

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

RUTH AUBERTINE,
Appellant,

v.

D1-13-134

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

Appearance for Appellant:

Philip Brown, Esq.
AFSCME Council 93
8 Beacon Street, 7th Floor
Boston, MA 02108

Appearance for Respondent:

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

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Ruth Aubertine (Ms. Aubertine), filed a timely appeal with the Civil Service Commission (Commission) on May 30, 2013, contesting the decision of the New Bedford School Department (NBSD) to suspend her for two days without pay from her position as Principal Clerk at the Normandin Middle School. A pre-hearing conference was held at University of Massachusetts Dartmouth School of Law on June 28, 2013. A full hearing was later held at the same location on August 23, 2013. Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the

parties were provided with a CD of the hearing. The parties submitted post-hearing briefs on September 20, 2013.

FINDINGS OF FACT

Based on Exhibits AA1 through AA13, and A1 through A7, the stipulations of the parties, the testimony of:

Called by NBSD:

- Sandra Damasio, Office Clerk, Normandin Middle School, NBSD, NBSD;
- Luz Fleming, Office Clerk, Normandin Middle School, NBSD;
- Steve Leonardo, Facilities Manager, Normandin Middle School, NBSD;
- William Burkehead, Principal, Normandin Middle School, NBSD;

Called by Ms. Aubertine:

- Ruth Aubertine, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Ms. Aubertine first began employment with the NBSD on September 2, 1980 as a Curriculum Aide. She worked as an Intermittent Clerk Typist for NBSD from November 29, 1982 through January 15, 1985. In February of 1985, Ms. Aubertine was appointed Permanent Clerk Typist for NBSD. On November 5, 1990, she was appointed Acting Principal Clerk at Roosevelt Middle School. She was promoted to Permanent Principal Clerk at Roosevelt April 9, 1991 where she remained until October 27, 2003, when she transferred to her current position as Permanent Principal Clerk at the Normandin Middle School.

(Exhibit AA1)

2. The Normandin Middle School, where Ms. Aubertine is currently employed, serves students in Grade 6 through Grade 8. There are approximately 1,100 students at the school and approximately 150 staff members. (Testimony of William Burkhead)
3. As a clerk in the front office at the Normandin Middle School, Ms. Aubertine is often the first point of contact that students, parents, teachers, and visitors have with the school staff and helps to shape first impressions of the school environment. (Testimony of William Burkhead)
4. Throughout the work day, Principal Burkhead relies on Ms. Aubertine for assistance in preparing paperwork as well as interacting with other school staff and parents. In addition, Ms. Aubertine works closely with the other clerks at Normandin Middle School. (Testimony of William Burkhead)
5. In September 2002, the Principal of Roosevelt Middle School, where Ms. Aubertine worked just prior to Normandin Middle School, issued a written warning to Ms. Aubertine for substandard work and insubordination after a parent and student reported that she had treated them “freshly and poorly” while the child was registering as a new student. (Exhibit AA2)
6. A January 2011 performance evaluation completed by Normandin Assistant Principal Michael Pacheco, noted that Ms. Aubertine “gets frustrated and overwhelmed with requests and interruptions and becomes short and curt” with others. The Assistant Principal also noted her behavior sometimes interferes with her working relationships. (Exhibit AA3)
7. A second performance evaluation completed by Normandin Assistant Principal Louise Murphy counseled Ms. Aubertine for being “assertive or insistent” toward others when there are multiple demands on her time and attention. (Exhibit AA4)

8. Principal conducted Ms. Aubertine's performance evaluation in March of 2012. She received an "Unsatisfactory" rating in the category of "Cooperation" for "occasions when Ms. Aubertine has had conflicts with other employees which have led to disciplinary meetings. Principal Burkhead urged Ms. Aubertine to work with her colleagues in a "professional manner." (Exhibit AA5)
9. In October 2012, Sandra Damasio, a clerk at Normandin who works closely with Ms. Aubertine, decided to submit a formal written complaint after she became extremely upset when Ms. Aubertine spoke to her in a condescending manner. The tone and tenor of Ms. Aubertine's comments bothered her that day and throughout the night after she went home, prompting her to file the complaint. Ms. Damasio has not had any negative interactions with Ms. Aubertine since. (Testimony of Ms. Damasio)
10. In response to the complaint from Ms. Damasio, Principal Burkhead met privately with Ms. Aubertine to discuss her interactions with colleagues and office professionalism (Exhibit AA6) After this meeting, Principal Burkhead warned Ms. Aubertine in writing that willful disrespect toward coworkers would not be tolerated. Mr. Burkhead outlined his expectations for Ms. Aubertine's behavior in the office going forward. Ms. Aubertine was warned to refrain from using an offensive tone in her communications at work, and avoid any and all confrontations with school employees, students, parents or community members. (Exhibit AA 7, Testimony of William Burkhead)
11. In early April of 2013, Principal Burkhead received a second formal written complaint about Ms. Aubertine from Luz Marie Fleming, a clerk at Normandin who also works closely with Ms. Aubertine in the main office. (Exhibit AA9)

12. Ms. Fleming was upset by a comment Ms. Aubertine made in front of other co-workers about Ms. Fleming's parenting approach. Ms. Aubertine told Ms. Fleming, "It all stems from what happens at home," in reference to the disciplinary problems Ms. Fleming was experiencing with her young child. While Ms. Fleming has had other negative interactions with Ms. Aubertine, this most recent interactions upset her enough to go home and discuss the matter with her fiancé, thus prompting the decision to file a formal complaint. (Testimony of Luz Marie Fleming)
13. Several days later, the school's maintenance engineer, Steve Leonardo, complained to Principal Burkhead about an interaction he had with Ms. Aubertine over the walkie-talkie. (Testimony of Mr. Burkhead)¹
14. Mr. Leonardo was unclogging a toilet in one of the student restrooms when Ms. Aubertine called him over the walkie talkie and ordered him to fix the air vent that was blowing cold air on her desk. Even though Mr. Leonardo indicated he would be there as soon as he could, Ms. Aubertine called again just a few minutes later because he had not immediately responded to her demand. (Testimony of Mr. Leonardo)
15. Mr. Leonardo reported to Principal Burkhead that Ms. Aubertine had been rude and disrespectful in her communications with him over the walkie-talkie, which could be heard by everyone else in the building with a walkie-talkie. (Testimony of Mr. Burkhead)
16. After the incidents involving Ms. Fleming and Mr. Leonardo occurred, Principal Burkhead conducted a hearing on Friday, May 3, 2013. Upon considering the evidence, Mr. Burkhead

¹ Mr. Leonardo testified that he never complained to Principal Burkhead about his interaction with Ms. Aubertine. His testimony was not credible. It is obvious that he subsequently regretted making the complaint against his longtime co-worker. His discomfort in offering any testimony against Ms. Aubertine was palpable. That notwithstanding, his decision to give less than candid sworn testimony is unfortunate .

found just cause to suspend Ms. Aubertine for 2 days without pay for the reasons cited in his decision letter dated May 9, 2013. (Testimony of William Burkhead, Exhibit AA12)

17. Ms. Aubertine then appealed his decision to the Interim Superintendent of the School District Michael Shea. (Exhibit AA13)

18. After hearing the evidence and circumstances, Mr. Shea upheld the 2-day suspension and invited the services of a counselor to help improve communication amongst the team in the main office. (Exhibit AA13)

LEGAL STANDARD

G.L. c. 31, § 43, 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.”

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 v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102,

(1997); 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 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).

ANALYSIS

While many of the facts in this matter are not in dispute, this decision also requires credibility assessment of the witnesses. Ms. Damasio and Ms. Fleming were good witnesses and I credit the entirety of their testimony. They did not enjoy testifying against their co-worker in this proceeding, but they took their sworn testimony seriously, providing an accurate account of their interactions with Ms. Aubertine, without trying to paint her in a positive or negative light. They both acknowledged Ms. Aubertine's credentials and candidly acknowledged that they have not experienced any further negative interactions with Ms. Aubertine. It is clear from their testimony, however, that they were bothered by the tone and tenor of Ms. Aubertine's comments, to the point that they felt the need to discuss the incident with their significant others.

Principal Burkhead was also a good witness. It was clear that he harbors no personal animus against Ms. Aubertine and highly values her strong work ethic. Based on my own personal observations, it is clear that they continue to maintain a good working relationship. Mr.

Burkhead feels compelled, however, to ensure that all staff are treated in a professional and respectful manner.

By all accounts, Ms. Aubertine has been a diligent, conscientious employee with the NBSD throughout her 33 year career. Ms. Aubertine does not dispute that she had interactions with these witnesses on the days in question. Rather, she testified that her intent was not to be disrespectful to her co-workers or cause them any stress or anguish. She expressed surprise that the matter had risen to the level of formal discipline. While her testimony is genuine, it is clear that she has not fully absorbed the impact that her words have on others. Several persons have complained to school administrators about their interactions with Ms. Aubertine and she has displayed a pattern of behavior that has been disruptive to her co-workers as well as to the school principal. Four different school administrators have addressed Ms. Aubertine about the need to maintain professionalism and courtesy in her interactions with colleagues, students, and visitors – resulting in counseling, poor evaluations regarding her interaction with other employees and written warning. Her behavior has, at times, created a tense, stressful work environment for the other clerks and school maintenance engineer that caused disruption in a school whose mission is to provide a safe learning environment for its students. For these reasons, Mr. Burkhead had just cause to discipline Ms. Aubertine.

Having determined that it was appropriate to discipline Ms. Aubertine for her behavior, I must determine if Mr. Burkhead was justified in the level of discipline imposed, which, in this case, was a 2-day suspension

“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. Civ. Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civ. Serv.

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." E.g., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

Here, after a de novo hearing in which I reviewed all of the documentary evidence and listened to the testimony of percipient witnesses, I have concluded, similar to Principal Burkhead's conclusions that Ms. Aubertine has engaged in the alleged misconduct. Further, given that Ms. Aubertine has previously been counseled, received poor evaluations and received a written warning, the short-term is consistent with principles of progressive discipline.

Conclusion

For all of the above reasons, Ms. Aubertine's appeal under Docket No. D1-13-134 is hereby **denied** and the decision by the New Bedford School District to suspend Ms. Aubertine for 2-days without pay is upheld.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein) on October 31, 2013.

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)(l), 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:

Philip Brown, Esq. (for Appellant)

Elizabeth Treadup, Esq. (for Respondent)