COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

CARLOS APONTE,
Appellant

v. D-07-253

CITY OF HOLYOKE,
Respondent

Appellant's Attorney: Devin Moriarty, Esq.
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Hearing Officer: John J. Guerin, Jr.[1]

DECISION

Pursuant to the provisions of G.L c. 31, § 43, the Appellant, Carlos Aponte (hereinafter "Appellant"), is appealing the decision of the Respondent, City of Holyoke (hereinafter "City") as Appointing Authority, to suspend him via written notice dated July 5, 2007 for three (3) days, without pay, from his employment as a laborer in the Park Maintenance Division of the City's Department of Public Works (hereinafter "DPW"). The appeal was timely filed. A hearing was held by the Civil Service Commission

[1] John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

(hereinafter "Commission") on January 9, 2008 in the City Council Chamber at Holyoke City Hall. One tape was made of the hearing. Since no notice was received from either party, the hearing was declared private. Proposed Decisions were submitted by the parties thereinafter, as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1 – 9 and Appointing Authority's Exhibit (1), the sworn testimony of the Appellant, and the sworn testimony of DPW Superintendent William Fuqua (hereinafter "Mr. Fuqua"), I make the following findings of fact: The Appellant was employed by the City until his voluntary retirement in September 2007.

1. On June 27, 2007, the Appellant did not arrive at work by the scheduled start time. (Stipulated fact)
2. The Appellant received a three-day suspension for the June 27, 2007 violation. , the Appellant did not arrive at work by the scheduled start time. (Stipulated fact)
3. The Appellant appealed the imposition of the three-day suspension to the Appointing Authority. (Stipulated fact)[2]
4. The Appointing Authority upheld the three-day suspension of the Appellant. (Stipulated fact)
5. A timely appeal to the Commission was filed on the Appellant's behalf. (Stipulated fact)
6. The Appointing Authority maintains General Conduct Rules and Regulations which includes the following prohibition:

[2] The City's Board of Public Works serves as the Appointing Authority for DPW employees and conducts appeal hearings in accordance with G.L. c. 31, § 41.

"Section I:

7. A violation of a safety, working, or employee conduct rule not specified in Section II shall be cause for corrective disciplinary action…For tardiness and failure to call in and report tardiness, corrective disciplinary action will consist of but not [be] limited to the following: two written warnings, a three day suspension…Issuance of disciplinary action starts a six-month 'probationary window'. If no additional violation of a safety, working or employee conduct rule occurs within that six-month period, the disciplinary action will be rendered inactive for future disciplinary purposes. All warning notices and suspension issued, whether active or inactive, will however remain a part of the employee's Personnel File. Each succeeding violation carries an additional six-month probationary window in which progressive discipline can continue. When the probationary window expires at any time during this process, all previous warning notices and/or suspensions will be rendered inactive." (Stipulated fact, Joint Exhibit 2)

8. The Appellant was represented by his Union. The Union and the Employer entered into a Memorandum of Agreement (MOA), dated in January of 2004, which affirmed that a Section I violation would have a rolling six-month window and that all other aspects of Section I offenses would remain unchanged. (Joint Exhibit 9)
9. The Appellant testified at the Commission hearing that he was well aware of the rule requiring him to call his employer if he was going to be late or absent. He knew that in the case of tardiness or absence, he was required to call at least fifteen (15) minutes prior to his scheduled start time. (Testimony of Appellant)

10. The Appellant failed to adhere to the rule of conduct and the contractual obligation requiring him to notify the DPW of his tardiness or absence at least fifteen (15) minutes prior to the start of his work shift three (3) times since August 2006. Specifically, the Appellant violated the requirement on August 23, 2006, January 3, 2007 and June 27, 2007. The Appellant acknowledged at the Commission hearing that he had received over a dozen previous warnings for the same misconduct during his approximately five (5) year tenure with the DPW. (Testimony of Appellant and JE's 2, 3, 4 & 5 and AA 1)

11. Article Fifteen, Paragraph C of the Agreement Between the Board of Public Works of the City of Holyoke, Massachusetts and Local Union No. 596 of the Laborer's International Union of North America, AFL-CIO (hereinafter "CBA") reads, in pertinent part, as follows:

> "The Union and the employees recognize the necessity that employees report for work regularly and on time and that absenteeism and tardiness seriously and adversely affect the operation of the Department and its ability to provide adequate and dependable service to the residents of the City. An employee who is not able to report for work at his/her scheduled or assigned starting time on a day on which he/she is scheduled or assigned to work shall notify the Department as far in advance as possible and, in any event, not less than fifteen (15) minutes prior to his/her scheduled or assigned starting time for that day. In the event of continued tardiness, absenteeism or the failure by an employee to comply with the provisions of this Paragraph, the Department may invoke disciplinary action, including reprimand, suspension or discharge . . . Tardiness or absenteeism shall be deemed to be of serious importance in considering the matter of discipline or discharge . . . " (JE 3)

12. The Appellant testified credibly at the Commission hearing that the power had gone off in his home during the overnight hours leading to the morning of June 27, 2007. As a result of the power outage, the Appellant's alarm clock failed to sound and the

Appellant woke up at 7 a.m. Mr. Fuqua credibly testified that 7 a.m. is the time when the day's work assignments are distributed to employees. (Testimony of Appellant and Mr. Fuqua)

13. As he lived nearby to the DPW, the Appellant hurried to prepare himself to get to work as fast as he could and did not call to notify the DPW of his tardiness. The Appellant testified that he felt it was too late to comply with the fifteen (15) minute rule so, rather than call, he used that time to hurry to work. (Testimony of Appellant)
14. The Appellant testified that he already knew that he was assigned to mow grass on June 27, 2007 as he had been previously given a work schedule for that shift. He launched directly into his task for the day and filled out his daily report at the end of his shift noting that he had accomplished his assigned work for that day. (Id.)
15. Since he had completed his work for the day, despite being tardy and failing to call ahead in accordance with the applicable rules and the CBA, the Appellant asserted that he had not engaged in "substantial misconduct which adversely impairs affects the public interest by impairing the efficiency of public service." Murray v. Second Dist. Ct. of Middlesex, 389 Mass. 508, 514 (1983). (Proposed Decision of Appellant)
16. Additionally, the Appellant argued that, since the warning for the June 27, 2007 incident was not actually issued until July 5, 2007 and the previous warning was issued on January 5, 2007, the discipline did not fall under the six-month, "rolling" probationary period required to elevate the warning to a three-day suspension pursuant to Section I of the General Conduct Rules and Regulations. (Id.)
17. According to Mr. Fuqua, the rule as applied in the present case was applied consistently with the practice of the application of the rule as well as being

consistently applied to other similarly situated employees. Although he testified that he could not recall names of specific individuals who had been subject to the similar application of this discipline, I found Mr. Fuqua to be credible, professional and responsive in this regard. (Testimony of Mr. Fuqua)

18. Mr. Fuqua testified clearly and without hesitation that the practice of the DPW had been to measure the six-month "rolling" probationary period from the date of the actual incident and not from the date discipline was issued. He was also persuasive in pointing out that there existed no notification or disciplinary difference between tardiness and absenteeism. The same fifteen (15) minute minimum notification is required for both circumstances. (Id.)

19. Finally, Mr. Fuqua testified credibly that the timing of the issuance of the instant, three-day suspension discipline corresponded with the regular pay period and that it was the practice of the City to impose discipline at the end of the regular pay period. Mr. Fuqua noted that by imposing the discipline at the conclusion of the regular pay period, it permitted the Appellant to receive pay for the July 4, 2007 holiday. Due to contractual restrictions, if the suspension had been imposed differently, the Appellant would have forfeited the additional holiday pay. I find that this consideration granted to the Appellant demonstrated an absence of bias or disparate treatment on the part of the City. (Id.)

CONCLUSION

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); 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 established "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).

The civil service law defines one of the basic merit principles as "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, § 1. Also, "when there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." City of Cambridge at 304.

The basic facts of this matter are not disputed save for the assertion by the Appellant that his violation of the DPW tardiness/absence notification rule was not subject to the six-month "rolling" probationary period. His argument that the violations should be measured by the date of issuance rather than the date that the incident occurred is not persuasive. There is no evidence to support his assertion. Conversely, Mr. Fuqua's testimony that the practice of the City is to measure the period by the date of incident makes more sense and is far more credible.

The Appellant also tries to differentiate between failures to call to report tardiness vs. absenteeism. A review of both Section I of the General Conduct Rules and Regulations

and Article 15, Paragraph C of the CBA reveals that no such distinction is made between tardiness and absenteeism. An employer has an inherent right to expect that its employees will report to work reliably and, when he or she cannot do so, will make reasonable efforts to notify the employer of same.

The Appellant admitted that he reported for late for work on June 27, 2007 without first notifying the DPW pursuant to the fifteen-minute minimum time period. Nevertheless, he contends, he did not adversely impair the public service by his misconduct as he completed his assigned tasks for that day. He raced to get to work, he arrived and he immediately launched into his assignments. If this were his first violation of the notification rule, it would be difficult not to credit the Appellant with his atoning initiative. That is not the case here. This discipline is the culmination of a fairly short career at the DPW marred by a significant number of similar violations, by the Appellant's own admission.

A paragraph in the City's Proposed Decision speaks succinctly to the question posed by the Appellant - whether making it to work without adhering to the notification policy actually adversely affects the public service:

> "In the instant action, the Employer and the Union negotiated reasonable rules regarding notification of an intended absence. It is hardly necessary to engage in argument describing the potential consequence to public service if public employees were not required to communicate regarding whether they intend to show-up for work. To suggest that absent damage to public service, there shall be no consequence, is absurd."

The Appellant's continued failure to comply with the stipulated attendance policies of the DPW demonstrated that the previous warnings for this misconduct were not corrective of

his behavior. The City is not obligated to exhibit infinite patience. Mr. Fuqua was credible in pointing out that the attendance policies were applied equally and the Appellant had not been singled.

In the absence of "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy", the Commission finds that, by a preponderance of the credible evidence presented in this matter, the City has sustained its burden of proving just cause for taking the action of suspending the Appellant for three (3) days without pay. Therefore, for all the reasons herein, the appeal on Docket Number D-07-253 is hereby ***dismissed***.

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John J. Guerin
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on July 17, 2008.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in 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:
Devin Moriarty, Esq. (for Appellant)
Megan Sullivan, Esq. (for Appointing Authority)