COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

TOBY TURNER,
Appellant

v.

D1-07-58

CITY OF CAMBRIDGE,
Respondent

Appellant's Representative:

Thomas G. Mari
Business Agent
Teamsters Local 25
544 Main Street
Boston, MA 02129

Respondent's Representative:

Tim D. Norris, Esq.
Collins, Loughran & Peloquin, P.C.
320 Norwood Park South
Norwood, MA 02062

Commissioner: Christopher C. Bowman

DECISION

The Appellant, Toby Turner (hereinafter "Turner" or "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the City of Cambridge (hereinafter "City" or "Appointing Authority") to discharge him for continued violations of work rules including those governing insubordination, respectful treatment of fellow employees, prohibition against threats and making derogatory remarks to fellow employees and seeking unauthorized and inappropriate gain through the use of his position with the City.

The Appellant filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on January 25, 2007. A pre-hearing conference was conducted on

April 12, 2007. After several continuances due to the Appellant's active military duty status, a full hearing was conducted on November 17, 2009 at the offices of the Commission. The hearing was declared private and witnesses were sequestered. The hearing was digitally recorded. The parties submitted post-hearing briefs on January 15, 2010.

FINDINGS OF FACT:

Sixteen (16) exhibits were offered into evidence and I accepted all except proposed exhibit 8. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- John McGrath, Highway Foreman, City of Cambridge DPW;
- Charles Sullivan, Working Supervisor, Sanitation Division, City of Cambridge DPW (now retired);
- Henry "Hank" Silva, Motor Equipment Operator / Driver, Sanitation Division, City of Cambridge DPW (now retired);
- John Nardone, Assistant Commissioner of Public Works, City of Cambridge;

For the Appellant:

- Toby Turner, Appellant;

I make the following findings of fact:

1. The Appellant, Toby Turner, was a tenured civil service employee in the City of Cambridge in the position of laborer. Prior to his termination, he had been employed by the City since 2001. (Stipulated Facts and Testimony of Appellant)

2. The Appellant previously served as a member of the United States Army Reserve and was deployed for active combat duty in Iraq. He was honorably discharged as a result of Post Tramautic Stress Disorder (PTSD) and torn meniscus in his knees. (Testimony of Appellant)

Prior Discipline

3. On May 28, 2002, the Appellant received a written warning for unexcused absences. (Exhibit 15)
4. On July 8, 2003, the Appellant received a written warning for a "no call, no show" violation. (Exhibit 15)
5. On July 18, 2003, the Appellant received a written warning for leaving the worksite without authorization. (Exhibit 15)
6. On August 21, 2003, the Appellant was suspended for three (3) days for doing a favor for a friend by picking up a considerable volume of construction debris located in the yard of a private residence in violation of department practice. (Exhibit 15)
7. On April 29, 2004, the Appellant received a written warning for multiple "no call, no show" violations. (Exhibit 14)
8. On May 14, 2004, the Appellant received a letter of reprimand for being rude and disrespectful toward his supervisor and co-worker. (Exhibit 14)
9. On October 21, 2005, the Appellant received a written warning for not showing for work after calling and indicating that he would be arriving late. (Exhibit 13)
10. On October 26, 2005, the Appellant received a verbal warning for unauthorized use of the radio. (Exhibit 13)

11. On November 3, 2005, the Appellant was suspended for 4 days for unauthorized use of the radio; walking off the job before the end of the work day; insubordination toward his supervisor; and abusive and threatening conduct toward his coworkers. (Exhibit 13)
12. On January 23, 2006, the Appellant was suspended for 1 week for insubordination. (Exhibit 12)
13. On May 3, 2006, the Appellant was suspended for 1 day for failing to bring in a relevant doctor's note upon his return to work. (Exhibit 12)
14. On July 10, 2006, the Appellant received a written warning for a "no call, no show" violation on July 7, 2006. (Exhibit 12)
15. On July 28, 2006, the Appellant received a written warning for failing to show for work after calling and indicating that he was on his way. (Exhibit 12)

Disciplinary Appeal currently before the Commission

September 2, 2006 Incident

16. John McGrath has worked for the City of Cambridge for thirty-five years. At all times relevant to this appeal, he served as a Highway Foreman and supervised the Appellant. He was a good witness. Notwithstanding his slight nervousness and anxiety, he had a solid recollection of events. He did not overreach in his testimony and did not appear to have any ulterior motive for testifying against the Appellant. I credit his testimony, including his recollection of what occurred on September 2, 2006. (Testimony, demeanor of McGrath)

17. On September 2, 2006, the Appellant was working on a Cambridge sanitation truck at Blake Street and Mass. Ave. with Motor Equipment Operator Hank Silva and a temporary employee. (Testimony of Appellant, Silva and McGrath)
18. Mr. Silva was also a good witness. Prior to his retirement, he worked for the City for approximately 32 years. He is a "salt-of-the-earth" type who speaks plainly. He had a good recollection of the events that are relevant to this appeal. (Testimony, demeanor of Silva)
19. Silva testified that while at the above-referenced worksite on September 2, 2006, he heard the Appellant and the temporary employee arguing. The Appellant approached Silva and complained that the temporary employee was not doing his fair share of the work. When Silva told the Appellant to "take it easy", the Appellant stated that he would no longer work with the temporary employee. Silva then called McGrath and informed him that the Appellant was refusing to work with the temporary employee. (Testimony of Silva)
20. When McGrath arrived, the Appellant repeated his concerns to him that the temporary employee was not doing his fair share of the work. McGrath then spoke with Silva and the temporary employee who told him that the *Appellant* was not doing his fair share of the work and that he was just "walking around". McGrath instructed the three employees to report back to the DPW yard. (Testimony of McGrath)
21. Once back at the DPW yard, the Appellant approached McGrath, told him that he would not work with the temporary employee and that he (the Appellant) was going

home. McGrath had not authorized the Appellant to leave for the day. (Testimony of McGrath)

22. I do not credit the Appellant's testimony that he was sent home by McGrath that day after telling him that the temporary employee was "high on drugs". This testimony did not ring true to me and contradicted the credible testimony of Silva and McGrath. (Testimony of Appellant)

23. The rules governing all City of Cambridge employees prohibit "leaving work before the end of a workday or not being ready to work at the start of a workday without approval of your supervisor; stopping work before time specified for such purposes"; "unauthorized absence from your work station or duty assignment during working hours"; and "insubordination or refusing to obey instructions properly issued by your supervisor pertaining to your work…" (Exhibit 16, Page 14) I find that, by refusing to perform the work assigned to him and leaving work without the permission of his supervisor, the Appellant violated these rules on September 2, 2006.

November 22, 2006 Incident

24. On November 22, 2006, Silva and the Appellant were assigned to the same rubbish truck. As part of their normal route, they stopped to pick up trash at a local business, ELI. (Testimony of Appellant and Silva)

25. There was a large amount of trash out front at ELI which the Appellant and Silva picked up. (Testimony of Appellant and Silva)

26. After picking up the trash in the front of ELI, an ELI employee came out and said there was more trash to be picked up out back. (Testimony of Appellant and Silva)

27. Although the Appellant and Silva offered divergent testimony regarding whether the ELI employee suggested that they go inside and accept cash for taking the extra trash (Testimony of Appellant) or whether the Appellant suggested they solicit cash without any prompting from the ELI employee (Testimony of Silva), there is no dispute that Silva did not want to ask for and/or accept cash to take the extra trash and the Appellant did. (Testimony of Appellant and Silva)
28. The Appellant told Silva that he (Silva) should go inside and accept cash for taking the extra trash. When Silva refused, the Appellant called Silva a "mother-fucker" and said that he (the Appellant) "didn't like white people anyway". (Testimony of Silva)
29. Silva testified that he was hurt by the Appellant's comments as he felt he had a good working relationship with the Appellant. (Testimony of Silva) In a statement that he prepared shortly after the incident in November 2006, Silva wrote, "All I wanted to do [after hearing the comments] was get away from him as fast as I could." (Exhibit 7) Silva then called McGrath, their supervisor, and asked him to come to the scene. (Testimony of Silva)
30. When McGrath arrived, he initially spoke with Silva and then proceeded to talk to the Appellant. McGrath testified that the Appellant "blew up" and told him that he shouldn't have talked to Silva before hearing his side of the story. The Appellant then began to walk away at which point he called McGrath a "white racist" and said that he should "put his foot up [McGrath's] ass." (Testimony of McGrath)
31. McGrath testified that, after hearing the Appellant's comments, he was "shaking" and didn't know what to do. McGrath testified that he has never had an employee speak to him like the Appellant did that day. (Testimony of McGrath)

32. For the reasons previously cited, I found McGrath to be a good witness. He had a good recollection of the events that occurred on November 22, 2006. His testimony was also corroborated by percipient witness Charles Sullivan, who was also present. Mr. Sullivan was a credible witness and specifically recalls the Appellant referring to McGrath as a racist and hearing the Appellant say he should put his foot up McGrath's ass. (Testimony of McGrath and Sullivan)
33. The Appellant testified that he called Silva a "motherfucker" and a "faggot". He does not dispute that he was "irate" when speaking with McGrath and he does not dispute calling McGrath a racist or saying that he should put his foot up McGrath's ass. The Appellant testified, however, that he was "50 or 60 feet away" from McGrath at the time and that he never meant for anyone to hear him or take his comments as a threat. (Testimony of Appellant)
34. The rules governing all City of Cambridge employees prohibit: "threatening, intimidating, harassing or coercing fellow employees…using obscene or abusive language towards another employee…threatening or employing physical violence towards another employee"; "any active harassment, sexual, racial or other…making racial or ethnic slurs…"; or "…any disorderly / antagonistic conduct…" and seeking inappropriate gain through the use of his position with the City. (Exhibit 16) I find that the Appellant's actions and statements on November 22, 2006 violated all of these rules.
35. I find that the City's actions in regard to fellow employee named Derek Koster do not constitute disparate treatment. I base this on the credible testimony of John Nardone, the City's Assistant Commissioner of Public Works. Based on his testimony, Koster

engaged in similar behavior and was subject to comparable progressive discipline. The fact that the decision to finally terminate Koster was allegedly related to allegations of theft does not show that the City treated Koster any differently than the Appellant. (Testimony of Nardone)

CONCLUSION

G.L. c. 31, § 43, provides:

> "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 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."

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. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

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, 133 N.E.2d 489 (1956).

"The commission's task…is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . 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'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (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." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police

Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

For all of the reasons referenced in the findings, I conclude that the Appellant violated the rules governing all City employees on September 2, 2006 when he refused to perform the work assigned to him and went home without authorization from his supervisor. Further, I conclude that the Appellant, through his statements and actions on November 22, 2006, violated various work rules including those governing insubordination, respectful treatment of fellow employees, prohibition against threats and making derogatory remarks to fellow employees and seeking unauthorized and inappropriate gain through the use of his position with the City.

I base these conclusions largely on the credible testimony of the City's witnesses, including John McGrath, Charles Sullivan and Hank Silva. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirment Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify 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); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

By a preponderance of the evidence, the City has shown that it had reasonable justification to discipline the Appellant for his misconduct.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was termination.

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.' " Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. *See* Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Town of Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006).

There is no evidence the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. The Appellant failed to show that he was treated any differently than other employees who engaged in similar conduct.

While the Appellant deserves our gratitude for his courageous service to our country, including this tours of duty in Iraq, the Appellant's lengthy disciplinary record more than justifies his termination.

For all of the above reasons, the Appellant's appeal under Docket No. D1-07-58 is hereby ***dismissed***.

Civil Service Commission

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Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 28, 2010.

A true record. Attest:

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Commissioner

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)(l), 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:
Thomas Mari (for Appellant)
Tim Norris, Esq. (for Appointing Authority)