COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

KENNETH D. TRAVERS, D1-07-320
Appellant

v.

CITY OF TAUNTON,
Respondent

Appellant's Representative:	Mr. Anthony Pini Field Representative Massachusetts Laborers' District Council 7 Laborers Way Hopkinton, MA 01748
Respondent's Representative:	Jane E. Estey, Esq. Assistant City Solicitor City of Taunton 15 Summer Street Taunton, MA 02780
Hearing Officer:	John J. Guerin, Jr.[1]

DECISION

Pursuant to the provisions of G.L c. 31, § 43, the Appellant, Kenneth D. Travers (hereafter "Appellant"), is appealing the decision of the Respondent, City of Taunton (hereafter "City") as Appointing Authority, to terminate him via written notice dated August 31, 2007 from his employment as a Gardener/Laborer with the City's Department of Parks, Cemeteries and Public Grounds (hereafter "Department"). The appeal was timely filed. A hearing was held on February 1, 2008 at the offices of the Civil Service

[1] John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

Commission (hereafter "Commission"). Two (2) tapes were made of the hearing. Witnesses were not sequestered. As no notice was received from either party, the hearing was declared private. Proposed Decisions were submitted by the parties thereafter, as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Stipulated Facts 1 – 20 and Joint Exhibits 1 - 37) and the testimony of Maria Gomes, City Human Resources Director (hereafter "Ms. Gomes"), Marilyn Greene, Department Commissioner (hereafter "Ms. Greene") and the Appellant**,** I make the following findings of fact, the first twenty (20) of which were stipulated by the parties:

1. The Appellant resides at 35 Forge Drive, Taunton, Massachusetts, 02780.
2. The City is a municipal corporation with an address of 15 Summer Street, Taunton, Massachusetts 02780.
3. The appellant was a civil service employee of the City in the position of Gardener/Laborer in the Department.
4. The Appellant began work as a laborer with the City on December 6, 2004.
5. The Appellant was discharged by the City on August 31, 2007.
6. The City discharged the Appellant for abuse of sick and personal time, failure to provide documentation of a medical condition as a basis for his absences from work, and abuse of City policies related to working hours, notification of use of sick time and use of city vehicles.
7. The Appellant had a record of disciplinary actions taken against him by the City, dating back to July 2006.

8. On July 3, 2006, the Appellant received a Verbal Warning for abuse of sick time.
9. The Appellant called in sick on July 13, 14 and 18, 2006.
10. On July 21, 2006, the Appellant was involved in a vehicle accident with a City vehicle.
11. The Appellant failed to attend a meeting on December 4, 2006 regarding problems with his attendance. Rather, he called in sick on that day.
12. On February 6, 2007, the Appellant was removed from the overtime list after failing to report to work after agreeing to a scheduled Saturday maintenance assignment. This was the second time he failed to show up as scheduled. The first missed assignment was a funeral in December 2006.
13. On or about March 7, 2007, the Appellant left a work site with a City vehicle, without permission. As a result, his co-workers were left stranded without a ride and the work was compromised.
14. As a result of his unauthorized absence from the job site, the Appellant was suspended on March 21, 2007 for 5 days. The suspension was later reduced to 3 days by agreement of the parties.
15. On July 26, 2007, the Appellant received a Verbal Warning regarding his failure to use his KRONOS badge for time keeping and payroll purposes.
16. The Appellant did not respond to requests by the City on May 10, 2007 and June 22, 2007, for medical documentation, in accordance with the Family Medical Leave Act (hereafter "FMLA"), of his absences from work and a medical opinion as to his ability to perform the duties of his job.

17. A disciplinary hearing was held on August 30, 2007 regarding the Appellant, to address issues of his sick time abuse and other disciplinary issues.
18. The Appellant was present at the August 30, 2007 hearing and was duly represented by his union.
19. At the August 30, 2007 hearing, the City again requested that the Appellant provide the City with Certification of Health Care Provider documents for Family and Medical Leave by 5:00 pm that same day.
20. The Appellant did not provide the requested documentation by 5:00 pm on August 30, 2007, as required by the City.
21. The City has a sick time abuse policy that defines abuse as including, among other things, taking sick days connected to scheduled leave, taking a disproportionate number of sick days on or about weekends and regularly taking sick days at particular times of year. (Exhibit 4)
22. Ms. Greene credibly testified at the Commission hearing that, after the July 21, 2006 vehicle accident involving the Appellant's operation of a city vehicle, the City observed a concerning change in the Appellant's attitude and demeanor. (Testimony of Ms. Greene)
23. Ms. Greene, as Commissioner of the Department, is the Appointing Authority of the Appellant's position, pursuant to civil service law. I found that Ms. Greene exhibited excellent recall of details in her testimony. Her answers were responsive and professional. Her knowledge of the subject matter resulted in confident and concise testimony which was indicative of her overall credibility. I found that Ms. Greene

had no motives for her part in the Appellant's termination that were unrelated to basic merit principles.

24. Ms. Gomes credibly testified at the Commission hearing that the Appellant declined to submit to voluntary drug and alcohol testing after the July 21, 2006 vehicle accident. This post-accident testing was only requested of the Appellant. The testing would only have been mandatory had the Appellant been driving a vehicle requiring him to possess a Commercial Drivers License (hereafter "CDL"). Ms. Gomes testified that she suggested that the Appellant submit to post-accident testing since he was unauthorized to have been operating the vehicle. (Testimony of Ms. Gomes)
25. I found Ms. Gomes to also possess excellent recall of the events in question and that her testimony was unhesitant and detailed. She had a very professional demeanor and was well versed in her duties and responsibilities relative to assisting employees through her administration of the City's Employee Assistance Program (hereafter "EAP"). I found that Ms. Gomes had no motives for her part in the Appellant's termination that were unrelated to basic merit principles.
26. Starting in July 2006, the Appellant began to use a significant amount of sick days. (Exhibit 35 and Testimony of Ms. Greene)
27. In December of 2006, the City referred the Appellant to the EAP to provide an opportunity for him to confidentially address any personal problems he was experiencing that might have been interfering with his job performance. The City made it clear to the Appellant that the EAP referral was a mandatory, "job jeopardy" referral and that "any additional employment issues, including problems with time

and attendance will lead to discipline up to and including termination." (Exhibit 15 and Testimony of Ms. Gomes)

28. The Appellant looked into the EAP, but did not take advantage of the EAP services, even though he was cognizant of his job being in jeopardy. He testified at the Commission hearing that he did not understand the EAP form instructions and was "uncomfortable" signing off on the personal financial information requested in order to take advantage of the EAP services. (Testimony of Appellant)
29. I found the Appellant's testimony to be uneasy but, for the most part, responsive. He was understandably nervous and became somewhat agitated at times during difficult questioning. I do believe that the Appellant was sincere in trying to be forthcoming with his answers. He testified that he was going through a divorce in July 2006, was in financial danger of losing his home and was also dealing with a problem tenant. He stated that he was concerned about the dissemination of his personal financial information to anyone in City management but knows, now, that Ms. Greene and Ms. Gomes were actually trying to help him.
30. None of the health provider's notes that the Appellant submitted at various times to the City described the nature and extent of the Appellant's illness. (Exhibits 7, 13, 25, 26 and 32)
31. The Appellant used 25.5 sick days in a twelve (12) month period, between July 2006 and July 2007. (Testimony of Ms. Greene and Exhibit 35)
32. The average City employee uses 6 sick days per year. (Testimony of Ms. Greene)
33. Many of the Appellant's sick days were around weekends and holidays. (Exhibit 35 and Testimony of Ms. Greene)

34. The Department is responsible for the operation and maintenance of twenty-five (25) municipal cemeteries plus all parks and public grounds in a City of 48 square miles. At the time of this hearing, the Department employed 18 full-time workers, excluding office staff. When an employee calls in sick, the Department must go to considerable effort to reschedule its work crews. (Testimony of Ms. Greene and Administrative Notice)
35. During the week preceding Memorial Day, employees of the Department are not allowed to take scheduled vacation due to the Department's obligations to prepare public grounds for many planned ceremonial services. (Id.)
36. The Appellant took sick and personal time in the days prior to the Memorial Day weekend in 2007. (Exhibit 35 and testimony of Ms. Greene)
37. The Appellant's failure to report for scheduled overtime interfered with the Department's work on the City's annual Memorial Day grounds display, as well as with an active burial obligation. (Testimony of Ms. Greene)
38. The City requested that the Appellant submit medical documentation, in accordance with the provisions of the FMLA, of his absences from work and his ability to perform the duties and functions of his job on May 10, 2007 and again on June 22, 2007. (Exhibits 27 & 28 and Testimony of Ms. Gomes)
39. The Appellant did not respond to the City's request for FMLA documentation. (Testimony of Ms. Gomes)
40. In accordance with G.L. c. 31, § 41, the City held a disciplinary hearing, on August 30, 2007, to discuss the Appellant's sick time abuse and other disciplinary matters dating back to July 2006. At that hearing the City gave the Appellant a final chance

to submit FMLA documentation. He agreed to submit the document by 5:00 pm on that same day. (Id.)

41. The third, written attempt by the City to familiarize the Appellant with the provisions of the FMLA on August 30, 2007 stated as follows:

> "As we discussed at your hearing today, the City has agreed to provide you with another copy of the packet for Family and Medical Leave.
>
> Please bring the Certificate of Health Care Provider to your attending physician. If your physician believes your current medical condition falls under the definition of the FMLA regulations that define a 'serious health condition,' please have them fill out this paperwork and return it to the Human Resources Department as we agreed by the end of business today at 5 p.m. (Union waived 15 day return requirement at hearing on this date). I have included Fact Sheet # 28 and 29 CFR§825.114 for you to reference with your physician.
>
> **The City is also requesting, for a third time, that you review that job description with your physician.**
>
> Please remember to sign all the appropriate medical release forms in your physician's office, which allow them to communicate with the Human Resources Department at City Hall and/or the City's Physician, Dr. Jacqueline Hess.
>
> Should you have any questions, please contact me personally at the above noted phone number."
>
> (Exhibit 31)

42. The August 30, 2007 disciplinary hearing was convened at 10 am and lasted approximately 20 minutes. (Rebuttal testimony of Ms. Gomes)

43. The Appellant did not return the required FMLA documentation by 5:00 pm, August 30, 2007. The Appellant instead submitted an unsigned, unstamped note from his health care provider's office at 12:40 pm on August 30, 2007. The note indicated that the provider was on vacation. Ms. Gomes credibly testified that, upon her receipt

of the note, she called the provider's office and was told that the office had been closed from noon until 1 pm but that the Nurse Practitioner who had previously signed paperwork on behalf of the Appellant had been in the office until 1 pm. (Exhibit 32 and Testimony of Ms. Gomes and Appellant)

44. Ms. Gomes also credibly testified that the City would have accepted the documentation signed by any health care provider competent to document the Appellant's condition. The Appellant did not request a further extension of time to submit the required FMLA documentation and offered no further information to the City. (Testimony of Ms. Gomes)

45. By hand-delivered letter dated August 31, 2007, the Department provided proper written notice to the Appellant of his termination of employment with the City for sick time abuse and other disciplinary issues dating back to July 2006. (Exhibit 34)

46. By all accounts, the Appellant was a good employee throughout his first year (2005) with the Department. The Appellant agrees that he was given several opportunities to reverse the downward slide that his employment had taken. According to his own Proposed Decision, the Appellant recognizes that the City "has shown deep concern for Mr. Travers by doing everything possible to assist him with personal or medical issues that he may have" and has "never condoned his behavior but has shown a tolerance and understanding." (Testimony of Ms. Greene and Ms. Gomes and Appellant's Proposed Decision)

47. The Appellant appealed his termination to the Commission on September 5, 2007. At the outset of this hearing, the Appellant inquired of the City as to an opportunity for a "last-chance" agreement in order that the Appellant may remained employed. The

City, after thoughtful consideration, declined any discussion of such an agreement despite this Hearing Officer's offer to help effectuate same. As a result, the hearing went forward and a decision is now recommended to the Commission.

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*).* See Town of Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston *v.* Collins, 48 Mass. App. Ct. 411 (2000); City of 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 Committee of Brockton *v.* Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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. 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) and Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

After reviewing the testimony and evidence submitted in this case, I conclude that the Appointing Authority, the City of Taunton, has demonstrated that it had just cause to terminate the Appellant's employment.

The Appointing Authority identified a problem with the Appellant's attendance and implemented a series of progressive disciplinary steps to attempt to resolve this issue. These included both verbal and written warnings, hearings and prior suspension. The City appropriately extended many opportunities to the Appellant to rectify the problem. They requested that he attend the confidential EAP. He refused to do so. Although his concerns regarding the confidentially of his personal information may have been genuine,

they are not supported by the facts and are unfounded based on the evidence. The City three times requested that the Appellant submit documentation of his medical condition in accordance with the provisions of the FMLA. Three times, the City provided documentation packets to the Appellant for completion by his health care provider. Despite having three chances to do so, the Appellant failed to submit the requested documentation. In accordance with the management rights clause in the collective bargaining agreement which the Appellant is subject to, the City had the right to request medical documentation from the Appellant. The City appropriately sought to determine if the Appellant's medical condition prevented him from performing the essential functions of his job or whether he required a reasonable accommodation in order to do so.

The Appointing Authority, the Appellant and his union representatives all agreed at the August 30, 2007 hearing that the Appellant would submit the requested medical documentation by 5:00 pm of that same day. When the Appellant failed to provide the documentation - despite having *three* opportunities to do so and despite the City's sincere attempts to assist him in doing so - the City had exhausted its longstanding patience and reasonably terminated the Appellant's employment.

Only the Appellant can ever fully know why he failed to comply with the standards of assistance that could well have rescued his employment with the City. Throughout this process, the City displayed only a willingness to correct the Appellant's career path and help him smooth the issues in his personal life that so clearly were adversely affecting his job performance.

For all of the reasons stated herein, I find that the City proved just cause for terminating the Appellant, Kenneth D. Travers. Therefore, the appeal on Docket No. D1-07-320 is hereby ***dismissed***.

Civil Service Commission

_____
John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on July 3, 2008.

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:
Mr. Anthony Pini
Jane E. Estey, Esq.