Decision mailed: 4/25/11
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KAREN WALSH,
Appellant

v.

Docket No: D1-08-258

CITY OF WORCESTER,
Respondent

Appellant's Attorney:

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

Respondent's Attorney:

Lisa M. Carmody, Atty.
City of Worcester
Human Resources Department
City Hall, Room 109
Worcester, MA 01608

Commissioner:

Daniel M. Henderson

DECISION

The Appellant, Karen Walsh (herein "Appellant" or "Walsh"), filed an appeal claiming she was terminated from her employment without just cause by the Respondent, City of Worcester ("Appointing Authority" or "City"). The appeal also claims that the termination was not conducted in accordance with the provisions of M.G.L. c. 31, §§42, 43. The issues presented by the Appellant include whether the City followed the necessary procedural requirements under §41 in terminating Walsh from her employment and, if so, whether there was just cause to

terminate her employment. The City claims that it did not act to terminate or otherwise discipline the Appellant, but took no action, on the belief that the Appellant had voluntarily resigned from her position. The City filed a Motion to Dismiss on the ground of lack of jurisdiction (late/untimely filing of appeal or resignation), on the first day of hearing, December 4, 2008. The Appellant objected to the late filing of the Motion to Dismiss, as it is dispositive and should have been filed per the Pre-Hearing Conference notice, prior to the Pre-Hearing Conference held on November 5, 2008. The Appellant filed an appeal at the Civil Service Commission (herein "Commission") on October 14, 2008. A full hearing was held at the Commission on December 4, 2008 and January 22, 2009. As no written notice was received from either party, the hearing was declared private. The hearings were recorded on four (4) audio tapes. This hearing officer tried to mediate a settlement at the conclusion of the hearing; yet was unsuccessful. The parties were then ordered to attempt to settle this matter and then to report back in writing within two (2) weeks regarding the status of settlement negotiations. The parties did not comply with this reporting order. Only the Appellant filed a post-hearing proposed decision.

FINDINGS OF FACT

16 exhibits were entered into evidence. Based on the exhibits and the testimony of:

For the Appellant

- Karen Walsh, Appellant
- James Walsh, husband of Appellant,

For the Respondent

- William McClune, Project Director City of Worcester
- Derek Brindisi, Acting Director of Health and Human Services for City of Worcester,
- Susan DiTaranto, Administrative Assistant, City of Worcester,
- James Gardiner, Acting Commissioner Health and Human Services, City of Worcester

I make the following findings of fact:

1. Walsh has been employed with the City since November 9, 1987. She was a tenured civil service employee at the time of these relevant events. She had previously been employed

in other City programs, including: Lead Paint, Hepatitis and Water Quality. She transferred into the Tobacco Program in 2004. (Testimony of Appellant)

2. The City Manager is the appointing authority for the City of Worcester. The City also has a Mayor and a City Council included in its governmental organization. (Exhibits, testimony and argument)

3. She was employed as a Senior Sanitary Inspector for the City's Department of Health and Human Services, assigned to the ("Tobacco Program") at the time of these events in June-July, 2008. She had transferred in to the Tobacco Program in 2004, at which time there were three (3) inspectors doing the tobacco compliance and point of purchase checks. The Appellant's duties mainly involved conducting "youth compliance checks" and "point of purchase checks" on businesses which sold cigarettes and other tobacco products, for violation sales to underage minors. The compliance or inspectional checks were performed for the City by way of the Worcester Regional Tobacco Control Collaborative, ("WRTCC" or "Collaborative") under the State's Massachusetts Tobacco Control Program, ("MTCP"). The WRTCC or Collaborative is a regional body composed of twenty-two (22) cities and towns, including the City of Worcester. There apparently are State and Collaborative standards and guidelines to be met to insure continued state funding and other grants. (Testimony of Appellant, Gardiner, McClune and Brindisi, Exhibits 13-16)

4. The City's witnesses described circumstances of the Collaborative continuously looking for new or repeat funding or grants. "We look for funding or grants continually, all the time."(T. Gardiner) The Collaborative is funded entirely by state funding or grants. (T. Brindisi) A grant could last for five years and then be increased or decreased depending

in part, on any changes in the make-up of the regional Collaborative or state statistical compliance. Massachusetts shared some part ($250 million) of the Federal Tobacco settlement and the Collaborative had to meet a certain state compliance rate to qualify for funding. The Tobacco Program receives approximately $190,000 from the State, Department of Public Health, in which Christie Fedor is the State Program Director. (Testimony of Gardiner, McClune and Brindisi, Exhibit 16)

5. Christie Fedor, the State Tobacco Program Director met with Gardiner, McClune and Brindisi on three occasions, sometime prior to June, 2008, and she informed them that the Collaborative was "not meeting its deliverables" or was underperforming statistically. All three witnesses felt that the Collaborative's future State funding was in jeopardy due to this statistical underperforming. The new standards to be met by each inspector called for of 15 youth compliance checks and 4 point of purchase checks, a total of approximately16+ stops per hour. These inspections were scheduled to cover the entire regional Collaborative of 22 Cities and Towns. (Testimony of Gardiner, McClune and Brindisi, Exhibit 16)

6. James Gardiner is Acting Director of the City of Worcester's Department of Health and Human Services. He is the "Department Head". He has been employed by the City for 29 years. He is also "in charge of the Tobacco Collaborative since August, 2006". He is responsible for or makes recommendations on the hiring and firing of Collaborative employees. (Testimony of Gardiner)

7. The Appellant described these "youth compliance" and inspectional, "point of purchase" checks as follows: a "youth compliance check" involved taking an underage youth in to her vehicle and instructing the youth on how to attempt to purchase cigarettes at a certain

location and report back to her on the results of the attempted purchase, while she waited observing nearby for the results. She then recorded the results. Citations/fines were issued for violations and resulted in potential court subpoenas for non-payment. The "point of purchase inspectional checks" involved going to the vendor location to check on proper display of signage or notice information; speaking with the manager, giving explanations and providing printed educational material. Walsh described the usual difficulties she encountered, such as: Vendor address changes, new vendors appearing, difficulty recruiting youth, forgetful youth- unable to follow direction or relay information, being in dangerous neighborhoods and waiting for a manager to be available to speak with, etc. However, her greatest complaint was that she was overwhelmed and unable to meet the new required number of checks, (15 per hour) and other inspections per hour). She calculated that the total of approximately 3,800 per year at approx.16+ per hour was the equivalent of one inspection or check every 4 minutes. She attempted to meet the new requirements and was unable to complete them; the new assignment number was "unattainable", it was "an impossibility", she was "overwhelmed". She relayed this information to McClune and Brindisi several times prior to and at the meeting on June 30, 2008. (Testimony of Appellant)

8. The City's witnesses disputed the total number of annual checks and inspections; claiming the annual 3800 total visits and the number of vendors to be visited was high. However, they believed that the required number of approximately 16+ per hour was doable or manageable, based on their experience. They did admit that in the past, the same number of checks and inspections were performed by three (3) people and in 2008 it was down to only one (1) person, the Appellant. They also claimed that the 16+ checks

per hour were much less than the new state standards calling for 24 checks per hour. (Testimony of McClune, Brindisi and Gardiner)

9. Brindisi testified that prior to fiscal year 2008, the past practice was that consultants did a vast majority of the regional inspections and the Appellant did the City of Worcester. The consultants were used as supplemental support for the regional Collaborative. (Testimony of Brindisi)

10. On August 13, 2007, McClune and Brindisi had discussed with Walsh, the state's concerns with the City's inspectional "inefficiencies" and that the state standards must be complied with to insure continued state funding. (Testimony of Brindisi and McClune)

11. McClune admitted that at the meeting on June 30, 2008, the Appellant had expressed distress and concern over the increased number of inspections/checks mandated by the state standards. However, she had also expressed similar concerns going back to August, 2007. He had tried to address the Appellant's concerns by keeping her assignments in Worcester and near-by communities, the use of city vehicles and GPS devices addressed her liability and safety concerns. He felt that the use of computers in October, 2007 had made the record keeping easier. (Testimony of McClune)

12. The Appellant testified that after the meeting on June 30, 2008 she became very upset. She had already tried to meet the new higher standards of checks/inspections for the entire Collaborative region and was overwhelmed. She just could not meet the new standards for the entire region; where she had been previously, primarily assigned to Worcester. She could not sleep and was having "anxiety attacks" and was thinking of retirement because of it. She needed some time off to think. On July 22, 2008 she received Gardiner's letter stating she had resigned, which was inaccurate. She tried to

contact her attorney on this but he was away on vacation so it took a week or so to contact her attorney. She did convey an intent to resign at some point in the future to her husband. She was stressed out and unsure of what to do. She was also considering taking sick time or FMLA. (Testimony of Appellant0

13. Brindisi testified that the "past practice" prior to Fiscal year 2008 had been that consultants did the vast majority of the regional (outside Worcester) checks or inspections, while the Appellant did them for Worcester. (Testimony of Brindisi)

14. Yet, even after the accommodations by McClune, the Appellant felt that meeting the new state standards could not be accomplished. The Collaborative at some point also began using "Consultants" to help with the inspections/checks work load. These consultants were paid at the rate of $25.00 per hour. Some of McClune's family and relatives were hired as consultants. (Testimony of McClune)

15. Brindisi testified that he was only aware of one person related to McClune working as a consultant. He was not previously aware of the several other family or relations named in testimony. He did feel that the family hiring situation was a concern as a potential conflict of interest. (Testimony of Brindisi)

16. McClune, Brindisi and Gardiner testified on June 23, 2008, at a City of Worcester City Council subcommittee hearing on Public Health and Human Services. The issue of the Regional Tobacco Collaborative was raised at this subcommittee chaired by City Councilor Gary Rosen. Gardiner admitted that the City of Worcester's participation in the regional Collaborative was a voluntary choice done for the state funding. They stated that a state 5 year grant ended for the Collaborative on June 30, 2008, requiring a new grant, which they were looking to increase. They believed that meeting the new increased state

standards calling for approximately 16 inspectional stops per hour was doable. The subcommittee Chairman questioned the ability of a single inspector to perform approximately 4000 inspections, when in the past the inspections were performed by three inspectors. He also questioned why it was good for Worcester to be in a Collaborative with 21 other cities and towns. These three witnesses believed that belonging to a Collaborative increased funding in a time of limited funding and staff; last year had the biggest cuts in funding for the Collaborative. They also felt that regionalization as a practice is probably coming if not here already.(Exhibit 16)

17. James Gardiner, the Acting Commissioner of the City's Department of Health and Human Services, (hereinafter "HHS") sent the Appellant a letter by certified mail, dated July 21, 2008 expressing the belief, as learned from her husband James through his staff, that she had resigned from her position. The letter further stated as learned from her husband through his staff, that she was requesting the use of accrued vacation and personal leave time which would carry her through August 8, 2008. "Thus, your resignation will be effective August 9, 2008. I will inform the City Manager of your decision to resign." (Exhibit 2) The Appellant had requested 20 days of leave from July 14 to August 8, 2008, by signing and submitting a request form. (Exhibit 1)

18. On June 30, 2008, Walsh met with Bill McClune ("McClune"), her immediate supervisor, at McClune's request to discuss a change in her job responsibilities. (Testimony of Appellant and McClune)

19. Walsh testified that she was "distraught" on June 30, 2008, when she was advised by McClune that her workload would be increased so as to require her to perform an estimated 3,800 inspections and/or checks a year in the City of Worcester and 21

surrounding cities and towns. She felt that the expected rate (15-19 per hour) of these inspections and checks was impossible to meet. (Testimony of Appellant)

20. Walsh also testified that June 30, 2008 was the first time that she was told that she had to do certain inspections and/or visits at intervals of four minutes apiece. That new requirement would have resulted in Walsh being responsible for doing an increased amount of approximately ninety inspection/checks per day. (Testimony of Appellant)

21. The record in this matter contains no written documentation evidencing a directive by the City to Walsh which sets out changes to Walsh's work obligations, the increased inspections/checks, either as of June 30, 2008 or prior thereto. (Exhibits, testimony of Appellant)

22. The implementation of the new higher number of inspections/checks pursuant to the higher state standards was to begin on July 1, 2008. The first day of the fiscal year for the Collaborative is July 1st. (Testimony of McClune, Brindisi and Appellant)

23. The City's witnesses testified as if the new higher state standards for the Collaborative inspection/checks had been delayed too long and that continued state funding was in jeopardy due to the delay in implementation. They had conveyed the state's dissatisfaction with the Appellant's prior performance to meet these standards. They felt that they had given the Appellant ample prior notice that the new higher standards must be implemented by July 1, 2008. They were worried about losing state funding for non-compliance and compliance was now mandated by the state. McClune also told the Appellant at the June 30th meeting that due to lack of money he cut some consultants; therefore she would have to do some of the surrounding towns. (Testimony of McClune, Brindisi and Appellant)

24. On June 30, 2008, at the meeting the Appellant appeared upset over the high number of inspections. He said he got the impression that she wanted to transfer or be reassigned. However, there were no open positions and no place to transfer to. (Testimony of McClune)

25. On July 1, 2008 she called in sick saying she couldn't sleep; she told McClune she would have to quit. McClune said he told her that she should think about what she was saying and he hoped she would feel better. She told McClune that her husband was also upset over the new changes. On July 2nd her husband called in to say she was sick and "going to take a few days off and we would come in to resign, probably on Monday." McClune "tried to discourage it [resignation] and look for an alternative". (Testimony of McClune)

26. June 30, 2008 was the last day that Walsh actually worked. On July 1, 2008 and between that date and July 11, 2008, Walsh did not report to work and used accumulated sick, personal and vacation days to which she was entitled for the work days in question. Walsh used these days with the full knowledge, and approval, of her supervisors. McClune only had conversations with Jim Walsh after July 1st, regarding the Appellant's situation and leave time. McClune testified that he had not previously seen the two Leave Request forms for a total of 25 days. (Exhibits 1& 11) He thought the amount of leave was highly unusual, given the limited staff and if he had received that leave request; he would have wanted an explanation. (Testimony of Appellant and McClune, Brindisi)

27. The new changes, of standards called for a higher number of checks and inspections per hour were to be implemented on July 1, 2008. However, the new standards were not implemented then. No inspections or checks occurred in July. A "special project" using consultants for checks and inspections was implemented sometime in August, 2008 by

McClune. In July, McClune did not do inspections but spent his time organizing and setting up inspection routes for efficiency. He set up the "27-18 Program" that ran from late July into September, 2008, in which he used a Northeastern University student he hired as a consultant for checks/inspections, at the rate of $25 per hour to do the inspections/checks. (Testimony of McClune)

28. On July 14, 2008, through August 8th, Walsh began use of twenty (20) days of accumulated vacation leave to which she was entitled. Walsh used these days with the full knowledge, and approval, of her supervisors. (Exhibit 1, testimony of Appellant, DiTaranto, Brindisi and McClune)

29. Brindisi testified that he spoke with the Appellant's husband Jim by telephone on July 8, 2008. He explained to Jim that HR was looking for a clarification of the Appellant's intention because her resignation was unclear. Brindisi was in contact with the City's HR department continuously during this period to keep it informed on the Appellant's status. He communicated with someone, an attorney in HR six to seven times between July 1 and July 15, 2008, solely on this issue. He received his instructions from the attorney in HR on this matter. Brindisi refers matters such as resignation to HR since he is not trained in these matters. Brindisi reached out to HR from day one on this resignation matter; he had an ongoing dialogue with HR from day one on this matter. He never sought a resignation from the Appellant or her husband, Jim. (Testimony of Brindisi)

30. In a letter to Walsh, dated July 21, 2008, James Gardiner, Acting Commissioner of Health and Human Services ("Gardiner") stated that Walsh's "husband has spoken to representatives of the Department on your behalf and informed us of your decision to resign ... Thus, your resignation will be effective August 9, 2008."Gardiner testified that

he sent this certified letter to communicate with Walsh and to "memoralize" her intent to resign. (Exhibit 2, testimony of Gardiner)

31. Gardiner testified that the normal channel for approval of Walsh's leave request would be to McClune as her supervisor, then Brindisi if needed and then if the circumstances were unusual or by request, to him. Although it was not the normal protocol, it was permissible for DiTaranto to bring the Appellant's leave request directly to him rather than to McClune or Brindisi. He did not consult with McClune or Brindisi regarding the issue or approval of Walsh's leave request. (Testimony of Gardiner)

32. James Walsh testified that he was the one who wanted his wife to resign from her job with the City because of concerns he had over her health. In his opinion, the situation in the workplace was very tense. Karen Walsh had filed two union grievances in August of 2007 and January of 2008 in an attempt to rectify the increased work assignment situation. He felt that his wife's past experience, combined with the sudden increase in her work responsibilities, created a concern in him about her health and well being. It was for all those reasons that Karen Walsh had decided to take some time off from work to consider her options. (Testimony of Jim Walsh)

33. Gardiner had been aware, at the time of these two prior grievances, were filed on Walsh's behalf by her union. He did then meet with the union representative, Sean Meagher regarding these work assignment grievances.(Testimony of Gardiner)

34. The Appellant testified that the two prior union grievances on excessive number of required inspections were still pending. (Testimony of Appellant)

35. The City stated that the Appellant's union also did file a grievance on this present matter, the resignation/separation from her employment status.(City's opening argument)

36. Gardiner was also aware of the Appellant's prior application for and taking of extended sick leave and family leave. She took family leave of at least five weeks in the fall of 2007. This leave was one of the options available to employees to take in effect a leave of absence. (Testimony of Gardiner)

37. Gardiner wrongly assumed that Walsh had resigned. When asked whether he had a written statement of Walsh's voluntary resignation, Gardiner stated that, he did not have any such documentation. (Testimony of Gardiner)

38. Testimony from McClune and Derek Brindisi indicated that it was the understanding of both McClune and Brindisi that Walsh only had an intention to resign from her position at some future date. They admitted that a person could change their mind on an intended act. (Testimony of McClune and Brindisi)

39. Brindisi testified that Walsh never "tendered" her resignation by submitting a letter of resignation and he does not deal with such matters as resignation but refers it to Human Resources. In this matter he reached out on day one to Human Resources (HR) and received instructions from attorney. (Testimony of Brindisi). McClune also testified that he refers such matters as resignation to Human Resources and his understanding is that a tender of resignation is the submission of a letter of resignation. (Testimony of McClune)

40. Gardiner, Brindisi and McClune testified that there was no written policy or procedure in place at the City which set forth the manner in which an employee's resignation would be presented and processed. (Testimony of Gardiner, Brindisi and McClune)

41. Gardiner testified that Walsh never submitted a letter of resignation in writing to the City.

42. A letter from Walsh to Gardiner, dated August 6, 2008, and hand delivered by James Walsh that same day, stated that Walsh had not submitted a resignation from her position as Senior Sanitary Inspector and, further, that Walsh's employment with the City continues and that Walsh remains eligible to return to her duties. (Exhibit 3).

43. Walsh also wrote a memo to the City's Department of Human Resources (HR), dated August 8, 2008, in which she requested that she be placed on sick leave, beginning on Monday, August 11, 2008, on the basis of an attached medical note from Fallon Clinic, dated August 7, 2008. This memo was ultimately referred on to Gardiner from HR. (Exhibit 4, testimony of Gardiner)

44. In a letter to Walsh dated August 8, 2008, Gardiner again stated that he considered her to have resigned effective August 8, 2008. He further stated that "you are considered to have voluntarily separated yourself from your employment as of August 8, 2008". Gardiner also denied Walsh's request to be placed on sick leave, as being unwarranted under the circumstances. (Exhibit 5)

45. By letter and fax of August 20, 2008, to Gardiner, Walsh, through her counsel, reiterated her position that she had not resigned from her position with the City and requested a meeting with Gardiner to discuss this matter. Gardiner did not respond to this request for a meeting. (Exhibit 7 and testimony of Gardiner)

46. Walsh never made an oral offer to any City employee to resign from her position as Senior Sanitary Inspector. (Testimony of Gardiner, Brindisi, McClune and DiTaranto)

47. The record in this matter contains no letter of resignation or a similar writing signed by Walsh and delivered to the City. (Exhibits and testimony)

48. The City never requested a letter of resignation from either the Appellant or her husband. (Exhibits and testimony)

49. McClune, without giving any prior notice, cleaned out the contents of the Appellant's work desk on or about August 7th and returned these contents to her about one week later. (Testimony of McClune and Appellant)

50. Gardiner made the determination that the Appellant had resigned based on oral information he had received from his staff, namely: Brindisi, McClune and DiTaranto in conjunction with the "paper work"- the request for vacation and personal time, which exhausted her available time. However, he knew that the information had been received by his staff indirectly from conversations they had with the Appellant's husband Jim and amounted to an expression of her "intention to resign". (Testimony of Gardiner)

51. Gardiner never spoke directly with either the Appellant or her husband regarding her intent to resign. Gardiner believes that "your actions demonstrate your intent" and that even though he had received the verbal information through his staff; "it pointed in one direction-resignation." (Testimony of Gardiner)

52. On July 7, 2008, DiTaranto had a telephone conversation with Jim Walsh regarding the Appellant's taking sick leave and/or vacation time. She faxed Jim Walsh a blank [leave] vacation request form, after she told him he would need a doctor's note to take sick leave; so he decided to take vacation time instead. She also had a conversation with Jim when he came in to her office on July 8th. Jim told her that the Appellant "can't work anymore" and that he had an appointment with the Retirement Board. Jim asked and she told Jim that the Appellant could not buy back sick time since she did not have enough

sick time available. The Appellant then used 20 vacation days between July 14th and August 8th. (Testimony of DiTaranto)

53. Late on Friday, August 8, 2008 Jim Walsh dropped off a sealed envelope for Gardiner at DiTaranto's office. DiTaranto gave the envelope to Gardiner that same day. She assumed that the envelope was a letter of resignation. She later became aware; prior to August 15th that it was a request for reinstatement. (Testimony of DiTaranto)

54. Walsh's personnel file contains two (2) different versions of a notice, dated August 15, 2008, titled "Employee Separation Notice", one which states under the "Explanation" section, the words "voluntary resigned"; the second of which contains no writing under said section. (exhibit 6) DiTaranto did not write "voluntary resigned" on the form, because she did not know what Walsh's status was at that time and it is not her hand writing. She did not know how to fill out this form so she spoke with Gardiner and someone in Human Resources for help. She could not recall who she spoke with in Human Resources. She did sign and date the form, (8/15/08) that was blank under section: "Explanation". (Testimony of DiTaranto)

55. The City did not determine the circumstances of the addition of the written entry "voluntary resigned" to the "Employee Separation Notice" form, including the author of the writing and the date and time of the written entry. The form however was apparently relied on by the City to formulate the Appellant's official employment status with the City. (Exhibit 6, Exhibits, testimony, argument and reasonable inferences)

56. Gardiner admitted that a "date stamp" is normally used to process documentation received in his office but a date stamp does not appear on the Appellant's letter to him

dated August 6th, (Exhibit 3) claimed to have been received on August 8th. (Testimony of Gardiner)

57. The City does not have a rule or regulation requiring that a resignation be in writing. Gardiner supports this policy, as it "allows flexibility to the employee". (Testimony of Gardiner)

58. Gardiner admitted that he did not speak with either the Appellant or her husband on the resignation matter. He also admitted that none of his staff was given an effective resignation date by either the Appellant or her husband, Jim. He admitted that the Appellant could have taken FMLA before the resignation date, which he designated as August 9th. He also admitted that the date of August 9, 2009 which he designated as her effective resignation date in his July 21, 2008 letter to her (Exhibit 2); is a mistake. The correct resignation date should be August 8, 2008. (Testimony of Gardiner)

59. The Appellant had not voluntarily resigned from her position of employment with the City at any time and therefore her resignation could not have been accepted by Gardiner on July 21, 2008, with her effective resignation date designated by Gardiner as August 9, 2008. (Exhibit 2, Exhibits, testimony and reasonable inferences)

60. By letter dated September 22, 2008, counsel for Walsh, did demand that Walsh be reinstated to her position on the basis that she had not resigned, nor had she been terminated, from her position. (Exhibit 9)

61. On September 26, 2008 the City issued a letter to Walsh's counsel denying the demand for reinstatement. (Exhibit 10)

62. Walsh filed her appeal on October 14, 2008 with the Civil Service Commission.

63. Gardiner never attempted to discipline or to terminate the Appellant's employment, nor did he ever recommend this action. He considers the Appellant to have voluntarily resigned from her position, which resignation he did accept. (Testimony of Gardiner)

64. The City did not act in such a way and with the disciplinary intent to terminate, discharge or remove the Appellant from employment. However, the Appellant was effectively "removed" from her position by the City's mistaken assumption and acceptance that she had voluntarily resigned. The City acted hastily in forming this mistaken assumption and never made any reasonable attempt to clarify or verify its assumption, under the circumstances here. The City consequently refused to consider her request for leave. The Appellant was not terminated but effectively removed from her employment, thereby losing compensation. Her effective removal from her position renders her a person "aggrieved" by the mistaken acts of the City. The City's action was based upon harmful error in the application of its procedure, an error of law, or upon other factors or conduct of the appellant-employee not reasonably related to her fitness to perform in her position. The City failed to comply with a basic precept of civil service law; that is assurance to all tenured employees of "fair treatment" in all aspects of personnel administration. The City also ignored or avoided several G.L. Chapter 31 procedural and substantive requirements, including reasonable justification, for any of its erroneous actions or omissions in this matter. (Exhibits, testimony, argument and reasonable inferences)

65. The City argued that it never had any intent to, nor made any attempt to discharge the Appellant from employment and therefore the City would be severely prejudiced by now having to show "just cause" for an action it did not intend to take. It is found here that under the circumstances of this appeal, the City acted with unjustified haste and formed a

mistaken assumption- the Appellant had voluntarily resigned from her position; thereby effectively removing her from her position. The Appellant as a result of the City's action has lost her position and compensation to her severe prejudice. She is a "person aggrieved" under Chapter 31, while having been denied the intended procedural or substantive protections of Chapter 31. (City's opening argument, exhibits and testimony, administrative notice and reasonable inferences)

66. Project Director, William McClune is the Appellant's supervisor. He is a 30 year City employee and displays the knowledge and expertise associated with his long career. He is professional in demeanor. He claimed that the Appellant had been given advance notice for approximately a year of the new changes of mandated higher inspections to be implemented on July 1, 2008. He claimed that the June 30, 2008 meeting, confirming the changes and implementation date, was merely the last such notice. However, he failed to produce any memo or other written prior notice of the changes and the implementation date. He and witnesses Derek Brindisi and James Gardiner appeared too coordinated and definite on this issue, considering the lack of any written documentation of it. McClune repeatedly testified to the urgency and necessity of the new changes being implemented on July 1, 2008; then backtracked, dropping the necessity and urgency when he was forced to admit that no inspections were actually performed in July, 2008. The Appellant was the only full-time City inspector for this Regional Tobacco Collaborative and McClune, Brindisi and Gardiner were her chain of supervisors or "bosses". McClune defended his omissions or any change in usual practice or protocol and lack of documentation of it by deferring to the authority or prerogative of his bosses: Brindisi and Gardiner. McClune hired paid "consultants" to "support" or complete inspections not

done by the Appellant. He has hired family members as paid consultants. He became very nervous if not unnerved at any questioning regarding the hiring of the paid consultants. He hesitated or stuttered, gulped and slowed his answers, or answered unresponsively or overly explanatorily when he became nervous. He also appeared very nervous regarding questioning on some other issues or conversations he had with the Appellant, her husband, Brindisi and Gardiner. McClune expressed concern over the need for continuous qualification for state funding, which provided all of the funding for the Regional Tobacco Collaborative. Hiring paid consultants according to available state funding seemed preferable to McClune, allowing more flexibility than the use of employees on fixed salary/benefits under a CBA. McClune by contrast was relaxed and jovial when he testified at the June 23, 2008 City Council subcommittee hearing, (Exhibit 16), at which he was not cross-examined. I find McClune to have a personal interest in this matter, as described; to the degree that the detailed accuracy of his testimony, though unintentional is incomplete or otherwise unreliable. I also find that the City's three main witnesses: McClune, Brindisi and Gardiner all had conflicting interests; that being a primary loyalty to meeting state standards for the sake of continuing state funding for their regional Tobacco Collaborative, at the expense of following the City and civil service procedural protections afforded to the Appellant-employee. They also believed that the use of consultants was more convenient and flexible for them than that of a permanent City employee. This is not a credibility assessment. (Exhibits, testimony, demeanor and testimony of McClune, reasonable inferences)

67. Derek Brindisi, Acting Director of Health and Human Services for the City of Worcester. He is an 8 and1/2 year City employee. He is professional in demeanor. He is relaxed,

confident and straight forward in his testimony. He did support McClune on the one year prior notice to the Appellant of the changes to be implemented on July 1, 2008. However, he was not the Appellant's immediate supervisor and was aware of only one family member of McClune hired as a consultant. He mimicked McClune on the urgency and necessity of the July 1st implementation date; yet failed to explain the lack of any July inspections. He felt that the Appellant was not meeting her responsibilities but admitted that she no prior discipline. He too felt that the regional collaborative organization and state funding was a fact of life, better addressed by hiring consultants. He also failed to adequately explain the lack of any written memos or other written documentation on the prior notice issue. He claimed to be in contact with the City's HR department continuously, from July 1st to July 15th, on the issue of clarifying the Appellant's "intention to resign" but failed to ever ask either the Appellant or her husband for a letter of resignation. Brindisi deferred to Gardiner and HR on determining the resignation issue. Brindisi had no explanation for the City's several procedural or common sense omissions in this matter. I find that any of Brindisi's errors or oversights was not intentional. Brindisi's demeanor at this hearing was similar to his demeanor at the June 23, 2008 City Council subcommittee hearing, (Exhibit 16).The City's three main witnesses: McClune, Brindisi and Gardiner all had conflicting interests; that being a primary loyalty to meeting state standards for the sake of continuing state funding for their regional Tobacco Collaborative, at the expense of following the City and civil service procedural protections afforded to the Appellant-employee. They also believed that the use of consultants was more convenient and flexible for them than that of a permanent City

employee. This is not a credibility assessment. (Exhibits, testimony, demeanor and testimony of Brindisi, reasonable inferences)

68. James Gardiner, the Acting Commissioner of Health and Human Services for the City of Worcester. He is a 29 year City employee. He is professional in demeanor. He is "in charge of the Tobacco Collaborative" with hiring and firing power. He admitted that the normal practice is for the Appellant's leave request to first go to McClune, then Brindisi if needed or requested and finally to him. Yet, he took the Appellant's leave request in this matter, directly from DiTaranto, without ever notifying or consulting with either McClune or Brindisi. He summarily denied her leave request, on the basis of having accepted her purported resignation. He believed that he had the authority to change the usual practice or procedure. He solely determined that the Appellant had resigned without ever speaking with her or receiving a written resignation. Gardiner refused to concede that his determination was erroneous or hastily concluded. He has known the Appellant and her husband for over 25 years, both socially and occupationally having worked with him. Gardiner continuously answered unresponsively; refusing to answer yes or no, preferring protracted explanations instead. His answers were continuously self-serving or unresponsive or defensive and long-winded. He speaks quickly and loudly which became magnified with his increasing defensiveness under cross-examination. He was especially defensive and unresponsive on some issues, as the issue of reporting on paid consultants. He was difficult to focus or control as a witness. He seemed indignant at the suggestion that he should have determined when and who altered the critical City "Employee Separation Notice" form. In contrast, Gardiner's testimonial demeanor at this hearing was strikingly dissimilar to his relaxed and responsive demeanor at the June 23, 2008 City

Council subcommittee hearing, (Exhibit 16). The City's three main witnesses: McClune, Brindisi and Gardiner all had conflicting interests; that being a primary loyalty to meeting state standards for the sake of continuing state funding for their regional Tobacco Collaborative, at the expense of following the City and civil service procedural protections afforded to the Appellant-employee. They also believed that the use of consultants was more convenient and flexible for them than that of a permanent City employee. I find Gardiner's testimony to be unreliable, including on the issues of his: motive, purpose, state of mind, procedural variations, errors or omissions or his factual and legal determinations. (Exhibits, testimony, demeanor and testimony of Gardiner, reasonable inferences)

69. The Appellant, Karen Walsh and her husband Jim are straightforward and responsive witnesses. However, they both appeared to be emotional and distressed at having to reflect on and remember some past unpleasant events. The Appellant appeared flushed, nervous and upset throughout her testimony. She spoke rapidly and loudly. Jim exhibited emotion, quaking voice and near tears at several junctures; when describing the effect on Karen and his concern for her health. They only answered to the best of their memory, admitting a lack of memory at times. I do believe that their emotional involvement did affect their memory to a minor degree. I find them both to be sincere and credible witnesses. (Exhibits, testimony, testimony and demeanor of Karen and Jim Walsh, reasonable inferences)

70. G. L. chap. 150E Section 8. Grievance procedure; arbitration.

Section 8. The parties may include in any written agreement, (CBA) a grievance procedure culminating in final and binding arbitration to be invoked *in the event of any dispute concerning the interpretation or application of such written agreement.* In the absence of such grievance procedure, binding arbitration may be ordered by the commission

upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one. *(Amended by 1989, 341, Sec. 80 eff. 8-15-89.)* (Emphasis added) (Administrative notice)

71. G.L. c. 31§ 38 outlines the procedure or process that the appointing authority is to follow to properly determine that an employee has permanently and voluntarily separated from employment. This section provides some procedural guidance and frame work which could also be useful in gauging the action taken in the circumstances of this present matter. *See* G.L. chap. 31 Section 38. Unauthorized leaves of absence; reports; separation from employment; review.

Section 38. Upon reporting an *unauthorized absence* to the administrator pursuant to section sixty-eight, an appointing authority shall send by registered mail a statement to the person named in the report, informing him that (1) he is considered to have *permanently and voluntarily separated himself from the employ of such appointing authority* and (2) he may within ten days after the mailing of such statement request a hearing before the appointing authority. A copy of such statement shall be attached to such report to the administrator.

The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence.

For the purposes of this section, *unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.* (Emphasis added) (Administrative notice, reasonable inferences)

72. G.L. chap. 31 Section 43. Hearings before commission.

Section 43. If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after filing of such appeal and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal. If the decision of the appointing authority is based on a performance evaluation conducted in accordance with the provisions of section six A and all rights to appeal such evaluation pursuant to section six C have been exhausted or have expired, the substantive matter involved in the evaluation shall not be open to redetermination by the commission. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

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.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section. (Emphasis added) (Administrative notice)

73. The City erroneously assumed that the Appellant had voluntarily resigned at the time that the Appellant was in the process of sorting out her own thinking on continuing her employment. She clearly was emotionally upset then, at what she considered to be a substantial recent increase in the quantity of her work assignment. She also had other assignment and performance standards complaints. Indeed, her union had filed several past grievances, on her behalf, regarding assignment or other conditions of employment issues since 2007. Her union also filed a grievance regarding her "severed" employment relationship with the City in this present so called "voluntary resignation" matter. During this time, the Appellant showed that she wanted to use all of her available leave time including vacation and personal time while she was making her decision on continuing her employment. On August 6, 2008, she denied her resignation and considered herself to be employed by the City. On August 8, 2008, she also submitted medical documentation to substantiate her request for the use of "accumulated sick time" beginning on August 11th, until she was "able to come back to work". This request was summarily denied by Gardiner on the ground that he had previously accepted her voluntary resignation. The Appellant also indicated that she was seeking further leave in addition to her "accumulated sick time"; this leave possibly being a leave of absence or some form of unpaid leave for an unspecified period as encompassed in of G.L. chap. 31, §§ 37& 38,. (Exhibits 1-7, administrative notice, reasonable inferences and testimony of Jim and Karen Walsh)

CONCLUSION

Under G.L.c.31, §43, the usual situation addressed by the Commission involves a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission. The standard of proof applied as a standard of review in the usual disciplinary actions is stated in the beginning of the second paragraph of G.L.c.31, §43. Yet, in this present matter the circumstances have occurred whereby the latter part of the second paragraph of G.L.c.31, §43 apply. That language is *"... 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."*

Instead of a disciplinary action by the appointing authority, an administrative act occurred by the appointing authority erroneously determining that the Appellant had voluntarily resigned from her position. This erroneous act is considered a harmful error in the application of the appointing authority's procedure or, an error of law. This erroneous act severed the Appellant's employment status, an obvious harm causing her to become an aggrieved person. The haste and inflexibility of the City's action under the circumstances here, by refusing to consider her timely request for further leave time and/or a return to her position and then for review of the matter, are

corollary administrative acts or procedural applications which also adversely affected the Appellant's employment status. The Commission has the duty to determine, under a "preponderance of the evidence" test, whether the appointing authority met its burden of proof that "there was just cause" for the action taken. G.L.c.31, §43. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, (2006); 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. 331,334, rev.den.,390 Mass. 1102, (1983).

An appointing authority's administrative action like a disciplinary action is determined by the same standard of proof, "by a preponderance of evidence". An action is "justified" if "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 (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 the "merit principle" which governs 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 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); 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 record, including whatever may fairly detract from the weight of any particular evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001)

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." E.g., 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)

In this present matter, a credibility finding was not made per se against the City's three main witnesses. However, it is found that they had a pervasive and primary interest in or loyalty

toward their Regional Tobacco Collaborative at the expense of Karen Walsh's City and civil service protections as a tenured employee. This conflict of interest clouded or affected their state of mind so that their judgment or decision making in this matter is highly suspect, rendering their testimony unreliable. I find McClune to have a personal interest in this matter, as described; to the degree that the detailed accuracy of his testimony, though unintentional is incomplete or otherwise unreliable. I also find that the City's three main witnesses: McClune, Brindisi and Gardiner all had conflicting interests; that being a primary loyalty to meeting state standards for the sake of continuing state funding for their Regional Tobacco Collaborative, at the expense of following the City and civil service procedural protections afforded to the Appellant-employee. They also believed that the use of consultants was more convenient and flexible for them than that of a permanent City employee. This is not a credibility assessment on any of these three City witnesses.

I find that the Appellant, Karen Walsh and her husband Jim are straightforward and responsive witnesses. However, they both appeared to be emotional and distressed at having to reflect on and remember some past unpleasant events. The Appellant appeared flushed, nervous and upset throughout her testimony. She spoke rapidly and loudly. Jim exhibited emotion, quaking voice and near tears at several junctures; when describing the effect on Karen and his concern for her health. They only answered to the best of their memory, admitting a lack of memory at times. I do believe that their emotional involvement did affect their memory to a minor degree. I find them both to be sincere and credible witnesses. Any conflict between the testimony of the Walsh's and that of the City's witnesses is resolved in the Walsh's favor.

In performing its appellate function, "the commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . .

[after] 'a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer' . . .For the commission, the question is . . .'whether, *on the facts found by the commission*, 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.' " Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (inconsequential differences in facts found were insufficient to hold appointing authority's justification unreasonable); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, rev.den., 428 Mass. 1102 (1997) (commission arbitrarily discounted undisputed evidence of appellant's perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer) See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a "disinterested" Commissioner in context of procedural due process); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

In reviewing the commission's action, a court cannot "substitute [its] judgment for that of the commission" but is "limited to determining whether the commission's decision was supported by substantial evidence" and is required to 'give due weight to the experience, technical

competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. . .This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' " Brackett v. Civil Service Comm'n, 447 Mass. 233, 241-42 (2006) and cases cited.

CBA-Grievance

The new increased work assignment, the number of inspection/checks per hour was the genesis of the dissatisfaction prompting her to consider resignation or retirement. The Appellant cited an increased workload and related changes in her working conditions as the basis for her leave requests. She wanted to take time off to evaluate all her options in the face of increased work demands. Indeed, the Appellant's union had filed several grievances on this work assignment issue, which may have still been pending at the time of this Commission hearing. Generally, matters involving changes in working conditions are an area of collective bargaining not within the purview of c. 31, § 41. See Roach v. City of Boston, D-04-311 (2007); See also Brienzo v. Acushnet, 14 MSCR 125, 125 (2001); ("The Commission has no jurisdiction to determine the collective bargaining rights of civil service employees"); Puopolo v. Department of Correction, 12 MCSR 169, 170 (1999); ("The Commission finds that the rejection of the Appellant's request to use sick leave time accrued, (separate from FMLA or § 37 leave of absence) is probably in the area of collective bargaining; Sullivan v. Cambridge, 11 MCSR 206, 207 (1998) ("[T]he Commission does not have jurisdiction pursuant to G.L.c.31 to interpret the provisions of the contract.").

The Commission believes that collective bargaining/grievance process is the appropriate means for addressing the Appellant's increased work assignments and also probably on her sick

leave request. Since the Appellant has already filed two grievances with her union, the Commission recommends that she continue to seek relief in that venue on those issues.

MISTAKE

The City made a mistaken factual/legal assumption as the foundation of its position. The City mistakenly assumed that the Appellant had voluntarily resigned from her position and then hastily accepted the purported resignation. The City summarily refused to address the Appellant's timely request for leave, based on its mistaken belief of a voluntary (oral) resignation. The City thereby cut off any further inquiry or discussion with the Appellant regarding her employment status or her request for additional leave, including leave without pay or her request for reinstatement to her position.

It has been established that a writing stating the intention to quit and a resignation date which is accepted in writing is sufficient and effective as a resignation. Once accepted, the severance from office is complete and is beyond recall, regardless of whether the resignation date is immediate or at some point in the future. Martin v. City Manager of Worcester 349 Mass. 760 (1965). Under common law, an effective resignation must be voluntary and must be accepted by the appointing authority. Warner v. Selectman of Amherst, 326 Mass. 435, 437 (1950). However, it is not necessary that the resignation be in writing. Campbell v. City of Boston, 337 Mass. 676 (1958); Johnson v. Griswold, 177 Mass. 34.

The City's hasty acceptance of and its mistaken conclusion that the Appellant had voluntarily resigned from her position is the basis of its refusal to consider her request for further leave, including a "leave of absence" which is addressed in G.L. chap. 31 § 37. In this matter, the City, through Gardiner, clearly avoided the reporting and procedural requirements of G.L. chap. 31 § 38. Section 38 addresses the situation of an employee being on an uncertain or unauthorized

absence from employment and thereby "considered to have permanently and voluntarily separated [her] self from the employ of such appointing authority". This section requires the appointing authority to send a statement of specific notice to the employee by registered mail of their claimed permanent and voluntary separation; and give the employee ten days after mailing of such statement, to request a hearing before the appointing authority. The appointing authority is further mandated to send a copy of such statement with a report to the personnel administrator (HRD) for the Commonwealth. This section further allows the appointing authority to restore the employee to the former position or to grant a leave of absence pursuant to section thirty-seven if such employee, within fourteen days after mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence.

For the purposes of this section, unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.

Gardiner, acting on the City's behalf, avoided all of the procedural requirements of G.L. chap. 31, §§ 37& 38, to the Appellant's detriment. Those procedural requirements are considerable, including detailed notice by registered mail with an opportunity to respond within ten days requesting a hearing; the definition of unauthorized absence being for a period of fourteen days. The opportunity to be restored to the former position or receive a leave of absence under section thirty-seven, if a satisfactory written request/explanation is sent by the employee within fourteen days of the mailing of the appointing authority's original written notice of unauthorized absence. The requirement of detailed reporting by the appointing authority to the personnel administrator (HRD) at the several proscribed stages. Finally, section 38 allows the employee the right to request a review by the personnel administrator (HRD) of the appointing authority's denial of their request for restoration to their former position or their request for a leave of absence. The personnel administrator shall conduct such review, provided that it shall be limited to a determination of whether the employee failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

It is noteworthy that Gardiner, in his July 21, 2008 letter, referred to a verbal representation of resignation as allegedly relayed by the Appellant's husband to "representatives of the Department". In this letter, Gardiner also designated August 9, 2008 as the "effective" date of the alleged resignation, without a written request by the Appellant. (Exhibit 2) The

Appellant, by letter to Gardiner dated August 6, 2008 denied that she had resigned or submitted her resignation and claimed her employment status in her same position. (Exhibit 3) On August 8, 2008, the Appellant sent a written request with a Fallon Clinic medical letter to the City's HR Department requesting sick leave beginning on Monday August 11, 2008. (Exhibit 4) Gardiner's next letter to the Appellant, dated August 8, 2008, again refers to her alleged resignation and his approval of her request for use of her "remaining accrued vacation and personal leave until your effective resignation date of August 8, 2008". Gardiner ends this letter: "Please be advised that you are considered to have voluntarily separated yourself from your employment as of August 8, 2008 and therefore, your request to be placed on sick leave is denied as being unwarranted under these circumstances." (Exhibit 5) Gardiner sent both letters to the Appellant by certified mail, signature requested. Gardiner also used the language: "you are considered to have voluntarily separated yourself from your employment.", in his second letter. This language is similar to the operative language of G.L. chap. 31, § 38 without meeting any of the numerous other procedural requirements of that section e.g.: prior specific notice, opportunity to respond, a hearing and detailed reporting to and review by the personnel administrator.

In this matter, the Appellant never offered a clear voluntary resignation, either in writing or orally under the totality of circumstances. Clearly, the best means of resignation is a properly delivered, signed and dated letter of resignation. The Appellant's husband may have orally indicated that the Appellant intended to retire at some undetermined future date, but he cannot render a resignation on the Appellant's behalf, unless the Appellant specifically designates her husband as her legal representative. Therefore, the Appellant did not resign. The City's witnesses

also conceded that a person has a right to change their mind regarding their intention of a future act.

The totality of the circumstances in this matter clearly shows that the City failed to assure the Appellant, a tenured employee, "fair treatment" in all aspects of its personnel administration. This is a violation of "basic merit principles", which are the fundamental precepts of civil service law.

Walsh filed this appeal with the Civil Service Commission ("Commission"), pursuant to M.G.L. c. 31, §§42, 43. Walsh asserts a claim, pursuant to §42, that the City failed to follow each of the procedural requirements specified in §41, where the City effectively "removed" Walsh from her position without holding a hearing, without providing her written notice of a hearing, a statement of reasons and a copy of §§41-45, and by failing to issue a timely decision. Under §43, Walsh appealed the act or decision of the City that effectively "removed" her from her position without just cause. § 41 proscribes that a tenured employee shall not be "removed" from his/her position "except for just cause and except in accordance with the provisions of this paragraph, ..." However, it has been determined here that Walsh's removal from her position was based on the City's mistaken assumption that she had voluntarily resigned from her position and not by removal for any disciplinary act; thereby the City acted as if it was not required to establish "just cause" nor required to follow the statutory procedures to establish same.

The role of the Civil Service Commission in the usual disciplinary action 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 Commission, 43 Mass. App. Ct. 300, 304 (1997). An action is "justified" when 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." City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928).

The evidence at the hearing, submitted both through testimony and documentary materials, establishes that Walsh did not resign her position with the City. While she acknowledges that she was emotionally upset and "distraught" at the change in working conditions imposed on her on June 30, 2008, Walsh wanted time to consider her options. She requested and was granted the right to use her accumulated sick, personal, administrative and vacation leave during the period between June 30, 2008 – August 8, 2008. During that period of time, Walsh responded to Gardiner's July 21, 2008 letter on August 6, 2008. By her response, which she submitted before the alleged effective date of her resignation, Walsh clearly informed Gardiner that she was not resigning and that she intended to remain employed with the City. On August 8, 2008, Walsh requested the use of accumulated sick leave on the basis of a medical report from Fallon Clinic dated the previous day. The letter also demonstrated her clear intent to remain employed by the City beyond August 8, 2008.

For some unexplained reason, Gardiner refused to acknowledge that his assumption that Walsh planned to resign effective August 8, 2008 was wrong. Walsh clearly advised Gardiner on several occasions that his position was wrong. Yet Gardiner persisted in his efforts to characterize Walsh's employment status as resignation through the submission of the Employee Separation Notices to the Department of Human Resources. The City's inconsistency on this important point is reflected in the fact that the two notices contain different statements under the "Explanation" section: one stating that Walsh had "voluntarily resigned" and the other being left blank. Yet these two notices are both dated August 15, 2008, more than a week after Walsh had clearly advised Gardiner that she had not resigned. The City failed to investigate and determine

who wrote "voluntarily resigned" and when written, on one of the City's Employee Separation Notice forms. This is the critical document on which the City administratively relies to determine that Walsh voluntarily resigned; yet, it did not inquire into its apparent alteration, a serious matter.

In the absence of a notice signed by Walsh, stating that she intended to resign effective August 8, 2008 and considering all the evidence presented to rebut any such assumption as to resignation having occurred on that date, it is concluded that Walsh never resigned from her position with the City. It is further evident that, in the absence of the submission of a letter of resignation, the City did not take the proper steps to terminate or remove Walsh from her position in accordance with the procedures required under G.L. c. 31, §41. As a tenured civil service employee, Walsh was entitled to written notice of hearing, a statement of reasons, and a right to be represented by counsel and to present evidence on her own behalf. Clearly none of those due process requirements were met by the City in the instant case. In addition, I find that, as of August 8, 2008, the City did not have just cause to terminate or remove Walsh from her position.

The facts found in this present matter show that circumstances have occurred whereby the latter part of the second paragraph of G.L.c.31, §43 apply. That language is *"... 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 facts found in this present matter show that the City, by a preponderance of the credible evidence in the record did violate the latter part of the second paragraph of G.L.c.31, §43 as cited above.

The final result was that Walsh was illegally removed from her position in violation of M.G.L. c. 31, §41. The City failed to prove that there was reasonable justification for the actions taken. As a long term tenured employee of the City, Walsh was entitled to greater respect, consideration and compliance with applicable statutory procedures than was provided by the City in this case.

For all of the above stated reasons, the Appellant's appeal, Docket No. D1-08-2011 is ***allowed***. The City is hereby ordered to return the Appellant, Karen Walsh to her position with out any loss of pay or other benefits.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman Yes; Henderson Yes, Marquis No, McDowell Yes and Stein Yes Commissioners) on April 21, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 to:
Gary S. Brackett, Atty.
Lisa M. Carmody, Atty.