

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION
ONE ASHBURTON PLACE: ROOM 503
BOSTON, MA 02108
(617) 727-2293**

LIONEL LAND,
Appellant
v.

D-13-103

CITY OF WALTHAM,
Respondent

Appearance for Appellant:

James W. Gilden, Esq.
173 North Main Street
Sharon, MA 02067

Appearance for Respondent:

Luke Stanton, Esq.
Assistant City Solicitor
City of Waltham Law Department
119 School Street
Waltham, MA 02451

Commissioner:

Paul Stein¹

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 42 and 43, the Appellant, Lionel Land appealed on April 10, 2013 to the Civil Service Commission (“Commission”), from the decision of the City of Waltham (“Waltham” or “Respondent”), to suspend him without pay for three (3) days and prohibiting him from working paid details for twelve (12) months from his position of Firefighter with the Waltham Fire Department (“Department”). A pre-hearing conference was held on May 14, 2013 and a full hearing was held on June 21, 2013 at the offices of the Commission. The hearing was digitally recorded and all of the witnesses were sequestered, except for the Appellant. Post-hearing briefs were filed by the Respondent on September 19,

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

2013 and by the Appellant on September 21, 2013. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Eight (8) exhibits were entered into evidence at the hearing. Two (2) additional exhibits were admitted as excerpts of Exhibit 6 labeled as 6-A and 6-B. Exhibit 2 is a series of photos labeled Exhibits 2A-2F. Based on these exhibits and the testimony of the following witnesses:

For the Respondent:

- Clifford Richardson, Waltham Deputy Fire Chief
- Paul Ciccone, Waltham Fire Chief

For the Appellant:

- Robert Marshall, Retired Waltham Firefighter and Union President
- Lionel Land, Appellant

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

1. The Appellant, Lionel. Land, is a tenured civil service employee in the position of Firefighter (F/F) for the Department since 1988. He has no prior discipline and has an Associate Degree in Fire Science from Bunker Hill Community College. (*Testimony of Land*)
2. On March 18, 2013, F/F Land was working a paid fire detail at a commercial building in Waltham. F/F Land's assignment was to oversee the area of the North Lobby on the second floor where welding was being done. The lobby was in the process of being renovated. F/F Land had begun by entering several rooms in the building looking for a fire extinguisher as he was required to have one on site. Once F/F Land found a fire

extinguisher, he began his work detail overseeing the welding scheduled from 6 p.m. to 2 a.m. (*Testimony of Land; Exhibit 3*)

3. F/F Land would have to occasionally walk down to the first floor directly underneath the lobby to check for any exposure from the welding hot work. His firewatch detail specifically limited his check of the first floor to the area underneath the welding project only. (*Exhibit 5*)
4. Later that evening, around 8:30 p.m., when the workers took a lunch break, F/F Land entered an unlocked door to a kitchen area on the first floor of the building. The area was supposed to be part of a secure office area comprised of a private equity firm. The counter next to the refrigerator had fruit and other various items on it. (*Testimony of Land; Exhibit 5; Exhibit 2D*)
5. F/F Land opened the refrigerator and helped himself to the food inside to make a sandwich. As F/F Land was eating the sandwich, a man entered the area from a different door from the one F/F Land had used. He asked F/F Land if everything was alright, F/F Land responded, and the individual left. (*Testimony of Land; Exhibit 1; Exhibit 3*)
6. On the morning of March, 19, 2013, the Department received an e-mail complaint forwarded by the management company for the detail location worked the previous evening by F/F Land. The e-mail detailed an associate who worked for the private equity firm found an individual in the kitchen making a sandwich. There was particular concern over security as the firm holds a large amount of confidential information. (*Exhibit 1*)
7. Fire Chief Ciccone requested that Deputy Fire Chief Richardson go to the premises to investigate the incident. Deputy Richardson interviewed witnesses, took photographs, and wrote a report of his findings for Chief Ciccone. (*Testimony of Richardson*)

8. The pictures show that the area was a professional office space, complete with a name of the business at the entrance, office furniture, a kitchen with chairs and a refrigerator, as well as fruit and other items on the counter suggesting it had been recently used. (*Exhibits 2A-2F*)
9. Deputy Richardson detailed in his report that none of the witnesses knew how F/F Land gained access to the office. It was supposed to be locked and secure. The associate who approached F/F Land in the kitchen stated he heard a noise coming from the kitchen and went to see what was going on. He was surprised to see F/F Land making a sandwich with food from the refrigerator that belonged to the employees of the firm. He did not want to be confrontational and so he returned to his workplace. (*Exhibit 3*)
10. As a result of this report, Chief Ciccone called F/F Land into his office on March 20, 2013. Chief Ciccone advised F/F Land of his right to have Union Representation, which F/F Land declined, and informed him that he may be disciplined. (*Testimony of Ciccone; Testimony of Land*)
11. F/F Land acknowledged that he had entered the area away from his work detail and consumed the sandwich, expressing his belief that the sandwich material was left in an area that he thought was part of the building that was to be renovated. (*Testimony of Ciccone; Testimony of Land*)
12. On March 28, 2013, Chief Ciccone delivered a letter to F/F Land indicating that he was being disciplined, stating, "I concur with the allegation that you did in fact consume property which did not belong to you without prior consent and also you were in an area of the building where you had no authorization to be, thereby abandoning your assigned area." (*Exhibit 4*)

13. The discipline imposed by Chief Ciccone was: a three (3) day suspension; prohibition from working paid details for twelve (12) months; F/F Land was to write a letter of apology to the private equity firm; and an assignment to undertake an online State Ethics refresher course. (*Exhibit 4*)
14. F/F Land served the suspension on one shift on Thursday, March 28th and two shifts on Monday, April 1st. (*Testimony of Land*)
15. F/F Land recognized that he had used poor judgment but believed the kitchen area was part of the construction area, not denying that he did in fact make and consume the sandwich. (*Testimony of Land*)
16. F/F Land appealed the discipline before a hearing officer of the Waltham Police Department. The hearing was held on April 5, 2013 and the hearing officer issued a decision upholding the discipline. (*Exhibit 5*)
17. F/F Land testified at the hearing on April 5th that he tried numerous doors in the building on the first floor, an area to which he was not assigned, and accessed the kitchen area by trying unlocked door knobs. (*Exhibit 5*)
18. City of Waltham Fire Department Rules and Regulations has a progressive discipline policy. Chapter 8, section 6(a) states in part: “The purpose of progressive discipline is to ensure that members are provided with the necessary assistance and motivation to meet the Department’s expectations in the areas of performance and behavior... [W]here the Department’s expectations are obvious (e.g. members are expected to know that they may not steal...) ... discipline may be imposed for a first violation.” (*Exhibit 6*)

19. The hearing officer found that the Department had just cause for its disciplinary action against F/F Land, and found that F/F Land's substantial misconduct adversely affected the public interest by impairing the efficiency of the public service. (*Exhibit 5*)
20. F/F Land wrote a letter to Chief Ciccone and Deputy Richardson disputing these charges, recognizing that he used poor judgment for making and consuming the sandwich. However, F/F Land felt it was more appropriate for him to receive a verbal reprimand and replace the bread and sandwich meat. (*Exhibit 8*)
21. F/F Land duly filed his appeal on April 10, 2013

DISCUSSION

Applicable Civil Service Law

G.L. c. 31, § 41, provides:

“Except for just cause... a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent... lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority.”

An employee aggrieved by the decision of an Appointing Authority 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) and cases cited. 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, 682, 923, *rev.den.*, 426 Mass. 1102, (1997). *See also* City of 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, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477, (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

Section 43 also vests the commission with authority to affirm, vacate, or modify a penalty imposed by the appointing authority. The Commission is delegated with “considerable discretion” in this regard, albeit “not without bounds,” so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. *E.g.*, Police Comm’r v. Civil Service Com’n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Com’n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification).

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., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *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).

"The commission's task ... 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" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). *See* Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev.den.*, 390 Mass. 1102, (1983) and cases cited.

Analysis

The basic facts of this case are clear with no dispute between the two parties. F/F Land was working a paid fire detail overseeing welding for a renovation project on the second floor of a building. At some point during his shift he left the vicinity where he was assigned to do a detail and entered a private kitchen on the first floor of the same building. In the kitchen, he fixed himself a sandwich using foodstuffs that belonged to neither him nor the Department. F/F Land testified at the hearing that his purpose of going into the kitchen area was that he had received information from others that smoke may have traveled into other rooms in the building and

tenants had complained. I do not find this testimony credible as this was the first time F/F Land ever offered this explanation for his actions. No such information was brought up during Deputy Richardson's investigation, during F/F Land's meeting with Chief Ciccone, or during his hearing with the hearing officer from Waltham Police Department. An investigation determined that the kitchen area was a part of a private equity firm. The pictures of the kitchen and office area indicated it was both a place of work and in recent use. There was no reason to believe it had been abandoned. Once the firm complained of F/F Land's actions, he was appropriately disciplined. Although this was F/F Land's first offense, the Commission has not found a significant difference in the facts as relied upon by Waltham to justify the Commission's ability to exercise its discretion to modify the disciplinary action imposed against F/F Land.

Finally, the Commission has considered F/F Land's claim under G.L. c. 31, § 42 that his civil service rights have been prejudiced by the Department's failure to follow the requirements of civil service law, namely, by imposing discipline for more than five days without conducting a prior hearing as required by G.L. c. 31, § 41. Section 41 requires a prior notice and hearing before an employee may be suspended "for a period of more than five days," Saturdays, Sundays and holidays excluded. Id. This statutory requirement has been construed to mean that a suspension of less than five working days still requires a prior hearing if the suspension is served over a period of more than five calendar days. Thornton v. Civil Service Comm'n, 80 Mass.App.Ct. 441 (2011). Here, F/F Land's three day suspension was served within a five calendar day period as defined by Section 41, so that the rule in Thornton does not require a prior hearing as to the three day suspension.

The question is further complicated, however, by the fact that F/F Land was also restricted from performing any off-duty details for a one year period. Thus, unlike Thornton,

which also involved forfeiture of detail opportunities during the same ten day calendar time frame as his suspension was served, F/F Land's loss of detail opportunities extended beyond the three days of the suspension. If such loss of detail opportunities is covered by Section 41, then the Thornton rule would, indeed, be implicated.

Accordingly, loss of off-duty detail opportunities are not a form of discipline covered by the "just cause" provisions of Section 41. Detail assignments are generally voluntary and often sporadic in nature and do not appear to fit the plain language of Section 41, which requires "just cause" and an opportunity for a hearing and review by the Commission whenever a tenured employee is "discharged, removed, suspended ... laid off, transferred from his position without his written consent ... lowered in rank or compensation without his written consent [or] his position be abolished." G.L. c. 31, § 41. In addition, apart from the legal hurdle, there is a substantial practical question as to how, if at all, the civil service law would enable the Commission to implement a remedy in such a situation. cf. White v. City of Boston and Another, 57 Mass.App.Ct. 356, 357 (2003) ("[T]he amount owed a public employee under G.L. c. 32 § 8, when there is a time gap between entitlement to reinstatement and the resumption of employment, is base compensation and does not include overtime and detail pay factors.") (*see also* G.L. c. 32, § 8).

CONCLUSION

Based on the facts and the law and rules herein, the Appellant's appeal under Docket No. D1-13-103 is hereby ***denied***.

Civil Service Commission

Paul M. Stein, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on June 26, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:

James W. Gildea, Esq. (For Appellant)

Luke Stanton, Esq. (For Respondent)