

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

LESTER BATHO,
Appellant

v.

D-07-71

PITTSFIELD PUBLIC SCHOOLS,
Respondent

Appellant's Attorney:

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American Federation of Teachers
Massachusetts, AFL-CIO
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Respondent's Attorney:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Lester E. R. Batho (hereinafter "Mr. Batho" or "Appellant"), is appealing the decision of the Respondent, the Pittsfield School Department (hereinafter "Schools") as Appointing Authority, to suspend him for five (5) work days without pay. The appeal was timely filed. A full hearing was held on October 26, 2007 at the offices of 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”). One tape was made of the hearing. As no written notice was received from either party, the hearing was declared to be private. Witnesses providing sworn testimony were not sequestered. Proposed Decisions were submitted by both parties thereafter, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 – 7 and Appointing Authority’s Exhibit 1) and the testimony of Eric K. Lamoureux (hereinafter “Mr. Lamoureux”), a Pittsfield Public School Teacher and the Appellant, I make the following findings of fact:

1. At the time of his suspension in January 2007, the Appellant was a tenured civil service employee of the Schools in the position of custodian. He had been employed at the Schools as a substitute custodian since October 2000 and became permanent in that position on January 12, 2004. (Testimony of Appellant)
2. The Appellant had been subject to prior discipline by the Schools. On or about October 20, 2005, he received a written reprimand for disrespectful treatment for being argumentative with an instructor and very disruptive to a class on three (3) occasions. On or about November 4, 2005, he received a written reprimand for failure to restock toilet paper and maintain cleanliness of an assigned area. (Joint Exhibits 3 and 4)
3. At the time of his suspension in January 2007, the Appellant was assigned to duties at the Silvio Conte Elementary School (hereinafter “Conte School”) from 3:00 p.m. until 6:30 p.m. and then at the Morningside School from 7:00 p.m. until the end of the night shift at 11:00 p.m. His supervisor at the Conte School was Jon Slocum

(hereinafter “Mr. Slocum”). (Joint Exhibit 2 and Testimony of Mr. Lamoureux and Appellant)

4. On or about November 17, 2006, a meeting was held among the members of the custodial team of the Conte School and Mr. Slocum. A “Memorandum for Record” was issued thereafter by Mr. Slocum, memorializing the items discussed among the team. (Joint Exhibit 2)
5. Among the issues that were discussed were the locking of offices and other rooms within the Conte School, the securing of all windows and exterior doors, the turning off of lights, specific assignments of personnel, workplace harassment policies and chain of command for reporting any incidents. (Id.)
6. The last paragraph of the November 17, 2006 memorandum reads as follows:

“Gentlemen, as adults and working professionals, we must be willing and able to work together, as a team and with mutual respect. I should like to think this meeting in and of itself will permit us to continue working in a positive, supportive and non-threatening way. I have set down my expectations clearly, however, the choice is yours. Further issues in the future, in the absence of evidence, will obligate me to take further action to correct these issues.”

(Id.)

7. The Conte School Principal, Administrator Joseph Curtis (hereinafter “Mr. Curtis”) and the custodians had keys to locked rooms and offices but the teachers did not. (Testimony of Appellant and Mr. Lamoureux)
8. Mr. Lamoureux was a second-grade teacher at the Conte School at the time of the incident that gave rise to the Appellant’s January 2007 suspension. He was the co-director of after school programs at the time and worked until 6:00 p.m. on those programs. (Testimony of Mr. Lamoureux)

9. On Friday, December 15, 2006, at approximately 4:30 p.m., Mr. Lamoureaux went to the Connected for Success (hereinafter “CFS”) program office and found that it was locked. Mr. Lamoureaux wished to retrieve a laptop computer and some books. The Principal, Donna Leep, and Mr. Curtis had left for the day and he had no key with which to unlock the office door. (Id.)
10. Mr. Lamoureaux paged for any custodian to assist him in unlocking the door but was unsuccessful in gaining anyone’s attention. Knowing the Appellant was still on duty upstairs at the school, Mr. Lamoureaux went in search of his assistance. He found the Appellant vacuuming and requested his help. (Id.)
11. Mr. Lamoureaux testified at the Commission hearing that the Appellant then launched into a verbal tirade, laced with vulgarities, which continued throughout the approximately five minutes it required for him to unlock the CFS office door for Mr. Lamoureaux. A preponderance of the evidence and testimony adduced at the Commission hearing indicates that the Appellant’s remarks were not directed toward Mr. Lamoureaux. Mr. Lamoureaux testified that he believed the Appellant had made the inappropriate and profane remarks relative to Mr. Curtis. As a result of the alleged verbal tirade, Mr. Lamoureaux filed a complaint against the Appellant with school administration. (Id.)
12. Mr. Lamoureaux filed his complaint against the Appellant on Monday, December 18, 2006 and filed a written account of the incident with the Schools on December 19, 2006. The following is the full text of that written account. It is displayed here in its entirety as it specifies Mr. Lamoureaux’s complaint and is consistent with his testimony at the Commission hearing:

“When our Fun Friday for CFS ended, I said goodbye to Joe [Curtis] and [Principal] Donna Leep and went upstairs. When I got to the CFS office I found it locked. I went to the intercom and paged a custodian to the upstairs office. I waited about 2 minutes and paged again. After another 2 or 3 minutes, I went to find Lester. I knew he was still upstairs because his closet door was still open. As I walked into the 4th/5th Grade Quad I could hear a vacuum going. When I found him I said, ‘Sorry to bother you, but I needed the CFS office door unlocked.’ He quickly responded, ‘Where is Joe?’ I told him Joe and Donna had both left. I said I had paged any custodian, but no one came so I found him. He then went into a rant about Joe and having to unlock doors. He told me ‘That fucking asshole said he would always be around to unlock the doors if someone needed to get into a room.’ I told him Joe had just left and I hadn’t noticed it was locked because the 2nd/3rd Grade Quad door was still open. He just kept complaining about how he had to stop his work to unlock the door. He said how, ‘Well there are a lot of people who don’t like that fucking asshole down there.’ (I guessed that this was Joe again.) By the end of what really was only a 5 minute task and conversation Lester had called Joe an asshole or fucking asshole about 5 times. I just kind of listened and didn’t say much because I was the only other person in the building, besides for Mark downstairs, and didn’t want to get into anything. I did tell Joe what happened the next day.”

(Appointing Authority’s Exhibit 1)

13. The Appellant testified at the Commission hearing that this incident simply never happened. He further testified that he would never have used profanity when speaking about someone as he has never used profanity in his life. (Testimony of Appellant)
14. As a result of Mr. Lamoureux’s complaint, the Schools held an investigatory meeting with the Appellant and his Union representative on January 5, 2007. At that meeting, the Appellant denied all of Mr. Lamoureux’s allegations, maintaining that he had never used such vulgar language and that he had simply complied with Mr. Lamoureux’s request. (Joint Exhibit 2 and Testimony of Appellant)

15. On January 9, 2007, the Schools issued the Appellant a notice pursuant to G.L. c. 31, § 41, indicating its intent to suspend the Appellant for five (5) days based on Mr. Lamoureux's complaint. ((Joint Exhibit 2)
16. A hearing pursuant to § 41 was properly held on January 25, 2007 and, on January 30, 2007, the Schools issued its final decision denying the appellant's appeal and upholding the five (5) day suspension imposed upon him. (Joint Exhibit 5)
17. I found Mr. Lamoureux to be a credible witness. His testimony at the Commission hearing was consistent with his contemporaneous written account of the incident at the time it occurred. He filed his complaint on the Monday following the Friday incident which indicated no question of his purpose in doing so. I found no evidence that Mr. Lamoureux harbored any ill-will towards the Appellant or that he was, in any way, motivated to file his complaint against the Appellant for political or otherwise non-merit based reasons. Mr. Lamoureux was mild-mannered, respectful and polite in his demeanor and answered all questions with the clarity, detail and lack of hesitation which is indicative of accurate statements. Indeed, there was no evidence presented at the Commission hearing that would lead one to believe that Mr. Lamoureux had any reason to fabricate his complaint.
18. I found the Appellant to have been consistent in his denials that he used profane language to complain about Mr. Curtis's unavailability and having to stop his work activities in order to assist Mr. Lamoureux on December 15, 2006. The Appellant was also polite and respectful at the Commission hearing and he, too, answered all questions with confidence and ease. However, I find that the Appellant had reason to be evasive regarding this incident as he had not quite been in his permanent position

for three (3) years yet and his progressive discipline (two written reprimands and this suspension) was beginning to mount. I find that the Appellant had been disciplined prior to the instant matter for an inappropriate verbal altercation with a fellow employee and had been cautioned through the November 17, 2006 memorandum (as part of a team) about inappropriate and disrespectful behavior towards others in the school community.

19. The Appellant filed a timely appeal with the Commission on February 5, 2007. (Joint Exhibit 7)

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). 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 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 Schools allege that the Appellant made inappropriate and profane remarks regarding an administrator, Mr. Curtis. The Schools provided evidence that the

Appellant was informed that he was not to use aggressive or profane language regarding co-workers or members of the public, and that he again conducted himself in an inappropriate manner in the instant matter.

After approximately one year in his permanent position, the Appellant received a written reprimand on October 20, 2005 for disrespectful treatment of a school instructor. The reprimand referenced three (3) incidents of such behavior leading to the issuance of the written admonishment. Further, on November 17, 2006, the Appellant was instructed to treat members of the school community and the public with respect and civility. The November 17 memorandum was thorough and unambiguous as to how members of the custodial staff were expected to conduct themselves in their personal interactions with others.

However, less than one month after this memorandum was issued, the Appellant was involved in the instant incident, after which an instructor found it necessary to file a formal complaint regarding uncivil, inappropriate and profane remarks relative to an administrator, Mr. Curtis. The Appellant's strategy of maintaining a blanket denial that this incident ever occurred is unconvincing. I find that Mr. Lamoureux's account of the matter was credible and motivated only by his understandable outrage at the Appellant's remarks.

It is found that the Appointing Authority has sustained its burden of proving by a preponderance of the credible evidence that it had just cause to suspend the Appellant for five (5) days without pay. Therefore, for all of the reasons herein, the appeal on Docket No. D-07-71 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on June 26, 2008.

A true copy. Attest:

Christopher C. Bowman
Chairman

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:

Jeffrey W. Jacobsen, Esq. (for Appellant)

Fernand J. Dupere., Esq. (for Appointing Authority)