

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

GARRY DOMOZICK,
Appellant

v.

D1-09-286

CITY OF WESTFIELD,
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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Commissioner:

Christopher Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 42¹ and 43, the Appellant, Gary Domozick (hereinafter “Domozick” or “Appellant”) appealed the decision of the City of Westfield (hereinafter “City” or “Appointing Authority”) to terminate him from his position of Building Maintenance Craftsman in the City’s Building Department. The appeal was timely filed. A hearing was held on December 16, 2009 at the American Federation of State, Council, and Municipal Employees, Council 93’s Western Office in Springfield, Massachusetts. As no written notice was received from either party, the hearing was declared private. One (1) CD was

¹ The Appellant waived his appeal under Section 42 (due process issues) on the day of the Pre-Hearing that was held on August 12, 2009.

made of the hearing. All witnesses, with the exception of the Appellant and one representative of the City, were sequestered. Both parties submitted post-hearing briefs on February 12, 2010.

FINDINGS OF FACT:

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

For the Appointing Authority:

- Richard Merchant, Personnel Director, City of Westfield;
- Donald York, Superintendent of Building, City of Westfield;
- Thomas Curran, Senior Building Custodian, Building Department City of Westfield;
- Norma Heggie, Head Clerk, Building Department, City of Westfield;
- Margaret Doody, Head Clerk, Health Department, City of Westfield;
- John Flagg, Building Inspector, City of Westfield;

For the Appellant:

- Charles W. Medeiros, City Council President, City of Westfield;
- Steven Fernandes, Backflow Inspector, Water Department, City of Westfield;
- Gary Domozyk, Appellant

I make the following findings of fact:

1. The Appellant was a tenured civil service employee of the City at the time of his termination. He had been employed since 1996 when he was hired in the Park and Recreation Department. (Testimony of Appellant)
2. At the time of his termination on June 11, 2009, the Appellant held the position of Building Maintenance Craftsman. His job duties and responsibilities included performing various maintenance, remodeling and repair tasks on municipal buildings throughout the City. (Testimony of Appellant; Exhibit 4)
3. As a Building Maintenance Craftsman, the Appellant reported directly to Senior Building Custodian Thomas Curran. (Testimony of Curran)

Facts Regarding Appellant's Prior Discipline

4. On May 11, 2004, the Appellant received a three-day suspension for insubordination which was subsequently reduced to a one-day suspension. (Exhibit 1)
5. On May 8, 2007, the Appellant was given a mandatory referral to the City's Employee Assistance Program ("EAP") due to his conduct. (Exhibit 1)
6. On August 20, 2008, the Appellant received a written reprimand for violating the City's sexual harassment policy. (Exhibit 1)
7. On September 3, 2008, the Appellant was disciplined with a deduction of two hours of pay for falsifying time records. (Exhibit 1)
8. On May 18, 2009, the Appellant received a three-day suspension for damaging a fellow worker's property. (Exhibit 1)
9. On May 18, 2009, the Appellant received a written reprimand for inability or unwillingness to work harmoniously with employees. (Exhibit 1)
10. On May 18, 2009, the Appellant received a written reprimand for disregarding safety rules. (Exhibit 1)

Facts Regarding Instant Appeal

11. The City's Personnel Director, Richard Merchant, began working for the City in June 2008. He held a similar position in the City of Chicopee for the prior eight (8) years. (Testimony of Merchant) Mr. Merchant was a good witness. He has a strong background in the field of human resources and he had a good memory regarding the events relevant to this appeal. He had no ulterior motive for testifying against the Appellant. Rather, for reasons discussed in more detail below, it appears he made a good faith effort to assist the

Appellant in moving beyond his prior disciplinary record. (Testimony, demeanor of Merchant)

12. Mr. Merchant testified that he first met the Appellant upon his arrival in June 2008 when the Appellant returned to work after an absence related to an injury that had occurred on the job the previous winter. According to Mr. Merchant, he met with the Appellant and local union president Steven Fernandes to discuss his job expectations, an ongoing investigation of alleged sexual harassment that had occurred approximately one year before, and the Appellant's physical restrictions following his injury. (Testimony of Merchant)
13. Mr. Merchant testified that prior to the June meeting, he was informed of a history of animosity between the Appellant and Mr. Curran. (Testimony of Merchant)
14. During his meeting with the Appellant, Mr. Merchant, referring to the Appellant's prior discipline, told the Appellant that, "that chapter is over with" and assured the Appellant that he would assist him as long as the Appellant simply did his job every day and went home. (Testimony of Merchant)
15. Within two (2) days of the above-referenced meeting, two (2) female employees spoke with Mr. Merchant and expressed concern that the Appellant had made them feel uncomfortable by coming to their office and complaining to them about work-related issues. Mr. Merchant again met with the Appellant and cautioned him to focus on his job duties. (Testimony of Merchant)

April 2009 Incident

16. On April 27, 2009, the Appellant and Mr. Curran had an argument over whether the Appellant should take his personal vehicle or a City vehicle to the City's airport to perform

- his cleaning duties. The Appellant believed that Mr. Curran was verbally abusive to him during this argument and filed a complaint with Mr. Merchant. (Testimony of Appellant)
17. On April 29, 2009, the Appellant was assigned the duty of cutting and painting a number of pieces of plywood that were to be mounted on a boarded up municipal building. The Appellant performed the work in a maintenance work room located in the basement of City Hall. (Testimony of Merchant)
 18. On April 30, 2009, Mr. Merchant was made aware that white paint was found located on some walls and on the floors of the work room. The paint on the walls was found on bulletin boards containing laminated articles and pictures that belonged to Mr. Curran. Mr. Merchant took pictures of the work room and they were presented as an exhibit at the hearing. When questioned by Mr. Merchant about the paint in the maintenance room, the Appellant explained that while he was painting he had been impaired by the fumes of the paint. (Testimony of Merchant; Exhibit 6)
 19. I do not credit the Appellant's statement that the fumes from paint led to his destructive behavior in the maintenance room on April 29, 2009. Rather, I find the photographs in Exhibit 6 deeply disturbing and evidence of an individual whose intent was to retaliate against his supervisor by defacing and destroying his property. (Testimony, demeanor of Appellant and Exhibit 6)

May 2009 Incident

20. On May 18, 2009, the City scheduled a meeting with the Appellant to discuss the events that had occurred in late April. The meeting was conducted at approximately 2:00 P.M., and was held in a small conference room adjoining the City's Personnel office on the second floor of City Hall. (Testimony of Merchant)

21. Prior to the start of the meeting, Mr. York, the Superintendent of Buildings, directed Mr. Curran not to attend the meeting or be in any close proximity to the meeting, and further not to have any contact with the Appellant. (Testimony of York)
22. Present at the meeting were Mr. Merchant, local union president Steven Fernandes, union staff representative Nadine Kennedy and the Appellant. At this meeting, Mr. Merchant presented the Appellant with a three-day suspension for the painting incident that occurred on April 29, 2009. In addition, the Appellant was issued three written reprimands relating to the April 27, 2009 argument with Mr. Curran and his failure to use the proper equipment while painting on April 29, 2009. The meeting lasted approximately 45 minutes.
(Testimony of Merchant)
23. Mr. Merchant testified that he left the maintenance room at approximately 2:45 P.M. in order to attend a 3:00 P.M. meeting. Mr. Merchant stated that the Appellant, Mr. Fernandes, and Ms. Kennedy remained in the room. (Testimony of Merchant)
24. The Appellant's testimony regarding what occurred immediately after the above-referenced meeting is wildly divergent from the testimony of Mr. Curran and three other City witnesses: Norma Heggie, Margaret Doody and John Flagg. (Testimony of Appellant, Curran, Heggie, Doody and Flagg)
25. The Appellant testified that after the meeting, he went to the Maintenance Office to pick up his work assignments and punch in. He stated that when he walked in, Mr. Curran was already present. He claimed that Mr. Curran appeared "cocky" and "aggressive." The Appellant testified that Mr. Curran came up to him and shoved him and called him a "dumb Pollack." He stated that Mr. Curran called his girlfriend a "slut" and his daughter a "whore." He then stated that Mr. Curran told him that he was stupid to try and make

complaints against him. The Appellant then stated that Mr. Curran walked away laughing like a mad man. The Appellant stated that no one else witnessed this event, and that he believed that Mr. Curran had shut the door to the maintenance office. (Testimony of Appellant)

26. The Appellant testified that he was afraid of Mr. Curran and that this type of conduct has happened on at least six other occasions. The Appellant stated that he would have filed a criminal complaint against Mr. Curran but thought that it would be useless because Mr. Curran was related to a police officer. (Testimony of Appellant)
27. I do not credit any portion of the Appellant's testimony regarding what occurred after the May 18, 2009 meeting. I find that he lied under oath before the Commission and that he fabricated every aspect regarding the events of that afternoon. Even when viewed independently, the Appellant's testimony is implausible. The Appellant testified that despite being physically assaulted and taunted that afternoon, he chose to punch out and go home without ever notifying anyone at City Hall or any union representative regarding what had just occurred, including the two union representatives who were present at the meeting that had just adjourned minutes earlier. Rather, the Appellant waited until the next morning to deliver a hand-written note to the personnel office raising these allegations. (Testimony, demeanor of Appellant and Exhibit 1)
28. As referenced above, the Appellant's testimony is wildly divergent from Mr. Curran and three other City witnesses.
29. Mr. Curran testified that he was in the Health Department office, located on the second floor of City Hall, throughout the time period that the assault, as alleged by the Appellant, took place (between 2:45 P.M. and right before 3:00 P.M. when the Appellant left the City

Hall parking lot to travel to another location to perform a work assignment). (Testimony of Curran and Doody)

30. Mr. Curran testified that he arrived in the Health Department Office on May 18th around 2:40 P.M. and remained there performing some work continuously until just before 3:00 P.M. when the Appellant drove away from City Hall. Mr. Curran spoke throughout that time with Margaret Doody, who is the Head Clerk of the Health Department. Ms. Doody fully corroborated Mr. Curran's testimony about his whereabouts from 2:40 P.M. to when the Appellant finally left City Hall by City van around 3:00 P.M. (Testimony of Doody)
31. Margaret Doody was a good witness. She works in the City's Health Department and has served as the Head Clerk for more than thirty (30) years. She had a good recollection of the events that occurred and testified in a straightforward manner about these events. I credit her testimony. (Testimony, demeanor of Doody)
32. Norma Heggie was working at her desk in the Building Department Office located in the basement of City Hall between 2:00 P.M. and 3:00 P.M. on May 18, 2009. Her desk is about fifteen (15) feet from the Maintenance Department Office where the assault by Mr. Curran, as alleged by the Appellant, took place. The door to the Building Department Office is open during business hours which run to after 3:00 P.M. (Testimony of Heggie)
33. Ms. Heggie testified that she first recalled seeing the Appellant enter the Building Department Office "around 3:00 P.M." on May 18th. (This is contrary to the Appellant's testimony who testified that he never even saw Norma Heggie on May 18th.) Prior to his entrance, she did not hear any disturbances outside her office nor did she hear anyone "laughing" in the hallway. The Appellant's demeanor was not unusual at the time and he

did not complain to her at the time that he had just been attacked by the Appellant.

(Testimony of Heggie)

34. Ms. Heggie was also a good witness. She has been the Head Clerk in the Building Department for over twenty-two (22) years. Her testimony was straightforward and plausible and she had no ulterior motive for testifying against the Appellant. (Testimony, demeanor of Heggie) The Appellant testified that he had a good working relationship with Ms. Heggie, but suggested that Ms. Heggie was testifying on behalf of the City “under duress”. Based on my observations of Ms. Heggie at the hearing, I find the Appellant’s allegation unfounded. (Testimony, demeanor of Heggie)
35. John Flagg is a City Building Inspector who works in the same office as Ms. Heggie. He was in the office at the time that the Appellant entered it on the afternoon of May 18, 2009. (Testimony of Flagg)
36. Mr. Flagg observed the Appellant briefly speaking with Ms. Heggie. Immediately afterward, he observed the Appellant leave the office. From his desk, Mr. Flagg observed the Appellant, through a window in the office, leaving City Hall through a back entrance and walking to the parking lot. He did not return. (Testimony of Flagg)
37. Mr. Flagg was also a good witness and I credit his testimony. He took his testimony seriously and was careful to limit his answers only to what he personally observed on the day in question. (Testimony of Flagg)
38. All three of the above-referenced percipient witnesses (Doddy, Heggie and Flagg), whose testimony I have deemed credible, corroborated Mr. Curran’s testimony that he was not in the Maintenance Room at the time he purportedly assaulted the Appellant. Even when viewed independently, however, I credit the testimony of Tom Curran. Mr. Curran has

worked for the City for twenty-seven (27) years and has served as a senior building custodian for the past twenty-two (22) years. He has no record of discipline. He had a calm demeanor and his testimony before the Commission rang true to me. Although angry at the false allegations, he rebutted them in an appropriate and measured tone, simply saying they were “not true”. (Testimony, demeanor of Curran) While various witnesses testified that the Appellant and Mr. Curran had a strained working relationship, no witness testified that they had ever seen the Appellant act violently or use the type of language (“whore” and “dumb Pollack”) alleged by the Appellant. In fact, the Appellant is the only employee of the City who has ever complained that Mr. Curran was violent and threatened other people. Thus, while I carefully considered all of the witness testimony, none of it undercut my credibility assessment of Mr. Curran. (Testimony of various witnesses)

Appellant’s Argument regarding City’s ulterior motive

39. Mr. Fernandes testified that after the Appellant was terminated, he provided him a document that showed the 2010 Budget Projection for the Building Department. That document dated April 29, 2009 indicated that the City planned on reducing the Appellant’s position from a full-time position to a part-time position. Mr. Fernandes indicated that the City never informed him as the union president that it planned on reducing the work schedule of the Appellant. (Testimony of Fernandes; Exhibit 5)
40. Mr. Fernandes, on cross-examination, acknowledged that the budget document may have been related to a workers’ compensation issue and, even if it was not, the Appellant would have been afforded full bumping rights if his position was converted to part-time. (Testimony of Fernandes)

CONCLUSION

G.L. c. 31, § 43, provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

“The commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

There was just cause for the Appellant’s dismissal in accordance with the standards articulated above given his extensive record of past discipline and the final, serious misconduct

in which he engaged, namely, falsely accusing (and in the process defaming) his immediate supervisor of an assault and other unseemly acts in late May 2009.

The Appellant's prior record reflects a pattern of extensive, progressive discipline which has failed to correct misconduct including falsifying his time records, violating the City's Sexual Harassment Policy, damaging a fellow worker's property and various other instances of misconduct.

In addition, he was referred to the City's EAP a number of times for misconduct issues. For example, in May 2007, he was given a mandatory referral to the EAP for among other reasons, "displays of anger" toward supervisors and others and a disruptive pattern of work. He was also referred to the EAP in 2008 following Mr. Merchant's completion of a sexual harassment investigation.

Aside from the numerous instances of formal progressive discipline and EAP referrals, he met multiple times with Mr. Merchant, the City's Human Resources Director, to respond to Mr. Merchant's concerns about his performance. Mr. Merchant repeatedly held out the "olive branch" to him and advised him in detail as to required steps he had to take to meet the City's performance expectations. It was emphasized that he had to "just do his job". Despite all of these formal and informal efforts on the part of the City, the Appellant persisted in ratcheting up the severity of his misconduct and, as the "final straw", concocted a story alleging that Mr. Curran engaged in unseemly conduct on the afternoon of May 18, 2009.

This story was pure fabrication designed to harm Mr. Curran. I base this conclusion largely on the credible testimony of the City's witnesses, including Tom Curran, Richard Merchant, Norma Heggie, Margaret Doody and John Flagg. 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).

No one corroborated the Appellant's version of what is alleged to have occurred in the basement of the Westfield City Hall on the afternoon of May 18, 2009. All of the facts support Mr. Curran's denial of the allegations. Immediately after the alleged assault, the Appellant spoke briefly with Ms. Heggie and was seen by Mr. Flagg. Nothing out of the ordinary in the Appellant's appearance or demeanor was noticed by these witnesses. No one overheard any disturbances at or before this time such as a physical assault or Mr. Curran allegedly "laughing like a mad man." Ms. Heggie further testified that the Appellant never mentioned to her, during his brief encounter with her in the Building Office on the afternoon of May 18, 2009, that he had just been violently assaulted in the Maintenance Office several feet away from her desk.

Mr. Curran testified credibly that he was nowhere near the Maintenance Office at the time of the alleged assault. The head clerk in the Health Department, Margaret Doody, credibly testified that he was with her in that office throughout the time period of 2:40 P.M. to around 3:00 P.M. when the Appellant left City Hall grounds.

Finally, there is insufficient evidence to conclude that the City had been making plans to reduce the Appellant's work schedule to a part-time position. Even if this were the case, it does

not change the fact that the Appellant engaged in egregious misconduct that warranted his termination.

For all the above reasons, the appeal under Docket No. D1-09-286 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) February 25, 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)
Gordon D. Quinn, Esq. (for Appointing Authority)