

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

ROGER MONIZ,
Appellant

V.

Docket No. D-05-17

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Roger Moniz (hereinafter "Appellant") filed this appeal with the Civil Service Commission (hereinafter "Commission" or "CSC") claiming that just cause did not exist for an action taken by the Respondent, City of New Bedford (hereinafter "City") as Appointing Authority, terminating his employment as a Carpenter for the City of New Bedford Department of Public Infrastructure. The appeal was timely filed. A hearing was held on June 29, 2005.

Two (2) tapes were made of the hearing. As no notice was received from either party, the hearing was declared private. Proposed Decisions were filed thereafter, as directed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1 through 57) and the testimony of Department of Public Facilities (hereinafter “DPF”) Working Foreman Camilo Carvalho, DPF Carpenter Frank Michalski, DPF Supervisor John Brizida and, DPF Commissioner Lawrence Worden, I find the following:

- 1.) The Appellant was a tenured civil service employee in the position of Carpenter, at the time of the alleged incident for which he was disciplined. He had been employed by the City since March 7, 1994. (Exhibits 1 and 2).
- 2.) The Appellant was terminated effective December 10, 2004 for knocking a fellow employee off a ladder and then proceeding to assault him, which occurred on December 6, 2004 at approximately 9:30 a.m., at Fire Station Six located at 151 Purchase Street, New Bedford, MA. (Exhibits 50, 51 and 53 and testimony of Mr. Worden.)
- 3.) During his tenure with the City, the Appellant had been disciplined on prior occasions for charges of physically assaulting a fellow employee, insubordination and misconduct, sick leave abuse, theft of public property in excess of \$1,000.00, verbal harassment of a supervisor, using profane language and leaving the work area without permission, including:
 - a.) On April 20, 1995, the Appellant received a written warning for

assaulting a fellow employee. After a hearing, Commissioner Worden found just cause to terminate the Appellant for assaulting a fellow employee and the Appellant was terminated effective April 26, 1995. On November 8, 1995, an arbitrator reduced the Appellant's termination to a three-month suspension without pay. (Exhibits 3 through 8 and testimony of Mr. Worden.)

b.) On April 3, 1997 the Appellant received a written warning for insubordination and conduct. After the Appellant called in requesting a non-scheduled vacation day and was denied, he swore at his supervisor and told him to mark him (the Appellant) as sick for the day. (Exhibit 9 and testimony of Mr. Worden.)

c.) On December 11, 1997 the Appellant received a written warning that his sick leave was questionable and indicated abuse of sick leave privileges. Since January 15, 1997 he was absent 15½ days. The Appellant was placed on sixty-day notice to improve his attendance record. (Exhibits 10 and 11 and testimony of Mr. Worden.)

d.) On November 18, 1998 the Appellant received a letter from Commissioner Worden contemplating the Appellant's termination and suspending him immediately for theft of property in excess of \$1,000.00 regarding a missing paint sprayer. The Appellant had alleged that he had taken the sprayer home to fix but, it was allegedly ruined by a flood in his basement. Although the Appellant had not been given authority to have the paint sprayer in his possession or at

his home, the parties reached a settlement that required the Appellant to serve a five-day suspension without pay for the period November 19, 1998 through November 25, 1998 and to pay restitution by providing the City with a replacement of the same model and type of paint sprayer no later than December 11, 1998. (Exhibits 12 through 17 and testimony of Mr. Worden.) During the CSC hearing on June 29, 2005, the Appellant testified that John Brizida had given him permission to take the paint sprayer home. The Appellant further testified that Mr. Brizida finally admitted to allowing the Appellant to take the paint sprayer home. Mr. Worden testified during the hearing that the Appellant said that Mr. Thatcher gave him permission to take it home but that Mr. Brizida never said that the Appellant could take the paint sprayer home. Mr. Brizida testified that he never told the Appellant he could take the paint sprayer home and further testified that no Police officer had ever questioned him about the incident. (Testimony of the Appellant, Mr. Worden and, Mr. Brizida)

- e.) On September 17, 1999 the Appellant was docked one day's pay for not calling and not showing up at work. (Exhibit 18 and testimony of Mr. Worden.)
- f.) On September 20, 1999, the Appellant received a written warning for verbal harassment of a supervisor, Joseph Perry, regarding job assignments. After a hearing, Commissioner Worden found just cause to suspend the Appellant for three days for verbal harassment of a

supervisor on a number of occasions and the Appellant was required to serve the suspension on three consecutive Wednesdays beginning October 20, 1999, October 27, 1999 and November 3, 1999. (Exhibits 19 through 25 and testimony of Mr. Worden.)

- g.) On October 25, 1999 the Appellant received a written warning for abuse of sick leave, having used 16³/₄ days since January 1, 1999. For the following sixty days, the Appellant was required to provide medical certification for all future sick leave as a condition of payment. (Exhibits 26 and 27 and testimony of Mr. Worden.)
- h.) On April 17, 2000 the Appellant was docked for the holiday for being out sick with no doctor's note. (Exhibit 28 and testimony of Mr. Worden.)
- i.) On June 21, 2001 the Appellant received a written warning for insubordination, misconduct and leaving work without permission after using profane language and leaving the work area without permission. Specifically, the Appellant told the Superintendent to "Go fuck [him]self" after the Superintendent gave him a work assignment. He was docked for the day and after a hearing, Commissioner Worden found just cause to suspend the Appellant for five days. On November 13, 2001, the parties settled the matter by reducing the five-day suspension to a three-day suspension. (Exhibits 29, 35, 37 and 38 and testimony of Mr. Worden.)
- j.) On June 30, 2003, the Appellant was transferred from the D.P.W.

Highway Department to Department of Public Facilities due to a consolidation of City departments. (Exhibit 39 and testimony of Mr. Worden.)

- 4.) The DPF was advised that, no later than December 31, 2004, the Emergency Medical Services (hereinafter “EMS”) Department needed to vacate privately owned space that the City had been leasing. (Testimony of Mr. Worden.)
- 5.) The DPF was charged with preparing facilities to accommodate the EMS Department at Fire Station 6. (Id.)
- 6.) The Appellant and a fellow Carpenter, Robert Carreiro, were assigned to the task of constructing the EMS facilities at Fire Station 6. (Testimony of John Brizida.)
- 7.) Prior to December 6, 2004, John Brizida, Clerk of the Works for the Department of Public Facilities visited Station 6 to check the progress of the ongoing work. He found that the work had not progressed to a level necessary to meet the December 31, 2004 deadline. Mr. Brizida found the Appellant and Mr. Carreiro in the Fire Station playing foosball and instructed them to get back to work. (Id.)
- 8.) At that time, fellow Carpenters Camilo Carvalho and Frank Michalski were finishing a job at another public building. (Id.)
- 9.) Mr. Brizida instructed Mr. Carvalho and Mr. Michalski that, upon the completion of their work, they were to report to Station 6 to assist the Appellant and Mr. Carreiro. (Testimony of Mr. Brizida, Mr. Carvalho and

Mr. Michalski.)

- 10.) Mr. Carvalho and Mr. Michalski completed their work and on the morning of December 12, 2004 they reported to work at Station 6, pursuant to the instructions of Mr. Brizida. (Id.)
- 11.) When the Appellant entered Station 6 he began complaining to Mr. Carvalho and Mr. Michalski that they all weren't needed because there was not enough work for all of them to do. (Exhibit 40 and Testimony of Mr. Carvalho.)
- 12.) Mr. Carvalho told the Appellant that he and Mr. Michalski had been sent to help them and if he had a problem he should speak with the boss. (Testimony of Mr. Carvalho.)
- 13.) The Appellant left Station 6 with Mr. Carreiro and went back to the DPF office. (Exhibit 40 and Testimony of Mr. Brizida.)
- 14.) The Appellant, in an agitated state, confronted Mr. Brizida and proceeded to tell Mr. Brizida that he was close to punching Mr. Carvalho in the face. The Appellant further stated that there was not enough work at the station for the additional men and wanted to know what Mr. Brizida was going to do about it. (Exhibit 40 and Testimony of Mr. Brizida.)
- 15.) Mr. Brizida told the Appellant that there was enough work to be done and instructed the Appellant to go pick up additional sheetrock at Beacon Lumber and that he would meet the Appellant at Station 6. (Exhibits 40, 41, 45 and Testimony of Mr. Brizida.)
- 16.) Mr. Brizida then proceeded to Station 6. (Exhibits 40, 41, 45, 47 and

Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)

- 17.) Upon returning from Beacon Lumber, the Appellant entered Station 6.
(Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski and the Appellant.)
- 18.) Mr. Carreiro stayed outside in the truck. (Exhibit 49 and testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski and the Appellant.)
- 19.) The Appellant came towards Mr. Brizida still complaining to Mr. Brizida about Mr. Carvalho and Mr. Michalski working at Station 6. (Testimony of Mr. Brizida.)
- 20.) Mr. Brizida was standing near a ladder, upon which Mr. Carvalho was standing, while securing the top of a piece of sheetrock to a wall stud. (Exhibits 40 and 48 and Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)
- 21.) The Appellant approached Mr. Brizida using profane language and demanding to know what Mr. Brizida was going to do about Mr. Carvalho's and Mr. Michalski's assignments. (Exhibits 40, 41, 48 and Testimony of Mr. Brizida and Mr. Carvalho.)
- 22.) The Appellant spoke only to Mr. Brizida and no words were exchanged between the Appellant and Mr. Carvalho. (Testimony of Mr. Brizida and Mr. Carvalho.)
- 23.) As the Appellant got closer to Mr. Brizida, he placed his hands on the ladder upon which Mr. Carvalho was standing, and shoved it. (Exhibits 40, 41, 48 and Testimony of Mr. Brizida, Mr. Carvalho and Mr.

Michalski.)

- 24.) At the time the Appellant pushed the ladder upon which Mr. Carvalho was standing, Mr. Carvalho had one hand holding the screw gun and the other holding the sheetrock. (Exhibit 40 and Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)
- 25.) Mr. Carvalho fell off the ladder, still holding the screw gun, and the sheet rock dropped to the ground. (Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)
- 26.) Mr. Carvalho hurt his hand as he attempted to hold on to the metal stud as the Appellant pushed the ladder away. (Exhibits 42, 44 and Testimony of Mr. Brizida and Mr. Carvalho.)
- 27.) As Mr. Carvalho fell from the ladder, Mr. Brizida put one hand out to catch the ladder and put the other hand on Mr. Carvalho's back so Mr. Carvalho would not fall back on the fire truck. (Exhibit 48 and Testimony of Mr. Brizida and Mr. Michalski.)
- 28.) Immediately after Mr. Carvalho's feet hit the ground, and before Mr. Carvalho was able to regain his balance, the Appellant began swinging at Mr. Carvalho and punched Mr. Carvalho twice in the face. (Exhibits 40, 41, 44, 47, 48 and Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)
- 29.) Mr. Carvalho did not have the opportunity to protect himself from being hit in the face. (Exhibits 41, 48 and Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)

- 30.) Mr. Brizida stepped between the Appellant and Mr. Carvalho and then Mr. Brizida told the Appellant to go home. (Exhibits 40, 41, 47, 48 and Testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski.)
- 31.) Mr. Carvalho never hit the Appellant back (Id.)
- 32.) Mr. Carvalho was advised to go to the doctor's to be checked and was also advised to file an incident report with the New Bedford Police Department, which he did. (Exhibit 42 and Testimony of Mr. Carvalho.)
- 33.) The Appellant was suspended pending a hearing. (Exhibits 43, 46 and Testimony of Mr. Worden.)
- 34.) In a letter dated December 10, 2004, Commissioner Worden notified the Appellant that, based on the testimony presented at the hearing, he found there was just cause to suspend and terminate the Appellant for knocking a fellow employee off a ladder then proceeding to assault him. (Exhibit 50 and testimony of Mr. Worden.)
- 35.) During the CSC hearing on June 29, 2005 Mr. Carvalho, Mr. Brizida and Mr. Michalski each testified that they saw the Appellant place his hands on the ladder, upon which Mr. Carvalho was standing, shove the ladder aside then punch Mr. Carvalho in the face more than once as he fell off the ladder. However, the Appellant would like the Commission to believe that he mistakenly bumped into the ladder. Mr. Carvalho then jumped down, ran under the ladder screaming at the Appellant and hit him with the screw gun. According to the Appellant, Mr. Carvalho then took a swing at the Appellant, missed the Appellant, hit himself in the face with

the screw gun and fell backwards, and it was not until then that the Appellant took a swing at Mr. Carvalho. I find that the testimony by Mr. Carvalho, Mr. Brizida and Mr. Michalski was credible on these points. Each man offered testimony that was consistent with one another's. Each man was confident and unhesitant in giving answers while under examination and, each man provided clear and detailed recollections of the incident in question. The Appellant, in contrast, simply did not provide credible testimony on this matter. He was unclear on details and appeared to attempt to manufacture explanations to show his behavior that day in a better light. (Testimony of Mr. Carvalho, Mr. Brizida, Mr. Michalski and, the Appellant.)

- 36.) Also contrary to the testimony of Mr. Carvalho, Mr. Brizida and Mr. Michalski, the Appellant testified that Mr. Michalski was on the other side of the wall with another City employee when the incident occurred and could not have seen a thing. When questioned on cross-examination, the Appellant admitted that he made no effort to call as a witness to corroborate his story the City employee who was allegedly with Mr. Michalski on the other side of the wall at the time of the incident. (Id.)
- 37.) Although it was Mr. Carvalho who was injured in the melee, with a swollen face from being punched by the Appellant and a sore hand from trying to grab the metal stud as the Appellant shoved the ladder from under his feet, the Appellant testified that if he hadn't put his hand up during the altercation, he (the Appellant) would have had stitches in his

face. The Appellant's testimony was again contrary to oral testimony and documented evidence in that the Appellant did not even see a doctor until December 7, 2004, after the Appellant filed an accident report. Furthermore, the documentation submitted by the Appellant in Exhibit 56 indicates that the Appellant presented only a small abrasion on his arm, which required no stitches. (Testimony of the Appellant and Mr. Brizida.)

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). 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); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The appellate courts have provided guidance for determining when an action of an Appointing Authority is not reasonably justified and therefore, should be reversed or modified by the Commission:

In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions . . . 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. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.

Town of Falmouth, 61 Mass. App. Ct. at 800, quoting City of Cambridge, 43 Mass. App. Ct. at 304.

In the present case, the Appointing Authority has shown, by a preponderance of the evidence, just cause for termination. The credible testimony of Mr. Brizida, Mr. Carvalho and Mr. Michalski depicts the Appellant as the aggressor who, without any justification, pushed Mr. Carvalho off the ladder and proceeded to punch him in the face. The Appellant had threatened to punch Mr. Carvalho in the face during his encounter with Mr. Brizida earlier in the morning of December 6, 2004 at the DPF offices.

The record indicates that Mr. Carvalho did nothing more than report to work at Station 6, pursuant to the instructions of his supervisor, and at no time did Mr. Carvalho threaten or antagonize the Appellant to provoke the assault to which he was subjected in the workplace at the hands of the Appellant.

Although the Appellant would like the Commission to believe that he hit the ladder by

mistake and hit Mr. Carvalho in the face in self-defense, the Appellant's argument is contrary to witness accounts and is not credible. Furthermore, the Appellant has a past and current record of insubordination, using abusive and profane language and fighting with co-workers in the workplace, which is clearly documented.

The record further indicates that the Appellant had previously been provided a number of chances to improve his behavior in the workplace.

The Appellant's conduct on December 6, 2004 violated the City of New Bedford's policy against Workplace and Domestic Violence (Exhibit 55). The Appellant's behavior on December 6, 2004 was reckless and unsafe and could have caused serious injury to Mr. Carvalho. The Appellant's behavior on December 6, 2004 is unacceptable behavior for the workplace and in and of itself supports his discharge. The Commission has previously upheld the termination of employees who have similarly assaulted coworkers in the workplace. See Curtis Lopes v. City of New Bedford, 12 MCSR 238, (1999).

Based upon the December 6, 2004 incident, coupled with his prior record for past similar conduct, the Commission concludes that the Appointing Authority had just cause to terminate the Appellant and did so in accordance with the applicable provisions of M.G.L. c. 31.

For all of the reasons contained herein, the Commission determines that there is just cause for the termination of the Appellant from the employ of the City. Therefore, the

Appellant's appeal on Docket No. D-05-17 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Taylor, Guerin Marquis and Bowman, Commissioners) on January 25, 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 to:
Wayne Soini, Esq.
Jane Medeiros Friedman, Esq.