COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOHN VALERI,
Appellant

v.

D-11-340

CITY OF LYNN,
Respondent

Appearance for Appellant:

Joseph L. DeLorey, Esq.
8 Beacon Street
34 Mulberry Street
Boston, MA 02108

Appearance for Respondent:

David F. Grunebaum, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

The Appellant, John Valeri (hereafter "Appellant" or "Mr. Valeri"), pursuant to G.L. c. 31, § 43[1], duly appealed to the Civil Service Commission (hereafter "Commission") on November 30, 2011, opposing the decision of Judith Flanagan Kennedy (hereinafter "Mayor"), Mayor of the City of Lynn (hereinafter "the City") and Appointing Authority, placing him on a

[1] At the hearing, the Appellant sought to amend the appeal by adding that the City of Lynn violated G.L. c. 31, § 42 in that the decision to suspend the Appellant's employment was issued in an untimely manner following the local hearing. At the hearing, the parties were advised they may address the motion to amend in their recommended decisions. In his recommended decision, the Appellant states that he has decided not to further pursue the motion to amend. The City of Lynn objects to the motion as untimely. Given the Appellant's decision not to pursue the motion to amend, it is moot.

two (2) day suspension as an employee of the Inspectional Services Department (hereinafter "the Department") for the City. A prehearing conference was held on January 24, 2012 and a full hearing was held on May 15, 2012. As no notice was received from either party, the hearing was declared private. Thereafter, the parties submitted proposed decisions. The full hearing was recorded and a copy of the recording was sent to each of the parties and was made part of the record. For the reasons stated herein, the appeal is denied.

Based on the seventeen (17) exhibits entered into evidence and the testimony of:

For the Appointing Authority:

- Michael Donovan, P.E., Director of Lynn Inspectional Services Department and Building Commissioner;

For the Appellant:

- John Valeri, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Valeri is a tenured maintenance employee and/or custodian of the Department who had worked in the Department for more than five (5) years at the time of the Commission hearing. (Testimony of Appellant; Stipulation) At all pertinent times, the Appellant was assigned to the 7:00 a.m. to 3:00 p.m. shift. (Ex. 9)
2. Mr. Michael Donovan is the Director of Inspectional Services and the Building Commissioner for the City. He has been the Director of the Department since February 1, 2004 and he has worked for the City since 1997. (Testimony of Mr. Donovan)

3. According to a contract between the City and the American Federation of State, County and Municipal Employees ("AFSCME") Local 1736, Department employees had one emergency vacation day for the fiscal year. Department employees also have non-emergency vacation days (marked "V" on the Appellant's timesheet that is Exhibit ("Ex.") 1), sick time (marked "S" on Ex. 1) and five (5) days of personal leave. (Testimony of Mr. Donovan) There is one marking "1/4 EV" on Tuesday of the week of February 19, 2011 on the Appellant's timesheet, which would appear to indicate that the Appellant took one quarter of the work day off for emergency vacation. (Ex. 1)(Administrative Notice) Department employees also have an emergency personal day. (Testimony of Mr. Donovan)
4. Department policy provides that, to use the emergency vacation day, Department employees on the 7:00 a.m. to 3:00 p.m. shift are required to call the Department attendance phone line one hour before the shift begins and leave a message indicating that they will be taking off an emergency vacation day. Department employees are not allowed to use the emergency vacation day on more than one day in a year, even if an employee uses less than the full emergency vacation day. Employees taking sick leave are also required to call the attendance phone line to inform the Department that they will be out sick. (Testimony of Mr. Donovan)
5. The process for requesting non-emergency vacation or personal days is that employees must submit a written request to their supervisor and obtain the supervisor's approval three or five days prior to the vacation days sought. (Testimony of Mr. Donovan)
6. As the Appellant is aware, if employees are uncertain about the amount of time off they have, they can swipe their identification cards at a computer terminal, which includes a

time clock system with an email capability, for employees to communicate with the administration. However, the time clock system does not separately identify emergency vacation time. Employees can check the amount of time off they have remaining, including emergency vacation time, by calling or emailing the Department payroll advisor or submitting a written request in this regard. (Testimony of Mr. Donovan; Ex. 17)

7. On May 16, 2011, the Appellant did not report to work as scheduled at 7:00 a.m. At approximately 9:30 a.m., the Appellant's father and/or a family member called to ask the Appellant to take his father to get medical attention in Boston in order to obtain oxygen. (Testimony of Appellant) Between approximately 9:30 a.m. and 10:00 a.m. on May 16, 2011, the Appellant called the Department attendance phone line, leaving a message that he was going to take off that day as an emergency vacation day. (Exs. 4; Testimony of Appellant) On May 16, 2011, the Appellant did not call the payroll supervisor to inquire if he still had an emergency vacation day he could use. (Testimony of Mr. Donovan) The Appellant was absent from work on May 16, 2011. (Testimony of Mr. Donovan and Appellant)
8. At the time of the events on May 16, 2011, the Appellant had already used his emergency vacation day three months earlier, in the week of February 19, 2011. (Testimony of Mr. Donovan; Ex. 1, p. 2) Having no emergency vacation day left to take on May 16, 2011, the Appellant was not paid for that day. (Testimony of Mr. Donovan)
9. At the time the Appellant called the attendance phone line on May 16, 2011 and stated he was taking emergency vacation time, he knew that he had other sick leave and vacation

time that he could have used in order to take the day off to assist his father. (Testimony of Appellant).

10. By letter dated May 18, 2011, Mr. Donovan issued the Appellant a two-day suspension for being absent from work on May 16, 2011 and calling in that day stating that he would be using his emergency vacation day when he had already used the emergency vacation day previously during the year in violation of the applicable collective bargaining agreement and giving the Appellant notice of his right to a hearing and related matters pursuant to G.L. c. 31, §§ 41 through 45. (Ex. 4)
11. At the Appellant's request, the City conducted a hearing concerning the Appellant's two-day suspension. (Ex. 17) The City upheld the two-day suspension and the Appellant filed the instant appeal. (Exs. 2, 3; Administrative Notice)
12. By letter dated April 1, 2010, Mr. Donovan issued the Appellant a written warning to the Appellant stating that the Appellant had failed to report to work on March 26, 2010, that his absence was not reported until 10:09 a.m., three hours after his shift began, and that the Appellant did not call the attendance line or notify his supervisor as required in the pertinent collective bargaining agreement and departmental procedure. (Exs. 9, 13)
13. By memorandum dated October 26, 2010, the City issued a verbal warning to the Appellant because he had called out sick to the attendance line on October 26, 2010 at 12:19 p.m. although the collective bargaining agreement requires employees to notify their department head or supervisor by telephone or in person at least one hour prior to commencement of the first work shift or at least four hours prior to the reporting time for the second or third shifts. (Ex. 12)

14. By memorandum dated January 5, 2009, Mr. Dennis Camilio, Assistant Supervisor of Custodians & Maintenance, issued to the Appellant a verbal warning regarding inadequate cleanliness of a building. (Ex. 14)
15. By letter dated October 22, 2008 from Ms. Jane Perry, Senior Custodian, to Mr. Camilio, Ms. Perry wrote that,

> " … John's [Valeri] attendance has slipped, with no calls or very late calls and repeatedly late. I have spoken to John on several occasions regarding his tardiness with no change. I have had numerous complaints from the offices in his assigned work areas …. I have spoking (sic) to John numerous times with small changes, then he reverts back to these habits …." (Ex. 16)

16. By memorandum dated October 23, 2008, Mr. Camilio issued to the Appellant a written reprimand regarding the Appellant's job performance, attendance and tardiness, pursuant to the observations of Ms. Perry and Mr. Camilio, indicating that both Ms. Perry and Mr. Camilio had spoken to the Appellant in this regard on a number of occasions. The written reprimand states that the Appellant is responsible for contacting his senior custodian before his shift begins, that the Appellant is subject to discipline if the unacceptable conduct continues and that the reprimand will remain in his personnel file for one year and may be used as part of progressive discipline during the one year period. (Ex. 15)
17. In fiscal year 2011, the Appellant failed to work a full week in approximately thirty-nine (39) weeks out of the year. (Testimony of Mr. Donovan; Ex. 17)
18. When the City passed a home rule petition around 2006, school custodians were transferred to the Department. Twenty (20) percent of custodians were absent. The City

sent letters to Department employees regarding attendance and addressed the matter in their collective bargaining agreement. The Department is large, having approximately ninety (90) custodians with many buildings to clean and maintain. Therefore, Department employee attendance is important and the Department takes it seriously; if employees do not report to work or report their absence in a timely manner, the City has to make other, costly arrangements to ensure that buildings are cleaned and maintained. Thus, this is a fiscal matter as well as an attendance matter. (Testimony of Mr. Donovan; Ex. 17)

Applicable Law

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.

G.L. c. 31, § 43. 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.

It is the function of the hearing officer to determine the credibility 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. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). *See also* Covell v. Dep't. of Social Services, 439 Mass. 766, 787 (2003).

Analysis

At the Commission's hearing, Mr. Donovan testified straightforwardly, calmly and consistently, throughout direct and cross-examination. He generally provided clear, prompt and knowledgeable responses to questioning but also admitted when he was uncertain how to respond to questioning or if he could not recall something. Overall, Mr. Donovan's testimony appeared to be professional, sincere, and unmotivated by bias. For these reasons, I find that Mr. Donovan provided credible testimony.

The Appellant's testimony was brief and he provided limited, sometimes inconsistent details about the events on May 16, 2011. He asserted that when he called the Department attendance phone line on that day reporting that he would be taking an emergency vacation day, he did so because he determined that the matter qualified as an emergency because it involved his father, who told him he needed to go to Boston to obtain oxygen. While the sentiment regarding the health of a parent is certainly expected and understandable, there was no other evidence indicating the nature of the emergency or what the Appellant did to help his father that day. In addition, the Appellant's comments in this regard appeared to lack affect. Asked on direct examination if he had a good faith belief on May 16, 2011 that he had emergency vacation time available, he stated that he knew he had time on the books but did not know that he had used the emergency vacation time. In fact, he had used the emergency vacation time only three months earlier. Further, on cross-examination, the Appellant stated that he did not recall but believed that he had already used the emergency leave prior to May 16, 2011. Also, the Appellant at one point testified that he could not discuss the availability of emergency vacation time when he notified the Department that he would be absent because he called the attendance line, as required, which is unattended by staff. However, by the time the Appellant called the

attendance line, it was near 10:00 a.m., approximately three hours after his start time. Further, the Appellant could have called the Department and spoken to someone about his available emergency vacation time but he did not. Asked why he did not call the Department to inquire about his emergency vacation time, the Appellant responded, without affect, that he was not thinking straight because of concern with his father. Moreover, the Appellant was supposed to begin work at 7:00 a.m. that day but he did not report to work at all and did not report his absence until 10:00 a.m., approximately four hours after he was required to report his absence. The Appellant also testified that he called the attendance line on May 16, 2011 because that's what he was told to you. However, given previous warnings sent to the Appellant, reminding him of the rules regarding attendance, the Appellant had notice of the manner in which absences were to be reported. For these reasons, I find that the Appellant's testimony has limited credibility.

A preponderance of the evidence establishes that the Appointing Authority had just cause to suspend the Appellant. At the time of the events here, the Appellant worked the 7:00 a.m. to 3:00 p.m. shift in the Department. The Appellant did not report to work at 7:00 a.m. on May 16, 2011. The applicable collective bargaining agreement and Department rules require a person working the 7:00 a.m. shift to report an absence for an emergency matter of sick leave one hour prior to the 7:00 a.m. shift. The Appellant did not call the Department to report his absence until three hours after his shift began. When he called to report his absence, it was with regard to an event that did not even occur until approximately two and one-half hours after his shift began and he reported that he was taking an emergency vacation day when he had no emergency vacation time, having used it only three months earlier. The Appellant testified that if staff attended the Department attendance phone line, he could have discussed the matter with them.

However, it was approximately 10:00 a.m. when the Appellant called the attendance line, by which time Department staff would have been available to answer his questions. Prior to the Appellant's conduct on May 16, 2011, the Department had given the Appellant warnings for other attendance and/or tardiness problems arising on October 23, 2008, March 26, 2010 and October 26, 2010, one of which events involved the Appellant's failure to report his absence until approximately 10:00 a.m., as in the instant case. The Appellant was informed that continued attendance problems may result in discipline. Thus, the Appointing Authority's two-day suspension for violating the collective bargaining agreement and Department in this case reflects appropriate progressive discipline. The Department also gave the Appellant a warning on January 5, 2009 regarding the lack of cleanliness in his assigned area. The Department appears to be addressing a serious attendance problem throughout the Department, not just with regard to the Appellant. There appears to be no bias or other inappropriate motive in this case.

Conclusion

The City has established, by a preponderance of the evidence, that it had just cause to suspend the Appellant for two days and the appeal is hereby denied.

Civil Service Commission

_____
Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on December 13, 2012.

A true record. Attest:

_____
Commissioner

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:
Joseph L. DeLorey, Esq. (for Appellant)
David F. Grunebaum@comcast.net (for the Appointing Authority)