COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

THOMAS KENNEY,
Appellant

v.

D-04-386

CAMBRIDGE HOUSING AUTHORITY,
Respondent

Appellant's Representative:

Anthony Pini
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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Thomas Kenney (hereafter "Kenney" or "Appellant"), pursuant to G.L. c. 31, §§42 and 43, filed a timely appeal with the Commission on September 9, 2004 claiming that the Cambridge Housing Authority (hereafter "Housing Authority" or "Appointing Authority") did not have just cause (Section 43 appeal) to terminate him for

sleeping while on duty and that the City failed to hold a timely hearing (Section 42 appeal) regarding the disciplinary action.

Subsequent to the Appellant filing his appeal with the Commission on September 9, 2004, the Appointing Authority filed a Motion for Summary Decision and Dismissal, arguing that the Commission lacked jurisdiction to hear the appeal based on the Appellant's waiver of his rights to a civil service appeal in connection with a prior settlement agreement.

A pre-hearing was conducted on November 8, 2004 at which time the Appellant was given ten days to file an response to the Appointing Authority's Motion for Summary Decision and Dismissal. On November 12, 2004, the Appellant filed an answer in the form of a "Motion to Move Forward for a Full Hearing". On November 22, 2006, the Commission denied the Appointing Authority's Motion for Summary Decision and Dismissal and scheduled a full hearing for January 8, 2007. (The reasons for denying the Appointing Authority's motion are included in the conclusion section below.)

A full hearing was held on January 8, 2007 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Both parties declined the option to have witnesses sequestered.

Two tapes were made of the hearing and both parties subsequently submitted post-hearing briefs in the form of proposed decisions. The record was kept open for the Appointing Authority to submit the Appellant's original time sheet pertaining to August 30, 2004. On January 10, 2007, the Appointing Authority submitted the time sheet in question. The original time sheet includes what appears to be the handwriting of the Appellant (in black ink) and the handwriting of another individual whose signature is

illegible but appears to have the initials "J.W." (in blue ink). Although the Commission does not doubt the authenticity of the document, it is impossible to determine when the individual with the initials "J.W." wrote the hand-written comments and, among other things, whether or not she wrote them based on her personal knowledge. Moreover, it would be highly prejudicial to accept this document as an exhibit without giving the Appellant the opportunity to cross-examine the individual who is the author of the hand-written notes. Therefore, the document was not entered as an exhibit.

FINDINGS OF FACT:

8 Joint Exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Cambridge Housing Authority:

- Harry Anderson, Area Maintenance Supervisor, Cambridge Housing Authority;
- Terry Dumas; then-Acting Executive Director; Cambridge Housing Authority;
- Clyde Godwin; Director of Human Resources; Cambridge Housing Authority;

For the Appellant:

- Thomas Kenney, Appellant;
- James Carvello; Mechanic Aide; Cambridge Housing Authority;
- Sal Bonnacci; Mechanic; Cambridge Housing Authority;

I make the following findings of fact:

1. The Appellant, Thomas Kenney, was a tenured civil service employee of the Cambridge Housing Authority. He had been employed by the Housing Authority for

approximately 21 years when he was terminated on August 30, 2004. (Joint Exhibit 1)

2. The Appellant's prior disciplinary record includes a warning and 2-day suspension in 1998 for misuse of sick days; a one-day suspension in 1999 for being off the work site and unauthorized use of the telephone; two warnings in 2001, one related to leaving work without authorization and the other related to use of sick time. (Joint Exhibit 1)
3. In 2002, the Appellant was found asleep during work hours. The Appointing Authority's decision to discharge him was reduced to a 19-month suspension based on an October 21, 2003 settlement agreement between the Appointing Authority and the Appellant. (Joint Exhibit 1)
4. The above-referenced settlement agreement, which reduced the Appellant's discipline to a 19-month suspension, is an overarching issue regarding all aspects of this appeal. As part of the October 21, 2003 settlement agreement, signed by the Appellant, his union representative and the Housing Authority's Executive Director at the time, Daniel Wuenschel, stated as follows:

> The CHA will agree to the reinstatement of Tom Kenney only with the following conditions:
>
> 1. He returns with no back pay;
> 2. Upon his return he will commence a one-year probationary period during which he waives his right(s) to:
>
>   a. Civil Service;
>   b. Arbitration;
>   c. Union representation in the event of a just cause proceeding;
>   d. Unemployment if terminated for just cause
>
> It must be understood by all parties (CHA, the Union and Mr. Kenney) that in the event of a just cause proceeding he, Mr. Kenney, waives his

rights to the above as an individual as well as someone otherwise covered by union protection.

3. He returns a Maintenance Mechanic Aide (top step) with no seniority applicable toward promotion. He may otherwise carry his seniority based on years of service.

   CHA will consider lifting the prohibition of promotion after three year's (sic) of trouble-free service resulting in good or better evaluations.

4. It is further understood and agreed by the CHA and the Union that should Mr. Kenney reject the above terms the Union won't represent him at the impending civil service hearing.

   (Joint Exhibit 4)

5. Harry Anderson was the Appellant's supervisor and he testified before the Commission on behalf of the Appointing Authority. Anderson was not the Appellant's supervisor when the above-referenced settlement agreement was reached between the parties. (Testimony of Anderson)
6. Harry Anderson, the Appellant's supervisor, reported to a senior site manager named Faith Walker. Faith Walker reported to Jack Geary, then-Director of Operations. Geary reported to the then-Acting Executive Director, Terry Dumas. Dumas was filling the position of Acting Executive Director after the retirement of Daniel Wuenschel, the former Executive Director who was a signatory to the above-referenced settlement agreement. (Testimony of Anderson)
7. Mr. Anderson testified before the Commission that the Appellant, who was a mechanic aide, was responsible for performing mechanical work in apartments including the maintenance and repair of boilers. (Testimony of Anderson)
8. Mr. Anderson testified before the Commission that, at the time of the incident, employee breaks generally took place between 9:00 A.M. and 9:30 A.M. The

Appellant does not contest that this was the normal break time for employees. (Testimony of Anderson and Appellant)

9. Mr. Anderson testified before the Commission that he walked into the employee break room at approximately 11:00 A.M. on August 30, 2004 and saw the Appellant sitting in a chair, asleep and snoring. Nobody else was in the break room at the time. The break room and the "boiler room" are both located in the basement of the same "New Town Court" building. According to Mr. Anderson, the Appellant was facing toward him while sitting in the chair. (Testimony of Anderson)
10. Mr. Anderson testified before the Commission that he walked over to the Appellant and touched him after noticing that he was asleep. According to Mr. Anderson, the Appellant woke up; told him he wasn't feeling well; and that he planned to go home at 12:00 Noon. Anderson testified that he told the Appellant he should go home immediately, at 11:00 A.M., instead of 12:00 Noon. (Testimony of Anderson)
11. Mr. Anderson testified that after he discovered the Appellant sleeping, he reported this to senior site manager Faith Walker, Anderson's supervisor. Anderson told Ms. Walker that, "Tom wasn't feeling well; he was sleeping; and probably went home." (Testimony of Anderson) The Appointing Authority did not call Faith Walker as a witness as part of the hearing before the Commission.
12. In May 2004, three months prior to the incident in question, Mr. Anderson attended the retirement luncheon of former Executive Director Daniel Wuenschel, a signatory to the October 21, 2003 settlement agreement between the Appellant and the Cambridge Housing Authority. Sometime after the retirement luncheon, Mr.

Anderson acknowledges having a "general conversation" regarding "disappointment that Tom Kenney wasn't gone." (Testimony of Anderson)

13. James Carvello has been employed as a mechanic aide for the Cambridge Housing Authority for the past 17 years. Carvello was part of the above-referenced general conversation with Harry Anderson after the retirement luncheon in May 2004. Mr. Carvello testified that Anderson, who had attended the luncheon, told a group of people, including himself, that, "Dan (Wuenschel) is pissed at me; I didn't get Kenney for him before he retired." (Testimony of Carvello)
14. Terry Dumas was the Acting Executive Director at the time of the incident on August 30, 2004 and she testified before the Commission. According to Dumas, she was the person ultimately responsible for terminating the Appellant. (Testimony of Dumas)
15. On September 1, 2004, two days after the incident in question, Jack Geary, Director of Operations came and talked to Terry Dumas. As Executive Director, Dumas was Geary's supervisor. Prior to this meeting with Geary, Dumas was unaware of the October 2003 settlement agreement between the parties. (Testimony of Dumas)
16. According to Ms. Dumas, she spoke with Mr. Geary for approximately 10 minutes on September 1, 2004 and most of that 10-minute meeting was spent talking about the prior settlement agreement. Ms. Dumas has a vague recollection that Mr. Geary told her that the Appellant was found sleeping on the job two days earlier, but could not remember who provided Mr. Geary with that information; whether or not the person who told Mr. Geary had actually seen the Appellant sleeping; or whether Mr. Geary had even talked to the Appellant. (Testimony of Dumas)

17. Dumas, Geary's supervisor, asked Geary if it was possible for an employee to waive his future appeal rights, as referenced in the October 2003 settlement agreement. Geary assured her it was and the Appellant was ordered to appear in Dumas's office shortly thereafter on September 1, 2004. According to Dumas, the Appellant was called into the office at which time Geary told the Appellant he was being fired for sleeping on the job and handed him his letter of termination. (Testimony of Dumas; Joint Exhibit 5)
18. Dumas remembers that the Appellant was very upset when he was handed the termination letter by Geary on September 1, 2004 and can't recall if he offered any explanation or defense. (Testimony of Dumas)
19. Twenty-one (21) days after the Appellant was terminated, Harry Anderson wrote a memo to the file regarding the fact that he found the Appellant sleeping in the break room on August 30, 2004. (Joint Exhibit 6)
20. The Appellant was not provided with a written notice by the Appointing Authority outlining the action contemplated (termination) and the specific reasons for such action.
21. The Appellant was not provided with a copy of sections forty-one through forty-five of Chapter 31 of the General Laws.
22. The Appointing Authority did not provide the Appellant with a full hearing concerning the reasons for his termination.
23. The Appellant testified on his own behalf at the Commission hearing and disputed the testimony of Harry Anderson. The Appellant testified that he was not sleeping in the break room on August 30, 2004 at 11:00 A.M. According to the Appellant, he

bumped into Harry Anderson at approximately 11:00 A.M. on August 30, 2004 while he (the Appellant) was walking back from the boiler room. The Appellant testified that he had just retrieved a hood for an oven range for a housing unit from the boiler room when he saw Harry Anderson in the hallway. Upon seeing Harry Anderson in the hallway at approximately 11:00 A.M., the Appellant claims he told Anderson that he wasn't feeling well and needed to go home at "lunch time". The Appellant claims he proceeded to the housing unit he was working on and put the range hood in the unit. After approximately 35-40 minutes, the Appellant testified that he went home but could not remember if he signed out or not. (Testimony of Appellant)

24. As previously referenced, it was not the normal practice of the Housing Authority to maintain work orders for work completed in the housing units, including such tasks as replacing oven range hoods. As such, the Housing Authority has no records to indicate whether or not the Appellant installed an oven range hood in a housing unit on the day in question.

CONCLUSION

Jurisdiction Issue

Pursuant to Rule 1.01 (7)(g)(3) of the Standard Adjudicatory Rules of Practice and Procedure, the Cambridge Housing Authority filed a Motion for Summary Decision and Dismissal, arguing that the Commission lacked jurisdiction to hear the appeal based on the Appellant's waiver of his rights to a civil service appeal in connection with a prior settlement agreement.

The Appellant, the Appointing Authority, and the Union entered into an agreement on November 6, 2003, whereby the Appointing Authority reinstated the Appellant. This

reinstatement was tendered on the condition whereby the Appellant agreed to waive all of his civil service rights and rights to arbitration via the grievance procedures of the collective bargaining agreement in the event of any further disciplinary proceedings for a period of one year after his rehire.

Although parties have the ability to reach agreements freely, such ability is not without limitations. An agreement between two parties shall not be enforced if it is in violation of recognized public policy. Bureau of Special Investigations v. Coalition of Public Policy**.** 430 Mass. 601, 603 (2000). Public policy is laid out in the statutory language, wherein the Legislature intimates the policy concerns underlying the enactment of the statute. Beacon Hill Civic Association v. Ristorante Toscano Inc.. 422 Mass. 318, 321 (1996). The Judiciary may also determine public policy. See A.Z. v. B.Z.. 431 Mass. 150, 160-161 (2000)**.** ("To determine public policy, we look to the expressions of the Legislature and to those of this court."). T.F. v. B.L.. 442 Mass. 522, 529 (2004).

A fundamental purpose of the civil service law, as codified in the basic merit principles of Chapter 31, is "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, s. 1. See Callanan v. Personnel Administrator for Comm.. 400 Mass. 597, 600 (1987). Debnam v. Belmont. 388 Mass. 632, 635 (1983)**.** Chapter 31 bestows the Civil Service Commission with the authority to "hear and decide appeals by persons aggrieved by decisions, actions or failures to act by local appointing authorities in accordance with the provisions of section eight of chapter thirty-one A". G.L. c. 31 s. 2(c).

The Legislature clearly recognized a strong policy interest in preventing public employers from making unjustified decisions concerning its employees. If the Appellant

were permitted to waive his future civil service rights by agreement, then the legislative purpose behind the law would be frustrated. Any action the Appointing Authority took against the Appellant would be without review. This is exactly the type of situation that Chapter 31 was enacted to prevent; an appointing authority having unchecked discretion to treat an employee as it wishes without the need to justify its actions. It must be noted that the Appellant agreed to waive any rights to arbitration under the collective bargaining agreement in addition to his waiver of his civil service rights. If the Appellant still had the means to submit a complaint to arbitration, then the agreement might not violate public policy. Arbitration, if elected by the employee, shall be the exclusive means of settling grievances involving disciplinary action taken by the employer, even if the subject of the grievance would normally be within the jurisdiction of the Commission. G.L. c. 150E s. 8. See Sullivan v. Town of Belmont. 7 Mass. App. Ct. 714, 716 (1979). The Commission has held that an employee maintains their right to appeal under Chapter 31 throughout every step of the grievance procedure until they decide to pursue their grievance to arbitration. Stewart v. Department of Employment and Training 7 MCSR 240 (1994). Vaughn v. Department of Public Health. 7 MCSR 248 (1994). In this case, the Appellant would have no means of making such an election because he has waived his rights to arbitration through the grievance process. The agreement reached by the parties in this matter does not provide the Appellant with any means of relief whatsoever against future action taken the Appointing Authority.

The language of the agreement states that the Appellant was without civil service rights for a "probationary" period of one year. A probationary status is only placed upon employees who have been placed in their position by an original appointment. G.L. c. 31

s. 34. An original appointment may only be made by the selection of a candidate from an eligibility list. G.L. c. 31, s. 6. The Appellant did not return to work with the Appointing Authority as a result of an original appointment. Therefore, the Appellant cannot be deemed a probationary employee under the language of Chapter 31. There is no indication that the Appellant was not reinstated as a tenured employee, which means that he falls under the Commission's jurisdiction in accordance with s. 43.

The Commission also takes notice of the fact that the Appellant waived his rights to "civil service" for a period of one year. This language is without modification or limitation. It is uncertain whether the parties intended that the Appellant surrender all of his rights to make any sort of appeal as permitted under the civil service law. The civil service law allows an employee to appeal to the Commission when aggrieved by an action of the Personnel Administrator, as well as by the appointing authority. G.L. c. 31 s. 2(b). The terms of the agreement would bar the Appellant from appealing even those matters that did not involve the Appointing Authority, such as an examination appeal.

Had the agreement only required the Appellant to withdraw his appeal at the time, the Commission would have no contention with the agreement. Indeed, the Commission encourages parties to reach an agreement where appropriate rather than proceed with the appeals process. However, the Commission will not enforce an agreement containing a complete waiver of an employee's civil service rights for matters yet to arise. Hence, the Appointing Authority's motion for summary decision and dismissal was denied and a full hearing on the underlying issue proceeded. The Commission regards the agreement as evidence that the parties were of the understanding that the Appellant was reinstated with the expectation that any subsequent infraction of the rules would result in termination.

Section 42 Appeal

Prior to terminating a tenured civil service employee, G.L. c. 31, § 41 requires that the employee be given "a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority." In the instant appeal, the Appellant was not given a written notice by the Appointing Authority indicating that they were contemplating his termination; he was not given any hearing by the Appointing Authority; and he was not provided with a copy of the relevant civil service laws required by Section 41. Rather, the Appointing Authority, operating under the assumption that the Appellant had waived his civil service appeal rights, terminated the Appellant after a ten-minute conversation between the Housing Authority's Acting Executive Director and Operations Manager, neither of whom were percipient witnesses to the alleged incident, and neither of whom even bothered to talk to the Appellant about the alleged incident before deciding to terminate him.

If the Commission finds that the Appointing Authority failed to follow the above-referenced Section 41 procedural requirements and that the rights of said person have been prejudiced thereby, the Commission "shall order the Appointing Authority to restore said person to his employment immediately without loss of compensation or other rights." G.L. c. 31, §42.

By any reasonable standard, there is simply no question that the Housing Authority's failure to even *speak* with the Appellant about the alleged incident, let alone conduct a hearing, before terminating him, did in fact prejudice the Appellant in this case. As

stated above, the Acting Executive Director at the time, who ultimately decided to terminate the Appellant, didn't even make an effort to talk to a percipient witness of the alleged incident. Rather, after a ten-minute conversation with one of her subordinates who was not a percipient witness, she authorized the Appellant's termination. It wasn't until twenty-one days *after* the Appellant's termination that his supervisor wrote a belated note to the file regarding the incident.

Section 43 Appeal

The role of the Civil Service 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." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). *See* Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass.

App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

If certain testimony presented at the January 8, 2007 hearing before the Commission, including the testimony of the Appellant's supervisor, had been presented as part of a statutorily-required Appointing Authority hearing that should have been conducted in 2004, the decision to discharge might, arguably, have been justified. However, no hearing was ever conducted by the Appointing Authority and based on nothing more than, at best, hearsay and a false belief that the Appellant had no right of appeal, the

Housing Authority terminated the Appellant after a ten-minute conversation to which the Appellant was not a party.

On a final note, we caution the Appellant not to read this decision as a vote of confidence or vindication regarding his prior bad acts. There is no doubt that the Appellant, as outlined in the settlement agreement, had one "last chance" to save his job after the last transgression prior to the incident which is the subject of this appeal. While a "last-chance agreement" does not give an Appointing Authority license to ignore due process requirements, as was done in this case, a last-chance agreement does, however, effect reasonable justification for a decision to terminate. Notwithstanding the outcome of this appeal, the Appellant's prior misconduct remains fair game for consideration if and when he engages in further misconduct. Moreover, this decision should not be construed as an indication that public employment can serve as a safe harbor for poor performing public employees in general.

For all of the above-reasons, the Appellant's appeal under Docket No. D-04-386 is hereby ***allowed*** and the Appellant is to be restored to his position without loss of pay or benefits.

Civil Service Commission

_____

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin, and Marquis, Commissioners [Taylor – Absent]) on March 8, 2007.

A true record. Attest:

_____

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Anthony Pini
Susan Cohen, Esq.