The Commonwealth of Massachusetts

SUFFOLK, ss.

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

ANTHONY FERRY,
Appellant

v.

Case No. D1-08-14

CITY OF FALL RIVER,
Respondent

Attorney for the Appellant:

Gerald E. Johnson, Esq.
Swansea Professional Park
1010 Grand Army Highway
Swansea, MA 02777

Attorney for the Respondent:

James W. Clarkin, Esq.
P.O. Box 267; 84 N. Main Street
Fall River, MA 02722

Hearing Officer:

Angela C. McConney, Esq.

DECISION

Pursuant to G.L. c. 31 §§ 42 and 43, the Appellant Anthony Ferry (hereinafter "Ferry" or the "Appellant") filed an appeal with the Civil Service Commission (hereinafter "Commission") on January 17, 2008 claiming that the City of Fall River (hereinafter the "City" or "Respondent") (1) committed procedural errors during the disciplinary process that prejudiced him, and (2) that the City did not have just cause to terminate him from his employment as a Water Filtration Plant Operator, Grade 3 on January 10, 2008. His appeal to the Commission was timely. A full hearing was held at the offices of the Commission on May 22, 2008, May 23, 2008 and June 6, 2008. As no written

notice was received from either party, the hearing was declared private. Five (5) audiotapes were made of the proceedings. Both parties submitted proposed decisions.

FINDINGS OF FACT

Based upon the documents entered into evidence, Joint Exhibits 1 – 11, Appointing Authority Exhibits 1 and 2, and a list of Stipulated Findings of Fact and the testimony of:

For the Appointing Authority:

- Terrance J. Sullivan, Administrator of Public Utilities
- Theodore J. Kaegael, Jr., Director of Treatment and Resources
- Randy Clarkson, Chief Operator
- Michael Griffin, Plant Operator
- Robert Jones, Plant Operator
- Thomas Medeiros, Plant Operator, and
- George Yentz, Plant Operator

For the Appellant:

- The Appellant, Anthony Ferry (hereinafter the "Appellant" or "Mr. Ferry"), Grade 3 license

I make the following findings of fact:

Background

1. The Appellant is a tenured Civil Service employee who commenced employment with the Respondent on or about February 23, 2004. (Testimony of Appellant, Stipulated Facts)
2. He worked in the City of Fall River's Water Treatment Plant (hereinafter ("Treatment Plant") as a Treatment Plant Operator (DW/Grade 3).

3. Theodore J. Kaegael, Jr., Director of Treatment and Resources (hereinafter "Kaegael"), was the Appellant's supervisor, and in charge of the overall running of the Treatment Plant. He is a Grade 4, the highest certification possible. (Testimony of Appellant)
4. The Treatment Plant treats and distributes water to approximately 90,000 people in the City of Fall River and surrounding communities. (Testimony of Appellant, Testimony of Kaegael)
5. The Appellant was a member of a bargaining unit, AFSCME, AFL-CIO, Council 93. There is a written collective bargaining agreement (hereinafter "CBA") between the Respondent and the union. (Exhibit 5)
6. As a Grade 3 Plant Operator, the Appellant is the most senior person on his shifts. He also had plenty of opportunities to work overtime. (Testimony of Appellant)
7. The Appellant got along with management until he became the union steward in February 2006, when Plant Operator Robert Jones (hereinafter "Jones") stepped down. (Testimony of Appellant)
8. The Appellant was an aggressive steward, engaging in protected union activity. He took notes of activity going on in his unit. He attended all monthly meetings. (Testimony of Appellant, Testimony of Kaegael)
9. While the Appellant was union steward, no grievances were filed in the unit. As problems arose, the Appellant brought them to Kaegael's attention, and they were resolved. (Testimony of Appellant)
10. The Appellant was required to comply with Respondent's Administrative Policies. (Testimony of Appellant)

11. Respondent's Administrative Policy No. 205, "Expected Employee Conduct" imposes "General Work Rules" upon employees, including the Appellant. (Exhibit 7). The General Work Rules include:

> "Dishonesty: The misappropriation or misuse of City money or property, falsification of records or reports or *making false statements* is strictly prohibited. It is the policy of the City of Fall River to establish and maintain the highest standards of professionalism and honesty. All employees have the duty and responsibility to act, work and behave in the most ethical manner possible."(*emphasis added*)
>
> "Peer Relations: Employees are expected to refrain from abusive or obscene language and to act with courtesy and consideration toward other employees at all times."
>
> "Relations with Managers/Supervisors: Employees are expected to refrain from discourtesy, abusive language and insubordination."
>
> Failure to comply with work rules, policies or practices may resort in disciplinary action up to and including termination." (Exhibit 7)

Discipline of the Appellant

10. The Appellant received a verbal warning on February 17, 2006 for berating a coworker after she inadvertently mailed his paycheck to the wrong address. (Exhibit 1)

11. The Appellant disputes whether he did indeed receive a verbal warning. He testified that nothing to that effect was placed in his union file. He also testified that when he met with Kaegael to discuss the matter, he was told that the meeting was not for disciplinary purposes. (Testimony of Appellant)

12. On May 3, 2006, the Appellant was suspended for five (5) days for putting his finger in the face of his supervisor, Kaegael. The Respondent found that such conduct amounted to "insubordination, discourtesy, … abusive language to his supervisor, and abusive and obscene language to a fellow employee." (Exhibit 3 (N))

13. Terrance J. Sullivan, Administrator of Public Utilities (hereinafter "Sullivan"), conducted the investigation that led to the suspension. He spoke only to Kaegael; but he did not speak to the Appellant or any of the other witnesses. (Exhibit 1)
14. On July 18, 2006, the Appellant was terminated for calling his supervisor, Kaegael "a fucking liar." The Respondent stated that such conduct amounted to "… [G]ross insubordination, inability to maintain proper discipline, [H]arassment of employees, [C]onduct unbecoming and counterproductive to order in the workplace, [F]ailure to conduct yourself in a professional manner while in the workplace." (Exhibit 3 (O))
15. Sullivan conducted the investigation that led to the termination. Again, he spoke only to Kaegael; he did not speak to the Appellant or any of the other witnesses. (Exhibit 1)
16. The Appellant appealed both the suspension and termination to arbitration. (Exhibit 1: Commonwealth of Massachusetts Board of Conciliation and Arbitration Case Nos. ARB-119-2006 and ARB 019-2007)

Allegations brought by the Appellant before the Watuppa Water Board

17. After his termination, the Appellant contacted a reporter from the Fall River Herald News, suggesting that there were irregularities at the water treatment plant, in violation of state law and public health standards. (Testimony of the Appellant, Testimony of Sullivan)
18. The reporter contacted the City, and reviewed documents in Sullivan's office. The paper did not run a story. (Testimony of Appellant, Testimony of Sullivan)
19. Before his termination, the Appellant has addressed his safety concerns about the Treatment Plant's operation to his supervisor, Kaegael. (Testimony of Appellant)

20. On August 9, 2006, the Appellant appeared before a duly posted public meeting of the Watuppa Water Board (hereinafter "Water Board"). He had provided notice of his intended disclosures to the Water Board in a July 25, 2006 letter. (Testimony of Appellant)
21. The Water Board is comprised of three mayoral appointees who oversee the operations of the City of Fall River Water Department. (Testimony of Respondent)
22. At the meeting, the Appellant exercised his First Amendment free speech rights. He addressed the Board, and made allegations of Treatment Plant mismanagement, implicating Kaegael and his former colleagues. (Testimony of the Appellant).
23. He also provided the Water Board with written notes detailing his accusations along with documentary and photographic evidence of the alleged wrongdoing (Exhibit 3 - (Appendix 2).
24. Before submitting his allegations, the Appellant conducted his own investigation; speaking with Jones, and Don Bunker, a consultant with knowledge on the subject. (Testimony of Appellant)
25. The Appellant had brought most if not all of the allegations to the City's attention before his first termination on July 18, 2006.
26. The allegations brought by the Appellant before the Water Board were as follows:

    (a) That on numerous dates, the Respondent had violated Massachusetts Water Treatment Plant Operational Regulations (310 CMR 22.11 B (2), Exhibit 11) by failing to have a Grade 3 or Grade 4 Water Treatment Plant Operator on-site.
    (b) That Water Treatment Plant employee, Robert Jones, had received illegal overtime payments "in a lock box" installed by Kaegael."
    (c) That Appellant's Supervisor, Kaegael, was drinking and sleeping on the job.
    (d) That Appellant's Supervisor, Kaegael, was away without official leave from work.
    (e) That Appellant's Supervisor, Kaegael, authorized an employee, Robert Hilton, to be absent from work without official leave.
    (f) That Appellant's Supervisor, Kaegael, had illegally authorized an automobile stipend to an employee, Randy Clarkson.

(g) That Appellant's Supervisor, Kaegael, had sought the help of an employee, Robert Jones, in falsifying water test samples.
(h) That Appellant's Supervisor, Kaegael and other employees, including the Appellant, attended an employee Christmas Party on December 23, 2005 in the afternoon at the Water Treatment Plant and that alcoholic beverages were drunk.
(i) That Appellant's Supervisor, Kaegael, on November 14, 2005, obtained, signed and presented the Appellant with an OSHA Training Certificate that falsely certified that Appellant had received eight (8) hours of training.

(Exhibit 3)

The bases for the Appellant's allegations brought before the Watuppa Water Board

27. The most serious of the allegations brought before the Water Board was allegation (a): inadequate staffing of the Treatment Plant with staff of the correct grade. If this were true, the Department of Environmental Protection ("DEP") could impose loss of license on the individual plant operators, the City could also lose its license to run the Treatment Plant, and the DEP could also impose severe penalties. (Testimony of Appellant, Testimony of Sullivan)

28. On February 2, 2006, Plant Operator Clarkson (hereinafter "Clarkson") was working but outside the plant for fifteen (15) minutes, while remaining in telephone contact. Both Plant Operators Thomas Medeiros and Michael Griffin (hereinafter "Medeiros" and "Griffin"), Grades 2 at the time who later became Grades 3, were working at the plant. (Testimony of Appellant)

29. On February 6, 2006, Griffin was running the plant while Kaegael was in his office. At some point Kaegael began to repair the lift station and left the Treatment Plant in order to get parts from the plumbing supply. It is in dispute whether Kaegael left after his 7 am to 3 pm shift ended in order to get the parts. (Testimony of Appellant)

30. He had brought up allegation (b), the issue of Jones and the overtime lockbox issue with Jones himself on or about May 3, 2006 in his capacity as union steward. (The "lockbox" had

31. When Jones was union steward, there was also an overtime dispute. After the lab tech was fired, Jones performed his duties and received compensation in the form of ten (10) hours overtime per pay period. The other plant operators protested because this overtime opportunity was not posted or shared. In order to make peace in the office, Jones gave up the overtime, and did the lab work on weekends at the regular plant operator rate of pay. (Testimony of Jones)
32. In his testimony, Kaegael acknowledged that overtime has been a thorny issue. There is a rotational overtime list. If someone calls out, the employee already present has to stay an extra four (4) hours, and the incoming employee must report four (4) hours early. (Testimony of Kaegael)
33. In regard to allegation (c), Kaegael had told at least one person at the Treatment Plant that his medication had changed, leading him to feel drowsy. (Testimony of Jones)
34. The Appellant also brought up allegation (f), the issue of Plant Operator Clarkson and his motor vehicle stipend in his capacity as union steward. The City had changed its practice of giving Treatment Plant operators City vehicles in order to do water testing, to giving a monthly to employees using their personal vehicles. The union was not consulted. The Appellant argued that in past practice union approval was necessary for anyone to receive any money over and above his salary. His union superior, Rachel Getty, also did not know that the motor vehicle stipends were being awarded. The issue was resolved when Kaegael

35. The stipend was not in the form of cash. It amounted to no more than one hundred dollars per month. (Testimony of Plant Operator Clarkson)
36. After the Appellant appeared before Water Board, the City stopped its practice of paying Clarkson to be on call and vacation *at the same time*. (Testimony of Clarkson). While he was an employee, the Appellant had protested against this practice of "double dipping." (Testimony of Appellant)
37. In regard to allegation (g), the DEP ordered monthly testing of eleven (11) site locations, with a start date of January 2006. Before the testing could begin, the sites had to be "proofed" and approved by the DEP. Because the approval was granted at the end of January, the earliest sample date was February 2, 2006. (Testimony of Jones)
38. Kaegael asked the consultant, Dr. Bunker, if the first test result on the February 2, 2006 date could be submitted as the January test to the DEP. Dr. Bunker said no. (Testimony of Jones)
39. Six months later, the DEP requested the test results, including those for January, 2006. Kaegael reminded the DEP that due to the late approval date, the City could not supply January test results. That was acceptable to the DEP. (Testimony of Jones)
40. The City was unaware of allegations (h) and (i) until the Appellant presented his allegations. (Testimony of Sullivan)

Water Board orders an investigation

41. At the conclusion of the meeting, the Water Board directed Sullivan to conduct an investigation of the allegations. (Exhibit 2)

42. The Appellant objected because he believed that he had already been singled out by Sullivan in the two previous disciplinary matters.

Result of the investigation

43. In his investigation, Sullivan interviewed fifteen witnesses. He submitted his report, which included Kaegael's written responses to the Appellant's allegations, to the Board on September 12, 2006. (Exhibits 2 and 3)

44. The report concluded that two of the nine allegations, allegation (h) - the 2005 Christmas party; and allegation (i) - the OSHA Training Certificate had merit. These two allegations involved both the Appellant and Kaegael. Kaegael was disciplined for his behavior. Sullivan concluded that the remainder of the Appellant's allegations were false "and the result of a disgruntled and desperate former employee that was terminated in July, 2006."[sic] (Exhibit 2)

45. The Appellant was present at the Water Board's October 2006 meeting, when the board accepted Sullivan's findings and closed the matter. (Testimony of Appellant)

46. Allegations (b) and (f) had been found to be credible and were resolved by the City while the Appellant was still an employee. However, Sullivan found that they were without merit in his investigation. (Exhibit 2)

47. The Appellant testified before the Commission that he included allegations (b) and (f) to show that there had been cover-ups at the Treatment Plant. (Testimony of Appellant)

Arbitrator's Decision

48. The Arbitrator's decision on the Appellant's two disciplines was issued on December 20, 2007. (Stipulated Facts)

49. The Arbitrator reduced the Appellant's five (5) day suspension to a written warning, and reduced the termination to a five (5) day suspension. The Appellant was thus enabled to return to work. (Exhibit 1, Stipulated Facts)

50. The Arbitrator noted procedural issues in the Appellant's discipline. He found that that there was an issue as to whether the City properly followed the steps set forth in Progressive Discipline #206. (Exhibit 1)

51. The Arbitrator found that in *both* the five (5) day suspension and the termination of the Appellant, Sullivan did not speak to anyone *but* Kaegael. The Arbitrator found there was enough conflict in the witness testimony that there could have been a different outcome *if* Sullivan had spoken to the witnesses. (Exhibit 1)

52. The Arbitrator stated that he found the lack of investigation surrounding the May 3, 2006 incident that led to the five (5) day suspension "to be a fundamental flaw." (Exhibit 1)

Second termination

53. Given the favorable Arbitrator's decision, the Appellant was preparing to return to work when he received a letter from the City, dated January 10, 2008, informing him that he had already been terminated due to his conduct before the Water Board on August 6, 2006. The City cited a violation of Policy No. 205.

"Violation of Policy 205
Dishonesty – failure to maintain professionalism and honesty
Dishonesty – failure to act, work and behave in the most ethical manner possible
Dishonesty – falsification of reports
Dishonesty – making false statements
Peer relations – failure to act with courtesy, toward other employees."
(Exhibit 4)

54. c. 31 §41 states:

> Except for just cause and except in accordance with the provisions of this paragraph, 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 if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, 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. (*emphasis added*)

55. However, the January 10, 2008 letter did not inform the Appellant of "contemplated action." It stated that he was already terminated, in violation of §41. The same letter informed the Appellant that he had a right for a just cause hearing. The letter was signed by Sullivan. (Exhibit 4)
56. Until he received the January 10, 2008 letter, the Appellant had had no contact with the City after the issuance of the Arbitrator's decision. (Testimony of the Appellant)
57. The City attached an Employee Warning Notice which showed that termination was the action to be taken. (Exhibit 4)
58. The City also attached a memo to the file from Sullivan detailing the Appellant's "culpability in the allegations that he put forth in August of 2006. There were no official grievances filed with these allegations (it is noted that grievances were filed for Mr. Ferry's suspension and termination)." (Exhibit 4)
59. The memo to file refers to Sullivan's report to the Water Board. The *January 10, 2008* letter based the Appellant's discipline on a report of an investigation requested by the Water Board for conduct which occurred on *August 6, 2006*. (Exhibit 4)
60. On January 14, 2008, the Appellant submitted an Official Grievance Form with AFSCME Council 93. (Exhibit 6)
61. On January 15, 2008, Sullivan denied the grievance stating "[e]mployee was terminated for cause as detailed in the termination notice." (Exhibit 6)

62. The Appellant filed an appeal under c. 31, §§ 42 and 43 with the Commission on January 17, 2008. (Stipulated Facts)

ARGUMENT

Standard of Review

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." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997). *See* Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). 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. Falmouth v. Civil Serv. Comm'n, 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. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Previous discipline

The City's interaction with the Appellant is riddled with procedural errors. The City failed to follow its own policy of progressive discipline pursuant to its own guideline, Progressive Discipline #206. Before the Appellant's (second) termination notice on January 10, 2008, the City had disciplined him in the following order: an oral warning, a written warning, and a five (5) day suspension. The correct discipline measure for an incident such as the one Appellant engaged in (i.e., Appellant calling his Supervisor an obscene epithet) would require something more than a written warning, but *not* a suspension as lengthy as the one provided by the City (i.e., a five day suspension); particularly given the environment where the Appellant worked, a workplace culture where the utilization of expletives was apparently frequent. Unless the act were extraordinarily egregious, the discipline should have been *progressive*, and progress from the written warning to a one or two day suspension, for example, thus resulting in the City evaluating the next following incident under a different paradigm. *See* Chor v. New Bedford, 12 MCSR 230 (1999); Stockman v. Division of Medical Assistance, 20 MCSR 522 (2007).

Inadequate investigations

It is puzzling that the City undertook the investigations of the five (5) day suspension and the termination by speaking only to one person, the Appellant's supervisor. It is undisputed that there were witnesses present on both occasions, and that the person conducting the investigations was aware of that fact. It is also undisputed that the accounts of the witnesses differed so much, had they been interviewed, discipline may not have issued at all. The arbitrator's report is at time scathing of the lack of fairness and professionalism displayed by the City. Notwithstanding said exhaustive report and its admonishments to the City, the City chose to terminate the Appellant once again.

Watuppa Water Board appearance

After the Appellant was terminated, and while his disciplines were pending in arbitration, he appeared before the Water Board on August 9, 2006 to present nine very serious allegations.

The Respondent argues that the Appellant was an employee on August 9, 2006 because the Arbitrator's December 20, 2007 decision restored him to his position *nunc pro tunc*. It is not clear if the City is characterizing the Appellant's actions as off duty misconduct. If so, the City fails to address the notice issue: how does an employee first receive notice of an August 9, 2006 violation on January 10, 2008? There is no way to redress the prejudice brought to bear on the Appellant due to this delay; the Appellant remains injured. The City's argument is without merit.

It is a matter of great concern to the Commission that the actions the City took in regards to Appellant's allegations to the Water Board lack even the appearance of objectivity. The investigation was assigned to Sullivan, over the Appellant's objections, although all nine allegations involved conduct by Kaegael - the Appellant's former supervisor, and the only person

interviewed by Sullivan in his previous investigations of the Appellant. The City would have been better served in having the investigation conducted by an independent neutral third party.

In the course of his investigation, Sullivan found that only two of the allegations were true. He found that on December 23, 2005, Kaegael, the Appellant and other employees held a Christmas Party at the Treatment Plant, where alcoholic beverages were consumed. Sullivan also found that on November 14, 2005, Kaegael obtained and signed an OSHA Training Certificate that falsely certified that Appellant had received eight (8) hours of training.

However, both of the proven allegations were lesser ones, and the only allegations that involved both Kaegael *and* the Appellant. It is true that Kaegael was disciplined for those two allegations, but the Appellant did not emerge without a blemish. It is possible that another investigator – one with no biases – could have proven more allegations – *i.e.*, ones not involving the Appellant. At least two other allegations (b) and (f), had had enough credibility to warrant resolution by the City while the Appellant was still an employee. It is telling that Sullivan did not discover these had been valid issues during the course of his exhaustive investigation.

As previously stated, the Appellant had brought these allegations to the City's attention when he was employee. There was no surprise here. Due to the City's previous flawed investigations of the Appellant, there is a high hurdle to overcome in yet a third investigation of the Appellant by the same investigator.

Second termination

After the arbitrator's award, the Appellant was preparing to return to work when he received notice of his second termination. The City cited his appearance before the Water Board, finding that his allegations were based on false assertions, motivated by the Appellant's malice towards Kaegael and his co-workers, and with reckless disregard for their veracity.

The Appellant argues that his second termination was retaliatory conduct. He argues that he was doubly protected, under the Whistleblower statute and under free speech. However, a Whistleblower claim is outside the jurisdiction of this Commission. G.L. c. 149, §185; *see* Donahue v. Department of Mental Retardation, 10 MCSR 230 (1997); Walker v. Holyoke, 20 MCSR 330 (2007) (upon initiation of an action under a Whistleblower claim, c. 31 appeal rights to the Commission are waived and must be adjudicated by the court along the other claims).

It does not matter whether or not the Appellant was a private person or an employee of the City of Fall River on August 9, 2006. The fact remains that the investigation conducted at the request of the *Water Board* is an insufficient basis for the termination of an employee of the *Treatment Plant*. Moreover, the Appellant was raising concerns that he already brought to the City's attention via a letter to Kaegael – in his capacity as an employee and a union steward. I do not find that the nine allegations were groundless and motivated by malice to the City, Kaegael and the Appellant's other coworkers. The City's outrage is disingenuous.

The Respondent argues that there would be no harmony in the work environment if the Appellant were to return to work. Such lack of harmony, due to the Appellant's public "vilification" of his supervisor and coworkers, the Respondent argues, would lead to a reduction in the efficiency of the Treatment Plant. The Respondent argues that there would be no teamwork among the Appellant and his colleagues.

The Appellant was never a quiet coworker. As union steward, he did not endeavor to win popularity contests, or hearts and minds. As a bull in a china shop, it was usual for him to charge in whenever he believed a violation was occurring. Undoubtedly, his coworkers were familiar with his abrasiveness and his lack of diplomacy.

The other workers at the Treatment Plant are trained and skilled professionals who know how to perform their duties. I have no doubt that they will continue to deliver excellent service in safeguarding the water that serves the over 90,000 customers in Fall River and the surrounding communities, regardless of who they are working with.

CONCLUSION

The City has failed to show by a preponderance of the evidence that there was reasonable justification for the Appellant's termination. I find that the City's reasons, based solely on the Appellant's presentation of allegations before the Watuppa Water Board on August 9, 2006 are insufficient. The City's so-called surprise and outrage is unfounded. The Appellant did not raise any issues that he had not already presented to the City when employed at the Treatment Plant.

The Appellant was not a City employee on the date of his presentation, and cannot be disciplined as such.

There is no question of the Appellant's skills or qualifications for the position of Plant Operator, Grade 3. There is no dispute that he was a difficult employee. The Appellant is an intelligent individual who took pride in his skills, and perhaps took his union responsibility too seriously - while displaying little or no interpersonal skills with his supervisor and coworkers.

Notwithstanding the decision of this Commission, the Appellant's past disciplinary history, as amended by the arbitration, remains open for consideration should further workplace incidents arise. It is noted that the Appellant's past disciplinary history is as follows: oral warning, written warning, and a suspension.

I remained concerned about the City's failure to give even the appearance of objectivity in its investigations of Mr. Ferry. The City sought a quick and convenient, but illegal way to rid itself of a troublesome employee.

WHEREFOR, for the above reasons, the Appellant's appeal filed under Docket No. D1-08-14 is hereby *allowed.* Mr. Ferry shall be restored to his position forthwith, and made whole for any loss of earnings and benefits less any interim earnings from January 10, 2008 until he resumes employment.

Civil Service Commission

_____

Angela C. McConney
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor [Marquis – absent], Commissioners) on November 19, 2009.

A true record. Attest:

_____

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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:
Gerald E. Johnson, Esq. (for Appellant)
Swansea Professional Park
1010 Grand Army Highway
Swansea, MA 02777

James W. Clarkin, Esq. (for Appointing Authority)
Box 267; 84 N. Main Street
Fall River, MA 02722