COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
(617) 727-2293

JOAO SILVA,
Appellant

v.

Case No. D1-14-19

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Richard E. Burke, Esq.
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P.O. Box 952
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Appearance for Respondent:

Jane Medeiros Friedman, Esq.
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133 William Street
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Commissioner:

Paul M. Stein.[1]

DECISION

On January 22, 2014, Joao Silva ("Appellant"), pursuant to G.L.c. 31, §§ 41-43, filed an appeal to the Civil Service Commission ("Commission") from a decision of the city of New Bedford ("New Bedford"), discharging him from his employment as a Motor Equipment Operator ("MEO") for the New Bedford Cemeteries Division. A full hearing was held at UMass School of Law in North Dartmouth, on April 11, 2014. The hearing

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

was declared private and the witnesses were sequestered. The hearing was digitally recorded and copies were sent to the parties. Both parties submitted proposed decisions to the Commission.

FINDINGS OF FACT

Nineteen (19) exhibits were entered into evidence at the hearing. Based upon these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Ronald Labelle, Commissioner
- Bill Days, Supervisor

Called by the Appellant:

- Shaun Braz, SMEO
- Jack Silva, MEO
- John Sousa, MEO
- Appellant Joao Silva, MEO

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

Prior to the incident leading up to termination:

1. The Appellant was employed by New Bedford as an MEO since November 10, 2003. He was a permanent, tenured civil service employee at the time of his termination. (*Exh. 1; Testimony of Appellant*)

2. Prior to being terminated, the Appellant was promoted to the position of Special Motor Equipment Operator ("SMEO") on December 1, 2008. Thereafter, he was demoted back to the position of MEO on June 4, 2012, after he was involved in a work-related automobile accident. (*Exh. 1; Testimony of Appellant and Labelle*)

3. The Appellant's demotion was for damage to public and private property in multiple accidents. In addition to being demoted, he was suspended for two (2) days. (*Exhs. 8b2-5 and 8b9*)

4. When Ronald Labelle, Commissioner of Public Works, demoted the Appellant to the position of MEO, he assigned the Appellant to the New Bedford Cemeteries Division, where he was assigned to report to the Rural Cemetery. The Appellant's direct supervisor was Bill Days. (*Testimony of Labelle, Days and Appellant*)

5. During the Appellant's time with the New Bedford Cemeteries Division, in his current position as MEO, he received a written warning for calling in sick after his shift started. (*Exh. 10; Testimony of Labelle*)

6. The Appellant received five (5) written warnings before this current incident, of which, four (4) were for the operation of a motor vehicle resulting in an accident, two (2) during the time he was first hired as an MEO and the other two (2) when he was an SMEO. The last written warning is cited in paragraph 5 when he called in sick. (*Exhs. 2b, 4b, 7, 8b1, and 10; Testimony of Labelle and Days*)

7. During the Appellant's time with the New Bedford Cemeteries Division, he was coached several times after some of the equipment the Appellant used was damaged or was no longer operable. (*Exh. 11c; Testimony of Labelle and Days*)

8. When the equipment is used on a daily basis and based upon the condition of the ground, i.e., the grass is overgrown or there are leaves covering the ground, it is reasonable that some equipment will be damaged from hidden stones or holes. (*Testimony of Braz, Sousa, J. Silva and Appellant*)

9. Prior to the Appellant's termination, his performance reviews showed that his job performance was satisfactory. (*Exh. 16a,16b,16c, 16d,16e,16f, 16g, 16h, 16i, 16j, 16k, 16l and 16m*)

10. The Appellant's performance reviews state the following:[2]

a. Performance review June 11, 2013, dependability: "He shows up for work on time every day." (*Exh. 16a*)

b. Performance review June 9, 2009, dependability: "Has *good attendance* and is able to work without supervision." (*Exh.16 f*) (*emphasis added*)

c. Performance review November 16, 2005, dependability: "Has a *good attendance record* and can usually be reached after hours." (*Exh. 16i*) (*emphasis added*)

d. Performance review May 7, 2004, dependability: "Has always been available to help out when needed." "[Appellant] has been a very dependable employee." (*Exh. 16k*)

e. Performance review March 4, 2004, dependability: "Have been able to count on him during regular and off hours." "He is well disciplined and has a good attitude." (*Exh. 16m*)

11. At the time the Appellant was terminated, he had accrued balances as follows: 100 hours of vacation leave, 644 hours of sick leave, 40 hours of personal leave, and 8 hours of comp leave. (*Exh. b*)

[2] These performance reviews were the only reviews with written comments relating to the Appellant's dependability. The other performance reviews only denote checkmarks.

12. The Appellant was not known to be an individual who would be disrespectful by using derogatory language and he was considered a good worker. (*Testimony of Labelle, Days, Braz, J. Silva, and Sousa*)

13. The Appellant knew, as an employee of the New Bedford Cemetery Division, that employees were entitled to take two (2) ten (10) -minute breaks and one (1) forty-five (45) minute meal period. (*Exh 18, Testimony of Labelle, Days, Appellant, Braz*)

14. Although employee breaks at the New Bedford Cemetery Division are limited to ten (10) -minutes, they may last a bit longer than ten (10) -minutes. (*Testimony of Labelle*)

15. Cemetery employees at the Rural Cemetery usually take their breaks together and at the same time and location at 9:30 a.m. (*Testimony of Labelle, Appellant, Days, J. Silva, Braz, and Sousa*)

16. When the weather is cold outside, it is reasonable for the employees working outside to escape the elements and find a warm location to take their break. (*Testimony of Labelle*)

The incident that resulted in termination:

17. On January 9, 2014, the Appellant reported to the Rural Cemetery where he was assigned to be that morning to lay foundations. (*Testimony of Appellant and Days*)

18. When the Appellant reported to the Rural Cemetery, fellow employee by the name of Shaun Braz informed the Appellant that he could not work on the foundation, as initially planned, because there was no sand to make cement. (*Testimony of Days and Appellant*)

19. Thereafter, the Appellant called Mr. Days. Mr. Days told the Appellant that he was to report to the Shawmut Avenue Department of Public Infrastructure ("DPI yard"). (*Testimony of Days and Appellant*)

20. The Appellant's coworkers were also assigned to work at the DPI yard that morning, but they did not work near the Appellant. The Appellant's coworkers were working together in an area where they could not see the Appellant. (*Testimony of Appellant, Braz, J. Silva, and Sousa*)

21. When the Appellant reported to the DPI yard around 9:25 a.m., he went to the mechanics shop to get gas for the "weed-whacker." While he was there, the Appellant talked to the DPI yard employees and learned that they take their break at 10:00 a.m. (*Testimony of Appellant*)

22. The Appellant learned of the DPI employees' break time when he made arrangements with an employee named Ritchie to get the Appellant a cup of tea[3] for his break. (*Testimony of Appellant*)

23. At 9:30 a.m., the Appellant's coworkers, who were all working together, took their normally assigned break that they would have taken at the Rural Cemetery. They stopped working and sat in their heated trucks. (*Testimony of Braz, J. Silva, and Sousa*)

24. At 9:30 a.m., Appellant went to the northern part of the DPI yard to start working. The temperature on January 9, 2014, from 9:53 a.m. to 11:53 a.m., ranged from 25°F to 27°F, with a windchill ranging from 16.3°F to 18.7°F, along with a slight drizzle. (*Exh. 14, testimony of Appellant*)

[3] The record refers to the Appellants beverage as both tea and coffee. I concluded that the beverage was actually tea and will refer to his beverage as such.

25. Shortly after the Appellant started to work, he decided to take his ten (10) -minute break around 10:00 a.m. like the employees did at the DPI yard. (*Testimony of Appellant*)

26. Prior to going to the break room, which was a reasonably warm location to take his break, the Appellant took his tools with him (the "weed-whacker" and gas can) and placed them in the mechanics shop; it is not an acceptable practice to take tools where employees eat. (*Testimony of Labelle and Appellant*). The Appellant removed his jumpsuit prior to leaving for the break room because he knew that he would be hot in his jumpsuit. The Appellant knew this because he has been in the break room on previous occasions. (*Testimony of Appellant*)

27. Thereafter, the Appellant went to the break room. While there, the Appellant got his cup of tea and sat among the other workers taking their break including one of the foremen. (*Testimony of Appellant*)

28. When the Appellant's break was over, around 10:10 a.m., he returned to the mechanics shop to gather his tools and to put his jumpsuit on. (*Testimony of Appellant*)

29. When Mr. Days arrived at the DPI yard sometime after 9:40 a.m., he was unable to locate the Appellant. Mr. Days then parked his truck and went to look for the Appellant. Mr. Days first walked the slope line on the northern side and walked halfway behind the dump trucks and could not find him. Thereafter, Mr. Days drove and looked around the western area near the dumpsters and could not find the Appellant. Mr. Days then proceeded to the area where the Appellant's coworkers were working and asked them if they had seen the Appellant, which they said they had not. Thereafter, Mr. Days went to the break room and did not see the Appellant. Mr. Days then proceeded to the

mechanics shop and found the Appellant standing there among fifty-five (55) gallon drums at approximately 10:25 a.m. (*Testimony of Days*)

30. When Mr. Days observed the Appellant, he was in the process of putting on his jumpsuit, he had a cup of hot tea, and he was there to gather his tools before he returned back to work. (*Testimony of Appellant*)

31. Mr. Days left the mechanics shop before the Appellant finished putting on his jumpsuit and gathering his tools. Thereafter, the Appellant went back to work and finished the rest of his shift. (*Testimony of Appellant*)

After the incident

32. Mr. Days gave a written notice to the Appellant stating that, "Employee was found hiding in the garage drinking [tea]. I search [sic] the yard for him for *10 minutes* than [sic] decided to check garage and there he was and it was not break time." (*Exh. 11a; testimony of Days*) (*emphasis added*)

33. Thereafter, in a letter dated January 10, 2014, the Appellant was notified that he was being considered for termination for:

> "Consistent Disciplinary history, *leaving his work area and assignment without permission and hiding from supervisor to avoid his work assignment*."

(*Exh. 11b*) (*emphasis added*)

34. After a hearing on January 16, 2014, a letter was sent to the Appellant that notified him that he was terminated, effective January 16, 2014. The reasons for his termination were:

> "Your consistent disciplinary history including absenteeism, carelessness, a 2 day suspension, a demotion *and leaving your work area and assignment without*

> *permission and hiding from your supervisor to avoid your work assignment*."

(Exh. 11c) (emphasis added)

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 this appeal, the City of New Bedford has not shown, by a preponderance of the evidence, that the Appellant engaged in misconduct on January 9, 2014. Specifically, on January 9, 2014, the Appellant did not leave his work area without permission, and he did not hide from his supervisor to avoid his work assignment, the reasons put forth by New Bedford to justify the termination.

On January 9, 2014, the Appellant went to work at the Rural Cemetery, which was the cemetery he was assigned to. Once the Appellant arrived at the Rural Cemetery,

his job assignment that morning was to work on foundations. The Appellant was informed, after his arrival, that there was no sand to make the cement so he could not make the foundation. Thereafter, he called his supervisor, Mr. Days, who told him to report to the Shawmut Avenue DPI yard. The Appellant brought with him some equipment to the DPI yard including a "weed-whacker" and gas can.

When the Appellant reported to the DPI yard around 9:25 a.m., he was told that he would be weed whacking on the northern side of the yard along the slope line. Before going to the northern side, the Appellant went to the mechanics room to get gas for the "weed whacker." While he was there, he talked with the employees who worked at the DPI yard. The employees informed the Appellant that they take their breaks at 10:00 a.m., which is not the time the Appellant would have taken his break at the Rural Cemetery. Before the Appellant left the mechanics shop, he made arrangements for a DPI yard employee named Ritchie to get him a cup of tea for his break at 10:00 a.m. Thereafter, the Appellant left the machine shop and went to the northern side to start his work.

At 9:30 a.m., the Appellant's coworkers took their breaks in heated work trucks without the Appellant. The Appellant's coworkers could not see the Appellant from where they were working.

At or around 10:00 a.m., the Appellant proceeded to take his break. Since it was cold out, the Appellant gathered his equipment and took it with him so he could go to the break room. Before the Appellant went to the break room, he took his equipment to the mechanics shop because he did not want to take it where employees eat. Knowing how

hot it would be in the break room because the Appellant has been there before, he removed his jumpsuit prior to leaving the mechanics shop.

When the Appellant entered the break room he was not the only employee taking his break. During this time, the Appellant received his cup of tea from the DPI yard employee and sat among the other employees, including a foreman. At or around 10:10 a.m., the Appellant got up and left the break room and returned to the mechanics room with his cup of tea.

When the Appellant was in the process of putting his jumpsuit back on, Mr. Days entered the mechanics room and found the Appellant standing there among the fifty-five (55) gallon drums. After a short interaction between the two parties, Mr. Days left without noticing that the Appellant was putting his jumpsuit on or that he had his equipment with him. After the interaction, the Appellant finished the rest of his shift.

Although Mr. Days testified that he searched for the Appellant for thirty-five (35) minutes, I do not find this credible. The written warning that was signed and approved by Mr. Days, specifically states that he searched for the Appellant for ten (10) -minutes. It is not plausible that it would take thirty-five (35) minutes to go from the northern side of the yard, to the western side of the yard to the break room, and then to the mechanics shop.

The Appellant did not leave his work area without permission. The Appellant is entitled to take a ten (10) -minute break, which he took. Although, the Appellant did not take his break during the time he would have at the Rural Cemetery, he took his break during the time that was appropriate for workers at the DPI yard. Going to the break room, as testified by Mr. Labelle, was a warm location that the Appellant should have taken his break when it is cold outside. Although the Appellant was found in the

mechanics room, it would have been a reasonable place to leave his equipment, as it is not reasonable to take equipment where employees eat.

The Appellant did not hide from his supervisor to avoid his work assignment. Mr. Days' testimony does not reflect that the Appellant was hiding. Mr. Days stated that the Appellant was "standing in the corner just inside the door," "just to the left, there are fifty-five (55) gallon drums and he was standing there," and "saw [the Appellant] to the side drinking [tea]." Mr. Days mentioned one time that the Appellant ducked, which I find to be consistent with the Appellant's testimony that he was putting his jumpsuit on. The fact that the Appellant had his cup of tea, which he got from Ritchie, is more evidence to prove that the Appellant left the break room and went to the mechanics room before he would return to his job assignment. Mr. Days could not testify as to whether the Appellant had his equipment with him or whether he had his jumpsuit on or was in the process of putting it on. I find that the Appellant's testimony is credible that he left his equipment and jumpsuit in the mechanics room, giving the Appellant an acceptable reason to be in the mechanics room before going back out into the field.

While the Appellant may have taken a longer break than ten (10) -minutes, that does not prove, by a preponderance of the evidence, that the Appellant left his work area without permission or that he was hiding from his supervisor to avoid his work assignment, the alleged misconduct which resulted in his discipline.

As New Bedford could not prove that the Appellant left his work area without permission or that he was hiding from his supervisor, no discipline was justified. Appellant's prior discipline cannot be used to justify his termination. His disciplinary

history would only be relevant in determining whether termination was the appropriate level of discipline if the instant charges had been proven.

Accordingly, the appeal of the Appellant, Joao Silva, is hereby **allowed**. The Appellant's termination is reversed and he shall be reinstated to his position with the New Bedford Cemeteries Division as a MEO without loss of compensation or other rights forthwith.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on October 16, 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)(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:
Richard E. Burke, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Respondent)