciplinary action up to and including termination.

(Exhibit 1.)

19. The Appellant was placed on paid administrative leave on February 27, 2012.

(Exhibit 5.)

20. In a letter dated March 2, 2012, Johnson informed the Appellant:

On January 26, 2012, a complaint of sexual harassment was filed against you and an investigation was initiated. During the course of the investigation, an allegation of retaliation surfaced and a secondary investigation was initiated. After careful review of the information gathered from the investigation, evidence has established that you violated the retaliation provision of the City's Sexual Harassment Policy.

This matter has been referred to the Assistant Commissioner of DPW and the Director of Water Operations for further consideration.

You are reminded that retaliation against any individual for filing a complaint of sexual harassment or for cooperating in an investigation of any such complaint is against the law. The City of Worcester takes all such claims of retaliation seriously and implications of such behavior can result in disciplinary action up to and including termination.

(Exhibit 2.)

21. In a letter dated March 8, 2012, City Manager Michael V. O'Brien informed that Appellant that, in accordance with the provisions of G.L. c. 31, §§ 41-45, he was being



suspended for a period of five (5) days without pay, effective March 9 through March 15, 2012. He was further notified that a hearing would be held to determine whether there was just cause to suspend him for an additional twenty (20) days based on the allegations set forth in the letter.

The Appellant was notified further that he had signed the document in which he indicated that he knew any retaliation would not be tolerated. The specific facts of the retaliation were noted. A Notice of Hearing and a copy of G.L. c. 31, §§ 39-45 were also attached. (Exhibit 3.)

22. The Appellant was reassigned to another department after he served the suspension. (Appellant Testimony.)

23. On March 13, 2012, the Appellant, through counsel, requested a hearing on the five (5) day suspension. (Exhibit 4.)

24. In a letter dated March 30, 2012, City Manager O'Brien notified the Appellant that he had adopted the findings of the hearing officer and concluded that there was just cause to suspend the Appellant for a total period of twenty five (25) days, five of which he had already served. (Exhibit 5.)

25. The Appellant filed a timely appeal.

### **CONCLUSION**

The Appointing Authority proved by a preponderance of evidence that there was just cause to suspend the Appellant for both the five (5) days for violating the sexual harassment policy, and twenty (20) days for retaliation.

Both [Name Redacted] and Spooner testified credibly that the Appellant made crude, unwelcome comments to [Name Redacted] several times over a period of six months and that the Appellant's comments to other co-workers were not as vulgar as those directed at [Name Redacted]. The comments made to [Name Redacted] on or about January 26, 2012 were overheard and admitted to in part by the Appellant himself.

The City's Sexual Harassment Policy, article I, Section D provides in pertinent [art:

It is ...against the policy of the City for any individual, male or female, to harass another individual sexually, that is, by making unwelcome sexual advanced, requests for sexual favors, or other uninvited verbal or physical contact of a sexual nature when:...such conduct has the purpose of interfering with an individual's work performance; or a hostile or intimidating work environment is created for the employee.

It is also against the policy of the City for an individual to sexually harass any person with whom the employee comes in contact on the job or to engage in any harassment or inappropriate or unprofessional conduct in the workplace.

[Name Redacted] was uncomfortable with the Appellant's vulgar comments toward him. The comments, including the repeated requests for sexual favors, were uninvited and of a graphic sexual nature. The Appellant's conduct was both inappropriate and unprofessional. It constituted a clear violation of the City's sexual harassment policy and merited the five (5) day suspension.

Once the report of sexual harassment was received and the investigation was commenced, several witnesses were interviewed, including those named by the Appellant. The Appellant was informed of the specific allegations against him and provided with the opportunity to respond. He also opted to have a hearing on the five (5) day suspension. Accordingly, the Appellant's argument that the February 21, 2012 and

March 8, 2012 notices were defective on the grounds that they lacked detail by not specifying the dates of the conduct or the complainant are without merit. The Appellant received the appropriate copies of G.L. c. 31, §§39-45 and he was provided with the subject matter of the City's investigation on several occasions. He was not prejudiced in his ability to prepare for the hearing before the Appointing Authority because he had actual notice of the charges. *Vrabel v. Mayor of Somerville*, 13 Mass. App. 961, 962 (1982.)

During her investigation, Callahan met with the Appellant and reiterated the City's non-retaliation provision. She also had him sign the acknowledgement signifying that he understood that he was prohibited from retaliating against any of the witnesses against him. Nevertheless, the Appellant still approached Mr. Spooner in February 2012 and threatened to sue him and Messrs. [Name Redacted] and Scott if they said anything more to "Dino." He told Spooner that he would take their houses and Spooner's truck. Mr. Spooner took this as a serious threat and reported the incident. He also testified credibly at the August 15, 2012 just cause hearing. The imposition of the additional twenty (20) day suspension was more than warranted.

Based on the foregoing, the actions of the City of Worcester in imposing the five (5) and twenty (20) day suspension re affirmed.

Division of Administrative Law Appeals,  
BY:

Judithann Burke,  
Administrative Magistrate

Michael Toscano

CS-12-484  
D1-12-149

DATED: November 13, 2013