

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

THOMAS DASILVA,
Appellant

v.

D-14-20

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Joseph Delorey, Esq.
AFSCME Council 93
8 Beacon Street, 7th Floor
Boston, MA 02108

Appearance for Respondent:

Elizabeth Treadup Pio, Esq.
City Hall, Room 203
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein.¹

DECISION

On January 23, 2014, the Appellant, Thomas DaSilva (“Mr. DaSilva”), pursuant to G.L.c. 31, §§ 41-43, filed an appeal with the Civil Service Commission (“Commission”) from a decision of the city of New Bedford (“New Bedford”), suspending him from his employment for one (1) day as a Diesel Engine Repairman (“DER”) for the New Bedford Department of Facilities and Fleet Management (“DFFM”). A full hearing was held at University of Massachusetts School of Law in

¹ The Commission acknowledges the assistance of Law Clerk Craig E. Reeder, in the drafting of this decision.

North Dartmouth on May 9, 2014. The hearing was private, it was digitally recorded, and copies were sent to the parties. New Bedford submitted a proposed decision to the Commission and Mr. DaSilva did not.

FINDINGS OF FACT

Eight (8) exhibits were entered into evidence at the hearing. Based upon these exhibits, the testimony of the following witnesses:

Called by New Bedford:

- Carlos Araujo, Garage Superintendent
- Kenneth Blanchard, Director of Department Facilities and Fleet Management

Called by Mr. DaSilva:

- Mr. DaSilva, Diesel Engine Repairman,

and inferences reasonably drawn from the credible evidence, I make the findings of fact set forth below:

1. Mr. DaSilva has been employed by New Bedford as a DER since March 12, 2007. He was a permanent, tenured civil service employee at the time of his one (1) day suspension. (Stipulation of Fact; Exh. 1)
2. During Mr. DaSilva's tenure, he has received one (1) written warning dated July 23, 2012, for carelessness. The written warning was issued when Mr. DaSilva did not bring equipment to an accident scene as requested. Mr. DaSilva also received one (1) notice for questionable sick leave, dated December 13, 2013. (Exh. 2 and 3)
3. DERs work in the City's garages to maintain and repair New Bedford's fleet of City vehicles. (Testimony of Araujo)

4. DERs are classified as essential personnel and are required to report for work during snow emergencies to repair vehicles used for snow removal. (Testimony of Araujo and Blanchard)
5. When a snow emergency is declared, Superintendent Araujo is responsible for mobilizing essential personnel. The Superintendent is responsible for contacting employees to call them into work. (Testimony of Araujo and Blanchard)
6. New Bedford is responsible for snow removal for the city during snow emergencies. (Testimony of Araujo)
7. On the night of January 2, 2014, a snow emergency was declared. (Testimony of Araujo)
8. The total snow fall during the snowstorm on January 2-3, 2014, was 9.5 inches. (Stipulation by Parties)
9. On January 2, 2014, Mr. DaSilva went to bed at or around 8:00 p.m. (Testimony of Appellant)
10. Prior to going to bed, Mr. DaSilva prepared food and clothing in case he was called into work because of a snowstorm. (Testimony of Appellant)
11. Superintendent Araujo called Mr. DaSilva prior to midnight. The Superintendent called Mr. DaSilva twice using two different numbers. Mr. DaSilva did not answer either of the phone calls. (Testimony of Araujo)
12. Although Mr. DaSilva's phone was on the nightstand next to his bed, he did not hear the phone ring. (Testimony of Appellant)

13. Mr. DaSilva noticed a missed call on his phone when his daughter woke him up at or around 3:00 a.m. to 4:00 a.m. During this time, Mr. DaSilva noticed it was snowing outside. (Testimony of Appellant)
14. Mr. DaSilva did not return the missed call, nor did he call the Superintendent to see if he needed to return to work. (Testimony of Appellant)
15. Mr. DaSilva was the only DER who did not report to work during the snow emergency on January 2-3, 2014. (Testimony of Blanchard)
16. Mr. DaSilva went to work on January 3, 2014, at 7:30 a.m., which was when he was scheduled. (Testimony of Araujo and Appellant)
17. Mr. DaSilva was issued a written employee warning dated January 6, 2014, for insubordination for failing to report to work. (Exh. 4)
18. By letter dated January 7, 2014, Mr. DaSilva was informed that Director Blanchard was contemplating a one (1) day suspension and that Mr. DaSilva could request a hearing. (Exh. 5)
19. By letter dated January 9, 2014, Mr. DaSilva was notified that a hearing would be held concerning the one (1)-day suspension. (Exh. 6)
20. After the hearing, by letter dated January 13, 2014, Mr. DaSilva was notified that he was being suspended for one (1)-day. The letter stated that Mr. DaSilva was suspended for one day for: failure to report during a snow emergency. (Exh. 7)

Applicable Law

Pursuant to G.L. c. 31, § 43, a “person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written

notice of such decision, appeal in writing to the commission . . . ” The statute provides, in pertinent part:

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 the 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 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.

G.L. c. 31, § 43.

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.” Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Comm’rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); 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. of Brockton v. Civil Serv. Comm’n, 43 Mass.App.Ct. 486, 488 (citing 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).

While the Commission makes *de novo* findings of fact, “the Commission’s task, however, is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). “Here, 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.’” Id. at 823-24 (citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)).

Analysis

Applying these principles to the facts of this appeal, I conclude that New Bedford did meet its burden to establish just cause to suspend Mr. DaSilva for one (1)-day.

Mr. DaSilva, who is a DER, is classified as essential personnel. Essential personnel’s duties include returning to work during snow emergencies to help with the city’s snow removal process. On the night of January 2, 2014, a snow emergency was declared. That night as per his standard practice, Superintendent Araujo called Mr. DaSilva to come into work on the night of January 2, 2014, and Mr. DaSilva did not answer the Superintendent’s call.

Mr. DaSilva went to sleep at or around 8:00 p.m. on January 2, 2014, it was sometime thereafter he missed the Superintendent’s call. Mr. DaSilva was aware of a missed call when his daughter woke him up somewhere around 3:00 a.m. to 4:00 a.m. It is not credible that he did not know or have reason to know that the call likely was from

the Superintendent, Although Mr. DaSilva knew that it was snowing outside, and prepared for it accordingly by setting aside clothing and food, he failed to return the missed call or to check with the Superintendent.

Mr. DaSilva, who was the only essential personnel employee to not show up for the snow emergency., Although I find that the Appellant did not intentionally or willfully go to sleep and miss the initial call to report, he clearly knew, when he decided to go to bed, that there was a good chance he would need to report and even took some action to plan for that eventuality. He certainly knew he should have reported, or at least checked in, when he did learn of the missed call and, yet, did nothing to call in or report even then. This level of carelessness and disregard for duty, especially duty as critical as supporting a snow emergency response, is precisely the type of misconduct that “adversely affects the public interest by impairing the efficiency of public service” and warrants discipline. The Appellant’s one (1) day suspension was justified by the preponderance of the evidence and should not be disturbed by the Commission.

Mr. DaSilva’s one (1) day suspension was justified by a preponderance of the evidence.

Accordingly, the appeal of the Appellant, Thomas DaSilva, is here by *denied*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on December 11, 2014.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Joseph Delorey, Esq. (for Appellant)

Elizabeth Treadup Pio, Esq. (for Respondent)