COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

FRANCESCO VALENTE,
Appellant
v.

CASE NO: D1-09-30

CITY OF NEWTON,
Respondent

Attorney for the Appellant:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Francesco Valente, brought this appeal pursuant to G.L. c.31, §43, seeking reversal of the Respondent City of Newton's ("City") decision to discharge him from his employment as a Motor Equipment Repairman on January 20, 2009. At hearing on September 17, 2009, the City presented evidence through two witnesses, Lori Burke and Thomas Daley, while the Appellant testified on his own behalf. Thirty (30) Exhibits were received in evidence. The hearing was digitally recorded.

FINDINGS OF FACT

Based upon the Exhibits and the testimony of Ms. Burke, Mr. Daley, and Mr. Valente, and the inferences reasonably drawn from that evidence, I make the findings of fact set forth below.

Appellant's Background

1. In December 2000, Appellant began his employment as a Motor Equipment Repairmen for the City of Newton's Department of Public Works ("DPW") at its Crafts Street Garage. (Testimony of Appellant)
2. The position of Motor Equipment Repairman requires performing skilled maintenance, diagnostic, and repair work on automotive and non-automotive equipment, including hydraulic, pneumatic, electrical and mechanical systems, and hoisting equipment, and related work. (Exhibit 1)
3. On October 1, 2002, Appellant sustained an injury to his lower back while attempting to change a tire at work. As a result of the incident, he received workers' compensation benefits. He was unable to work from the date of the incident through January 1, 2003. On January 2, 2003, Appellant returned to work in a light-duty capacity. By February 2003, he returned to full-duty status. (Testimony of Appellant)
4. On April 11, 2005, Appellant re-injured his lower back while attempting to lift a truck tailgate at work. As a result of the injuries, Appellant filed for workers' compensation benefits seeking temporary total incapacity. (Testimony of Appellant; Exhibit 4)

5. The City, which is self-insured for workers' compensation purposes, denied Appellant's workers' compensation claim. (Exhibit 4)

6. As a result of his absence from work, the City ordered Appellant to undergo an independent medical examination ("IME"), on September 19, 2005. The first IME was performed by James Rainville, M.D., of New England Baptist Hospital, who opined that Appellant was fit to return to work on a full-time basis, with a "30-pound lifting restriction for at least the first 6 weeks of return to work until his overall conditioning improves." (Exhibit 5)

7. On October 5, 2005, Appellant returned to work on a part-time basis (four hours per day) in a light-duty capacity. (Testimony of Appellant)

8. On November 14, 2005, Appellant returned to full-time status, but continued to work under the 30-pound weight restriction. (Testimony of Appellant)

9. Appellant's injuries to his lower back persisted upon his return to work. (Testimony of Appellant)

10. After exhausting his remaining sick and vacation time, on December 27, 2005 Appellant was placed on medical leave pursuant to the Family and Medical Leave Act ("FMLA"). (Testimony of Burke)

11. By correspondence March 31, 2006, sent via certified mail, return receipt requested, the City attempted to inform Appellant that he had exhausted his twelve (12) weeks of FMLA leave, and must provide additional medical documentation of his disability in order to extend his leave of absence. (Exhibit 16; Testimony of Burke)

12. Although the City was unable to produce a receipt, and Appellant does not explicitly recall receiving the letter, the evidence suggests that Appellant was on notice of the City's demand for him to return to work or provide additional documentation of his ongoing disability. (Testimony of Appellant; Testimony of Burke)

13. The Appellant returned to work at the City's Crafts Streets Garage on or about June 5, 2006, but soon discovered that he remained unable to perform the duties of a mechanic. After this date, he did not return to work. (Testimony of Appellant)

14. Thereafter, Appellant filed a claim for permanent partial disability worker's compensation benefits based on his injuries. The City, which is self-insured, denied the claim, and Appellant then filed an appeal with the Massachusetts Department of Industrial Accidents ("DIA"). (Exhibit 4; Testimony of Appellant)

15. On July 12, 2006, the City scheduled Appellant to appear at a second IME by James Bono, M.D. at New England Baptist Hospital. Dr. Bono opined that "[b]ased on [Appellant's] subjective complaints, he is not able to return to work in any capacity at this point." He further concurred with Dr. Rainville's objective findings of September 19, 2005 that Appellant was fit to return to duty with a lifting restriction. (Exhibit 9)

16. On December 8, 2006, Dr. Rainville conducted his IME of Appellant, and found that Appellant "does not have any medical reason for avoiding work activities and that he should work on a full time basis with a 30 pound lifting restriction because of his probable deconditioning." (Exhibit 10)

17. On July 16, 2007, Dr. Rainville performed his third IME of Appellant, and concluded that Appellant "has the capacity to return to work on a full time basis ... I have suggested a permanent 30-pound lifting restriction. I also suggested that he be allowed to change position frequently throughout the day to maintain maximum comfort." (Exhibit 11)

18. At some point in either 2007 or 2008, Appellant began performing light automotive maintenance and repairs for friends and acquaintances out of his personal garage. (Testimony of Appellant)

19. In December 2007, Appellant and his cousin, Attorney Glenn Nardone, attempted to speak with Lori Burke, the City's Workers' Compensation Manager and Health and Safety Officer, in an effort to discuss Appellant's employment status. Upon learning that Mr. Nardone was an attorney, Ms. Burke ended the meeting, and requested Appellant to schedule a meeting after the holidays with the City's attorney present. (Testimony of Appellant)

20. By letter of January 28, 2008, the City notified Appellant that it had scheduled a fitness for duty examination for him on May 29, 2008 with Reid Boswell, M.D. (Exhibit 12)

21. On February 29, 2008, Dr. Rainville conducted his fourth IME of Appellant, noting that Appellant's "repeat diagnostic studies do not justify his profound pain behaviors or complaints." He further opined that Appellant "is capable of returning to work on a full time basis [with] a permanent 30-pound lifting restriction. He should be allowed to change positions frequently." (Exhibit 13)

22. On May 19, 2008, Appellant was evaluated by his own physician, Alexios Carayannopoulos, D.O., at Lahey Clinic Medical Center, who noted that Appellant "is still working full-time, full-duty as an auto mechanic. He says he is unable to stop working. He does several activities at work such as leaning under a car that seem to aggravate his pain most." (Exhibit 25A).

23. By letter of June 6, 2008, Dr. Boswell noted that based on his evaluation of Appellant on May 29, 2008, it was his opinion that Appellant's "non-work related hip osteoarthritis is not contributing to his disability." Dr. Boswell did not comment further on Appellant's general ability to perform the duties of a mechanic for the City. (Exhibit 14)

24. On August 11, 2008, Dr. Rainville performed his fifth IME of Appellant. Dr. Rainville opined that Appellant "does have the capacity to work on a full time basis as there is no benefit for avoidance of work activities or rest at this time . . . because of his deconditioning a 30-pound lifting restriction remains appropriate. With persistent work activity, however, this restriction for lifting would be eliminated." (Exhibit 15)

25. In 2000, the City employed twelve (12) mechanics at the Crafts Street Garage. Because of various cuts and difficulty finding replacements, only eight (8) mechanics remained at the Garage in 2008. By August of that year, only five (5) mechanics were engaged in full-time employment with the City. (Testimony of Daley)

Procedural History

26. On August 27, 2008, the City sent Appellant notice of a civil service hearing for September 4, 2008 to determine his employment status since he had not reported to work since December 2005. (Exhibit 3A)

27. By letter of September 2, 2008, the City rescheduled the hearing for January 6, 2009. (Exhibits 3B & 3C)

28. Following a second postponement, on January 15, 2009, the DPW, with Commissioner Thomas Daley acting as Appointing Authority, conducted a hearing regarding Appellant's employment status. The Appellant did not testify. (Testimony of Appellant)

29. Based on the evidence presented, Commission Daley terminated Appellant's employment "for not reporting to work for [his] job as a mechanic for the City of Newton since approximately December 2005." (Exhibit 3D)

30. Several months after the City discharged Appellant, it hired a mechanic to replace him at its Crafts Street Garage. (Testimony of Daley)

31. By Report dated March 5, 2009, Administrative Judge Richard Heffernan of the DIA found that the injury sustained by Appellant on April 11, 2005 was work-related, and that Appellant was entitled him to temporary total incapacity benefits from April 11, 2005 to October 4, 2005, and from December 31, 2005 to July 12, 2006. DIA Administrative Judge Hefferenan also awarded Appellant partial incapacity compensation from October 5, 2005 to November 14, 2005. (Exhibit 4)

32. On February 2, 2009, Appellant filed an appeal with the Civil Service Commission ("Commission"), requesting review of the City's decision to terminate his employment, pursuant to G.L. c.31, §43.

33. The City filed a Motion to Dismiss on March 31, 2009, asserting that Appellant had abandoned his position as a mechanic with the City.

34. Appellant filed an opposition thereto on April 23, 2009, arguing that the City failed to comply with the provisions of G.L. c.31, §38, pertaining to abandonment of employment.

35. A hearing on the City's Motion to Dismiss was held on July 20, 2009.

36. By letter of July 21, 2009, the City agreed to voluntarily withdraw its motion. In the same letter, Appellant agreed to withdraw his Section 38 argument and proceed in accordance with Section 43 of Chapter 31.

CONCLUSION

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L. c.31, §41 may appeal to the Commission under G.L. c.31, §43, which 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.

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 (2006). 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, *rev.den.*, 426 Mass. 1102 (1997). *See also Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, *rev.den.*, 440 Mass. 1108 (2003); *Police Dep't of Boston v. Collins*, 48 Mass. App. Ct. 411 (2000); *McIsaac v. Civil Service Comm'n*, 38 Mass. App. Ct. 473, 477 (1995); *Watertown v. Arria*, 16 Mass. App. Ct. 331, *rev.den.*, 390 Mass. 1102 (1983).

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 (1971); *Cambridge*, 43 Mass. App. Ct. at 304; *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. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488, *rev.den.*, 426 Mass. 1104 (1997); *Murray v. Second Dist. Ct.*, 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard

against political considerations, favoritism and bias in governmental employment decisions.'" *Falmouth*, 447 Mass. at 823.

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). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 264-65 (2001). "The commission's task, however, 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*, 447 Mass. at 823*; see Watertown*, 16 Mass. App. Ct. at 334. Likewise, the "power accorded the commission to modify penalties must not be confused with the power to impose penalties *ab initio*, which is a power accorded the appointing authority." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004); quoting *Police Comm'r v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a

substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation." *Falmouth*, 447 Mass. at 823.

The law vests considerable authority in the appointing authority, which retains the "sole power to decide whether to fill vacancies on either a permanent or temporary basis." *Somerville v. Somerville Municipal Employees Ass'n,* 20 Mass. App. Ct. 594, 597 (1985); quoting *Kenney v. McDonough*, 315 Mass. 689, 693 (1944).

The primary question here is whether the City had just cause to terminate Appellant's employment and replace him with another employee when Appellant remained unable to perform the duties of a mechanic for thirty-one (31) months (June 2006 – January 2009) as a result of a work-related injury, and during a time when the City was becoming increasingly understaffed at its Crafts Street Garage. Despite the qualified medical opinions of Drs. Rainville and Bono, a preponderance of the evidence – including, without limitation, the Appellant's numerous unsuccessful prior attempts to return to light-duty work – suggests a substantial probability that the Appellant's back injury very likely continued to prevent him from working on vehicles at the City's garage well into 2008 and beyond, even in a light-duty or part-time capacity.

I make this finding knowing that Appellant admitted he performed vehicle maintenance at his personal garage beginning in approximately 2007. The Appellant's work at the City's garage, in all likelihood, put a much greater degree of stress on his back than when he performed maintenance projects at his personal garage. The Appellant's sporadic work at home, which was also painful for him, is something of a red herring that has little bearing one way or the other on whether the City was justified to

conclude that the Appellant should be terminated for his unwillingness and/or inability to return to his much more arduous City job.

It does remains troubling that the City failed to take decisive action for a considerably long period of time after June 2006, when Appellant claims he reported to work in response to the City's letter (or, as the City claims, it did not receive a response from Appellant to its March 31, 2006 letter). From this point forward, the City should have taken far clearer steps to communicate directly with Appellant, ordering him to report to work, once his FMLA leave had been exhausted. Had this been done, regardless of Appellant's response, the City could have resolved the dilemma then. If the Appellant responded that he was still unable to perform the work, the City would have been justified in initiating termination proceedings in late 2006 or thereafter. Instead, the parties remained in limbo for over two years while the Appellant was ordered to attend countless medical examinations, and the City remained understaffed at the Crafts Street Garage.

Although the City's bureaucratic and communication shortcomings put Appellant in an awkward situation, they do not prevent it from eventually taking justifiable action to discharge and replace him. It is certainly understandable that the City would find it unacceptable for taxpayers to suffer the consequences of leaving a vital maintenance position unfilled for extended and indefinite periods. This particular City garage maintained most of the City's fleet, including police, emergency and snow removal vehicles. The City could not afford to leave Appellant's position unfilled while routine and emergency repairs were delayed due to a lack of manpower. Moreover, Appellant has provided no indication that his condition was improving or is likely to improve in the

near future. In the worker's compensation proceedings, Mr. Valente claimed permanent partial disability as a result of the April 2005 incident. While this implies that he may be capable of performing some of the mechanic's duties, it also underscores the Appellant's belief that there is grave doubt that he will ever be able to perform all of the duties of his former position. Knowing all of this, the City was under no obligation to leave the Appellant's job vacant indefinitely and retain the Appellant on the payroll, and was justified in initiating termination proceedings when it eventually did so in 2008. See generally Freeman v. City of Cambridge, 6 MCSR 157 (1993); Perry v. Town of Plymouth, 6 MCSR 84 (1993).

It is worth noting that regardless of the City's right to initiate termination proceedings, Mr. Valente's rights, if any, to receive disability, retirement or similar benefits, or any other relief to which he may be entitled (for example, preference in rehiring for a "suitable" or "similar" job under G.L.c. 152, §75A, upon showing he is fully rehabilitated and capable of performing the duties of a mechanic or similar position) or his rights, if any, under a collective bargaining agreement, is unaffected.

In sum, the Respondent established by a preponderance of the evidence that it had just cause under G.L. c.31, §41 to terminate Mr. Valente's employment on January 20, 2009. Therefore, for the reasons stated above, Mr. Valente's appeal is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on October 21, 2010.

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the 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: David W. Downes, Esq.
Donnalyn B. Lynch Kahn, Esq.