

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STANLEY YEE,
Appellant

v.

D1-09-427

BOSTON PUBLIC LIBRARY,
Respondent

Appellant's Attorney:

Michael J. Maccaro, Esq.
AFSCME Council 93
8 Beacon Street, 7th Floor
Boston, MA 02108

Respondent's Attorney:

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City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Stanley Yee (hereinafter "Yee" or "Appellant") is appealing the decision of the Boston Public Library (hereinafter "Library" or "Appointing Authority") to terminate him from his position of Painter in the Library's Facilities Department. The appeal was timely filed on December 16, 2009. A pre-hearing conference was held on January 5, 2010. A full hearing was held on March 4, 2010 at the offices of the Civil Service Commission (hereinafter "Commission"). As no written notice was received from either party, the hearing was declared private. One (1) CD was made of the hearing. Two witnesses were sequestered prior to the start of the hearing. The parties submitted post-hearing briefs on April 8, 2010 (Appointing Authority) and April 12, 2010 (Appellant).

FINDINGS OF FACT:

Based upon the eight (8) documents entered into evidence and the testimony of the following witnesses:

For the Appointing Authority:

- Dennis O'Donnell, Laborer, Facilities Department, Boston Public Library;
- Pedro Nova, Laborer, Facilities Department, Boston Public Library;
- James Meade, Buildings Manager, Facilities Department, Boston Public Library;

For the Appellant:

- Stanley Yee, Appellant

I make the following findings of fact:

1. The Appellant was a tenured civil service employee of the Library at the time of his termination and had been employed there since July 13, 1994 when he was hired as a Junior Building Custodian. (Exhibit 7; Testimony of Appellant)
2. At the time of his termination on December 7, 2009, the Appellant held the position of Painter in the Library's Facilities Department. The Appellant held that position since 2006. As a Painter, the Appellant was responsible for painting in the branches at the central library. (Exhibit 7; Testimony of Appellant)
3. The Appellant had never been disciplined prior to his termination. (Stipulated Facts)
4. James Meade ("Mr. Meade"), the Library's Buildings Manager, testified that the Appellant was a good worker with a good work record. He further testified that it was his opinion that the Appellant was well liked by his co-workers. (Testimony of Meade)

Facts Regarding the Appellant's Termination

5. At some point in October 2009, Jim Rooney (“Mr. Rooney”) reported to Mr. Meade that he believed that someone had been urinating in his work area. (Testimony of Meade)
6. On or about November 9, 2009, Mr. Rooney again approached Mr. Meade and informed him that someone had urinated on his chair and in his workplace. Upon learning this, Mr. Meade contacted the Carpenter’s shop and asked them to change the lock on Mr. Rooney’s office. (Testimony of Meade)
7. Mr. Meade testified that there were a number of people that had the new key to Mr. Rooney’s office. (Testimony of Meade)
8. On or about November 10, 2009, Mr. Rooney informed Mr. Meade that someone had again urinated on the floor outside of his office and that someone had put Crazy Glue in a lock on his desk. (Testimony of Meade)
9. Mr. Rooney also discovered that there were feces smeared upon his locker and was very upset. Mr. Meade observed the feces on his locker. (Testimony of Meade)
10. Both Mr. Rooney and Mr. Meade reported these incidents to Ruth Kowal, Director of Administration and Finance. (Testimony of Meade)
11. The Library began an investigation into the matter. During the investigation, Mr. Rooney told Mr. Meade that two employees, Dennis O’Donnell and Pedro Nova, reported that they had allegedly witnessed the Appellant urinating on the floor of the Laborer’s area located in the basement of the Johnson Building on two prior occasions. (Testimony of Meade)
12. Mr. Meade interviewed both Mr. O’Donnell and Mr. Nova and they reported that they had witnessed the Appellant urinating on the floor in the past. Both employees provided typed statements about what they had allegedly witnessed. These statements were provided to the Library on or about November 23, 2009. (Testimony of Meade; Exhibits 4 & 5)

13. After meeting with Mr. O'Donnell and Mr. Nova, Mr. Meade met with the Appellant. During this meeting, the Appellant denied ever urinating on the floor. (Testimony of Meade)
14. Based on the reports for Mr. O'Donnell and Mr. Nova, the Library placed the Appellant on Administrative Leave with Pay until a disciplinary hearing could be held. The notice that was sent to the Appellant also indicated that a police investigation regarding the destruction of property was also ongoing.¹ (Exhibit 1)
15. A disciplinary hearing was held on December 2, 2009, and the Appellant testified on his own behalf. The Appellant denied ever urinating on the floors of the Library. (Exhibit 2; Testimony of Appellant)
16. On December 7, 2009, the Library issued the Appellant a Notice of Termination. The reasons provided for the Appellant's termination were for inappropriate conduct in the workplace, including urinating in work areas on at least two (2) occasions. (Exhibit 2)
17. The Appellant timely filed his Appeal with the Commission on December 16, 2009. (Stipulations)
18. The Appellant, Mr. O'Donnell and Mr. Novo testified at the Commission hearing. (Testimony of O'Donnell and Nova)
19. Mr. O'Donnell is a twenty-six (26) year employee of the Library and has known the Appellant for the past 5 – 7 years. He considered the Appellant to be a friendly, easy-going individual and never had a disagreement with him. Mr. O'Donnell testified that on a Wednesday in late October 2009, at approximately 7:15 – 7:20 A.M, he witnessed the Appellant urinating on the floor. Mr. O'Donnell testified that when he saw the Appellant

¹ The police conducted an investigation into the matter and were unable to determine who was responsible for the urination and defecation. As part of their investigation, the police interviewed the Appellant. (Testimony of Meade)

he said to him “What the hell are you doing Stanley, are you having a psychotic moment?”

Mr. O’Donnell stated that the Appellant did not reply, but walked into the paint shop. Mr. O’Donnell testified that he cleaned up the urine and did not think about the matter further until he learned that someone had urinated on the floor and spread feces on a locker two days later. Mr. O’Donnell testified that after the second incident he reported the incident regarding the Appellant to Mr. Meade. He didn’t report the first incident because he thought the Appellant must just be having a “crazy moment” and that what he saw was “way beyond anything I ever imagined.” (Testimony of O’Donnell)

20. Mr. O’Donnell was a good witness. He is a salt-of-the-earth, curmudgeonly gentleman who speaks plainly. Although it was apparent that he did not enjoy testifying in the unfamiliar and formal setting of the Commission, he took his testimony seriously and answered the questions after careful consideration. His answers were consistent and believable. He had no ulterior motive for testifying against the Appellant who he had always considered to be a friendly, easy-going person. I credit his testimony. (Testimony, demeanor of O’Donnell)
21. Mr. Nova has been an employee with the Library since 2007. He never worked directly with the Appellant but was familiar with him as he saw him throughout the work week. He never had any disagreements with the Appellant. In January 2009, Mr. Nova walked into the Laborer’s area and saw the Appellant urinating on the wall by the refrigerator. Mr. Nova testified that he approached the Appellant and asked him what he was doing. The Appellant denied that he was urinating and Mr. Nova told him, “I know what I saw.” Mr. Nova told the Appellant that he would not report the incident because he did not want the Appellant to get into trouble, but told him not to do it again. Mr. Nova testified that he did

not clean up the urine and did not report the incident to his supervisors or any coworkers.

Mr. Nova testified that he first told Mr. Rooney about the event in November/December 2009 as part of the Library's investigation. (Testimony of Nova)

22. Mr. Nova was also a good witness. He has a quiet, but friendly demeanor and struck me as an individual with high integrity. As English is not his primary language, he took great care to ensure he understood the questions being asked of him. His answers rang true to me and I found his reasons for not reporting the incident at the time believable. I credit his testimony. (Testimony, demeanor of Nova)
23. The Appellant testified on his own behalf and denied ever urinating on the floors of the Library. In regards to the allegation made by Mr. O'Donnell, the Appellant indicated that he was out sick for most of the month of October 2009 due to a leg infection. (Testimony of Appellant)
24. As referenced above, Mr. O'Donnell testified that he saw the Appellant urinating in "late October" 2009. Exhibit 8 is a copy of the Appellant's attendance records submitted by the Appellant. Although he was out sick for a good part of October, he returned to work and worked on October 28th, October 29th and October 30th of 2009. (Exhibit 8)
25. Viewed independently of the testimony of other witnesses, the Appellant's testimony could otherwise appear plausible. He appears to have been a good worker who did not have any personal problems with his coworkers and enjoyed his job. It is inexplicable why he would commit the acts in question. Given the huge divergence in their testimony, however, either the Appellant is being untruthful in his testimony before the Commission or the two other percipient witnesses are being untruthful. Even after a careful review of the Appellant's testimony, my finding regarding the high credibility of the other two

percipient witnesses has not changed. Thus, I do not credit the Appellant's testimony.

(Testimony, Credibility Assessments)

CONCLUSION

G.L. c. 31, § 43, provides:

"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); 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 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 (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 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

By a preponderance of the evidence, the Appointing Authority has shown that it had reasonable justification for disciplining the Appellant for inappropriate conduct in the work place, which included urinating in work areas on at least two (2) occasions. I base this conclusion largely on the credible testimony of the City’s witnesses, including Dennis O’Donnell and Pedro Nova. It is the function of the hearing officer to determine the credibility of the

testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Mr. O'Donnell testified credibly that he witnessed the Appellant walking and urinating in the Laborers' work area. Similarly, Mr. Nova credibly testified that in January 2009 he witnessed the Appellant walking and urinating in the Laborers' work area. Mr. Nova testified credibly that he told the Appellant not to "do it [urinate on the floor] again" and decided not to come forward until more incidents of urine in the work place occurred. Mr. Meade explained that he alerted the appropriate people and conducted an investigation when he learned that someone was urinating in the work place. An investigation was conducted by the Library, and based on what they deemed to be credible statements from Mr. O'Donnell and Mr. Nova, they terminated the Appellant. Here, after a de novo hearing in which I heard testimony from Mr. O'Donnell, Mr. Nova and the Appellant, I have reached the same findings as the Appointing Authority based on the credible testimony of Mr. O'Donnell and Mr. Nova.

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

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well

as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees’ suspensions to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

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

As referenced above, I have reached the same findings and conclusions as the Appointing Authority regarding the Appellant’s misconduct. Further, there is no evidence that the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. While the Appellant has no prior disciplinary history, the seriousness of the charges and the unsanitary and unsafe working environment created by the Appellant warrants his termination.

For all the above reasons, the Appellant’s appeal under Docket No. D1-09-427 is hereby ***dismissed.***

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Taylor and Stein Commissioners) on April 22, 2010.

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:

Michael J. Maccaro, Esq. (for Appellant)
Samantha Doeppen, Esq. (for Appointing Authority)