

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

MARK FRESIA,
Appellant

v.

D-04-359

CITY OF PITTSFIELD,
Respondent

Appellant's Attorney:

Joseph DeLorey, Esq.
A.F.S.C.M.E., Council 93
8 Beacon Street
Boston, MA 02108
(617) 367-6044
jdelorey@afscmecouncil93.org

Respondent's Attorney:

Fernand J. Dupere, Esq.
P.O. Box 373
223 College Highway
Southampton, MA 01073
(413) 527-4716
freddupere@aol.com

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Mark Fresia (hereinafter "Fresia" or "Appellant"), is appealing the decision of the City of Pittsfield (hereinafter "City" or "Appointing Authority") to permanently demote the Appellant from Working Foreman to Water & Sewer System Maintenance Man. The appeal was timely filed. A hearing was held on June 27, 2007 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Two tapes were made of the hearings. All

witnesses, with the exception of the Appellant and Bruce Collingwood, Commissioner for the Appointing Authority, were sequestered. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Based upon the 21 documents entered into evidence (Joint Exhibits 1-18; and Appellant Exhibits 19-21) and the testimony of the following witnesses:

For the Appointing Authority:

- David P. Brites, City Water-Sewer Maintenance Man
- Kevin Swail, City Back Flow Compliance Inspector
- Charles G. Hurley, City Working Foreman
- David Santolin, Former City Superintendent of Water Department

For the Appellant:

- Bruce Collingwood, City Commissioner of Public Works
- Mark Fresia, Appellant
- Mike Bailey, City Employee
- Brian Stack, City Employee

I make the following findings of facts:

1. The Appellant is a tenured civil service employee of the City and has been employed there since 1996 when he was hired in the Water and Sewer Division of the Department of Public Utilities. On September 9, 2002, he was promoted to Working Foreman in the Water and Sewer Division of the Department of Public Utilities. (Exhibit 15)
2. On July 26, 2004, the Appellant was demoted to the position of Water & Sewer System Maintenance Man as a result of three alleged incidents which are the subject of this appeal. (Testimony of Appellant)

Summary of Prior Disciplinary Action

3. All of the prior disciplinary action against the Appellant preceded the City's decision to promote him to the position of Working Foreman. (Exhibits 6 – 11)

4. On July 30, 1999, the Appellant received a written warning for insubordination. (Exhibit 6)
5. On December 14, 1999, the Appellant received a three-day suspension which was subsequently reduced to a one-day suspension for insubordination. (Exhibit 7)
6. On February 29, 2000, the Appellant received a written warning for general misconduct. (Exhibit 8)
7. On September 29, 2000, the Appellant received a written warning for insubordination and general misconduct. (Exhibit 9)
8. On December 16, 2003, the Appellant received a written reprimand for insubordination. (Exhibit 10)
9. On March 10, 2004, the Appellant received a five-day suspension for insubordination and harassment. (Exhibit 11)

Disciplinary Appeal Currently Before the Commission

**CHARGE 1 OF 3: ASKING EMPLOYEES FOR AUTHORIZATION TO TAPE
RECORD THEIR CONVERSATIONS**

10. The first basis for the demotion concerned the Appellant having presented a document to co-workers authorizing him to tape record his conversations with them. (Exhibit 12)
11. On or about March 2, 2004, the Appellant approached a number of his subordinates in the Water, Sewer, and Drain Department and informed them that they had to sign a form which stated the following:

We, the undersigned employees of the City of Pittsfield Water, Sewer and Drain department and office employees, understand and give permission to Mark Fresia to tape record any and all conversations that he has with us.

Those of us who do not sign understand that the tape recorder may be on when we are in the presence of those that did sign.

(Exhibit 12)

12. David Brites has been a Water & Sewer Maintenance Man for approximately 7 ½ years and he testified before the Commission. On March 2, 2004, the Appellant was Brites's immediate supervisor. Brites read the above-referenced form on March 2, 2004 and told the Appellant he would not sign it. Brites told the Appellant that the form was illegal. Brites testified that the Appellant told him (Brites) that others had signed it, that he (the Appellant) would conduct the tape recording anyway, and that Brites should simply "not talk" while the tape recorder was on. (Testimony of Brites)
13. Brites called the City's Personnel Director, Kelly Reagan, who was also an attorney. Ms. Reagan informed Brites that the form was illegal. Brites brought a copy of the form to Ms. Reagan. (Testimony of Brites)
14. Kevin Swail has been a Back Flow Compliance Inspector since March 5, 2007, and a Laborer prior to that date. He was also asked by the Appellant on March 2, 2004 to sign the above-referenced audiotape form. Swail signed the form. (Testimony of Swail)
15. Later that day, the Appellant met with Personnel Director Kelly Regan. After he was advised by Reagan that such tape recording is illegal, the Appellant agreed he would not engage in any such recording. (Testimony of Appellant)
16. The Appellant was motivated to seek permission to tape record his co-workers by his concerns that Commissioner Collingwood had discounted his reports about other employees allegedly "putting him down" in their conversations with certain contractors. Although Collingwood told the Appellant he would need "proof", Collingwood did not tell the Appellant to tape record employees and/or seek their permission to do so. (Testimony of Appellant)

17. The Appellant never discussed the form with any of his supervisors prior to creating the form and asking the employees to sign the form. (Testimony of Appellant)
18. The Appellant testified that he believes that asking employees to sign the form regarding tape recording was not bad judgment, and was reasonable if it wasn't against the law. (Testimony of Appellant)

CHARGE 2 OF 3: THREATENING REMARKS

19. The second basis for the demotion concerned an alleged threat made by the Appellant in January 2004 that he would bring a gun to work and point it at co-worker Charles Hurley. (Exhibit 13)
20. Charles Hurley was a Working Foreman during the time period in question (January to early February of 2004). (Testimony of Hurley)
21. The Appellant heard that Hurley wanted to drop out of the Union. (Testimony of Appellant)
22. The Appellant tried to get Hurley to sign the blue Agency Service Fee card. Hurley refused. The Appellant said you have to sign. (Testimony of Appellant)
23. David Santolin, who was City Superintendent of the Water Department at the time, overheard the conversation between the Appellant and Hurley regarding signing the union card. (Testimony of Santolin)
24. After Hurley left the building, the Appellant went to Santolin and asked Santolin to do something about Hurley not signing the card. Santolin told the Appellant that he should go to the Union. Santolin testified that the Appellant then went to his desk, slammed his hand down on the desk, and said "I will bring my fucking gun in here and point it in his (Hurley's) direction." Santolin admonished the Appellant for his statement, but did not immediately report it to anyone. (Testimony of Santolin and Exhibit 13)

25. After Mr. Hurley left the building that morning, Mike Bailey, a Water Department employee for 6 years, was also in the room. He was called to testify before the Commission by the Appellant. Asked during direct testimony to recall what the Appellant said to Mr. Santolin after Hurley left the room on the morning in question, Bailey stated, “I don’t remember exact words; I remember him slamming his hand down on the desk; I don’t remember any threats”. Asked by this Commissioner what he *does* remember the Appellant saying on the morning in question, Mr. Bailey stated, “I don’t remember what he said; its in my police statement”.
(Testimony of Bailey)

26. Brian Stack, a 22-year employee of the Water Department, was also present in the room after Mr. Hurley left the building on the morning in question. Stack, however, testified before the Commission that he left the room shortly after Hurley did, in an attempt to seek Hurley out and have him sign the union card in question. Further, Stack testified that, after he returned to the room, he again left the room while the Appellant and Mr. Santolin were still engaged in a conversation. (Testimony of Stack) I find that Mr. Stack was not a percipient witness to the entire conversation in question, as, according to his own testimony, he was not present in the room for a significant portion of time that the Appellant was speaking to Mr. Santolin.

27. I find that the only percipient witnesses to the entire conversation between the Appellant and Mr. Santolin that morning were the Appellant, Mr. Santolin and Mike Bailey.

28. As referenced above, Mr. Santolin did not immediately report the alleged threatening comments made by the Appellant on the morning in question. Santolin testified, however, that the threatening comments “weighed on him” over the next 2 months and, based on a conversation with an Employee Assistance Program counselor, he decided to come forward

and report the comments made by the Appellant to Personnel Director Kelly Reagan.

(Testimony of Appellant)

29. On March 26, 2004, after speaking with Personnel Director Kelly Regan, Santolin provided a statement to the Pittsfield Police Department which is included as part of Exhibit 13.

Santolin's March 26, 2004 statement to police is consistent with his testimony before the Commission. Specifically, in Santolin's 2004 statement to police, he stated that the Appellant stated, "I will bring my fucking gun in here and point it right at him", referring to Hurley. (Testimony of Santolin and Exhibit 13)

30. I find that David Santolin is a good witness with high credibility. His testimony before the Commission was consistent with his statement to the Pittsfield Police Department in 2004; he did not seek to overreach in his testimony before the Commission; and he showed no ulterior motive for testifying against the Appellant. He had a calm demeanor throughout his testimony and offered a credible explanation regarding why it took him two months to report the comments made by the Appellant. (Testimony, Demeanor of Santolin)

31. Mike Bailey also provided a statement to the Pittsfield Police Department in March 2004, which was included as part of Exhibit 13. In his March 2004 statement to police, Bailey stated in part, "I believe [Hurley] had left the office when Mark slammed his fist into the desk. He said something and it was obvious he was upset but I wasn't really paying attention to him. Det. McGrath asked me if I saw [Hurley] and [the Appellant] get into any type of physical confrontation while they were in the office. No, I did not. He also asked me if I heard Mark make any threats to or about Charlie. No I did not. Like I said, because they have done this before and act like kids, I just block it out." (Exhibit 13)

32. Both during his testimony before the Commission in June 2007 and in his statement to the Pittsfield Police Department in 2004, Mr. Bailey indicated that he was uncertain about the exact words the Appellant used on the day in question. While he does not remember the Appellant referencing a firearm, his testimony was equivocal and stood in contrast to the certain and consistent testimony of Mr. Santolin. (Testimony of Bailey)
33. During his testimony before the Commission, the Appellant, while acknowledging that he may have been a “little angry” and that he slammed his hand on his desk on the morning in question, adamantly denied ever saying he would bring a firearm to work. (Testimony of Appellant)

CHARGE 3 OF 3: TELEPHONE INCIDENT

34. The third basis for the demotion is the alleged behavior of the Appellant toward David Brites on July 20, 2004, when Brites was using a telephone in the administrative offices of the Water Department to make funeral arrangements for his father who had been diagnosed with cancer and was terminally ill. (Exhibits 4 & 5)
35. On or about July 20, 2004, Brites had requested of David Santolin, Superintendent of the Water Department, that he be allowed to use the phone in Santolin’s office to make a personal call regarding setting up an honor guard for his father. Santolin gave Brites permission to use the phone. Santolin was the Appellant’s direct supervisor. (Testimony of Brites)
36. During his lunch break Brites got up and went to Santolin’s office to use the phone. (Testimony of Brites)

37. At the time the Appellant saw Brites go into the office at issue and use the telephone, the Appellant was not aware that Mr. Santolin had given Bates permission to use the particular telephone. (Testimony of Appellant)
38. Mr. Brites testified that as he was speaking with a woman from Veteran's Affairs, the Appellant stormed out of the lunch room and into Santolin's office. According to Mr. Brites, the Appellant started yelling and screaming that "you can't use the fucking phone, get off the phone, and you better not be using that phone in there . . . David's not here, I'm in charge." Brites testified that the Appellant stood in front of him and started waving his hands in his face. Brites explained that Santolin had given him permission to use the phone. The Appellant was approximately one and one-half feet away from Brites and was standing over him as he attempted to use the phone. The Appellant stated, "David's not here, I'm fucking in charge." The Appellant then picked up another phone in the office and started pressing all of the buttons, and yelling "get off the phone". The Appellant then hung up on Veteran's Affairs. (Testimony of Brites)
39. The Appellant then called Santolin, and started yelling at Santolin. The Appellant then gave Brites the phone, and Brites asked Santolin to confirm that he had given him permission to use the phone. Santolin told Brites to inform the Appellant that he did have permission to use the phone. (Testimony of Santolin) The Appellant again started yelling and screaming for approximately ten to fifteen seconds. (Testimony of Brites)
40. Brites told the Appellant that he was calling Veteran's Affairs to set up an honor guard for his dying father. The Appellant told him to use the break room phone. Brites told the Appellant that he needed to use the phone in Santolin's office because it was more private. (Testimony of Brites)

41. Brites picked up the phone again in an attempt to call Veteran's Affairs. The Appellant ripped the phone out of Brites' hand, and slammed the phone down. The Appellant then pushed himself in front of the phone, and said "well you're not using this fucking phone."
(Testimony of Brites)
42. Brites punched out, left the office and contacted the police as he feared that the Appellant might chase him down. (Testimony of Brites)
43. During his testimony before the Commission, Brites relayed the information clearly and didn't waiver on the key facts of his testimony. Brites' testimony was consistent with the other witnesses' account of the incidents. Brites did not show any bias, and had no reason to be untruthful about the incidents. I find his testimony before the Commission in this case to be credible. (Testimony, Demeanor of Brites)
44. The Appellant did not dispute much of Brites' account of the above-referenced incident, but he testified that had he received notice that Santolin had given Brites permission to make a call from that particular telephone, he would not have taken any action upon seeing Brites use the telephone. (Testimony of Appellant)
45. Asked by this Commission whether, in retrospect, he would still respond as he did on the morning in question, the Appellant indicated that "assuming the same facts" (that were available at the time), he would not have done anything differently. (Testimony of Appellant)
46. The Appellant testified that he offered Brites the option of using his (the Appellant's) personal cell phone on the day in question. (Testimony of Appellant)
47. During his testimony before the Commission, the Appellant's testimony was contradictory and conflicted with the testimony of the other witnesses. In regard to the union card/gun threat incident, the Appellant testified that he made no reference to a firearm. However,

Santolin testified convincingly that the Appellant had made the threat. Further, the Appellant testified that he asked Hurley if he could please sign the card. All witnesses to the event testified that the conversation was loud, that they were yelling at each other, and that the conversation was boisterous. I find it highly unlikely that the Appellant was calm and polite during the conversation in question.

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 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. 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).

When the Commission modifies an action taken by the Appointing Authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from inappropriate actions such as partisan political control. Id. at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

The Appellant is accused of 1) asking employees to sign a form regarding recording telephone conversations; 2) threatening to bring a gun into work regarding a coworker's refusal to sign a union card; and 3) physically and verbally intimidating a subordinate who was attempting to make a private phone call regarding his dying father. The City demoted the Appellant from Working Foreman to Water & Sewer System Maintenance Man.

The Appellant has a history of insubordinate conduct and general misconduct. During his twelve years of employment with the City, the Appellant has received numerous disciplinary actions which all relate to insubordinate and/or general misconduct.

In the instant appeal, the City alleges three independent incidents which all relate to insubordinate and general misconduct. The incidents show that the Appellant is not fit to remain in a supervisory role, and that his conduct places the City and his subordinates in an untenable situation which could result in litigation and/or loss of valuable employees.

The Commission concludes that the Appellant, after a boisterous conversation with a co-worker regarding the signing of an agency fee-card, stated, in the presence of David Santolin, "I will bring my fucking gun in here and point it in his direction" referring to the employee who had refused to sign the card. This incident shows a lack of appropriate supervisory judgment, and an extremely concerning threat dealing with workplace violence. The Appellant had the right to ask the employee to sign the card in question. However, once the employee refused to sign the card, the appropriate course of action would have been for the Appellant to contact his union representative to determine how to proceed. Instead, the Appellant became verbally aggressive with the employee, and, after the employee left the room, made a threat of violence with a gun. Such conduct is inappropriate for any employee, but is particularly alarming conduct for a supervisor.

Further, the Commission concludes that on or about March 2, 2004, the Appellant brought a form in for his subordinates and other employees to sign. The form granted the Appellant permission to tape conversations with employees. The Appellant created the form because he believed other employees put him down and his work. A subordinate, David Brites, refused to sign the form, and stated that the form was illegal. The incident reflects the Appellant's poor

judgment, and inability to work with his subordinates and other employees in a professional manner. The Appellant never discussed the form with any of his supervisors prior to creating the form and asking the employees to sign the form. The Appellant had no concerns regarding creating the form, or asking employees to sign the form. Further, even after a subordinate had indicated that the form was illegal, the Appellant continued to ask the subordinate to sign the form. The Appellant testified that even to this day he believes that asking employees to sign the form regarding tape recording was not bad judgment, and was reasonable if it wasn't against the law.

The appropriate course of action would have been for the Appellant to discuss the form with a supervisor prior to asking employees to sign the form. In addition, after a subordinate indicated that the form was illegal, the Appellant certainly should have asked a supervisor regarding the propriety of using the form. The Appellant testified that he knew Brites was going to inform the personnel office, which indicates that at least at that point he knew the form might not be legal. Instead of reconsidering, the Appellant continued to request employees to sign the form. The incident is also concerning because it indicates a lack of appropriate supervisory management. The Appellant believed that his subordinates were out to get him, and that he needed to protect himself from the subordinates by taping their conversations. This type of management decision and thinking is clearly contrary to effective supervisory principles, and creates an uncomfortable work environment for his subordinates.

Finally, the Commission concludes that on or about July 20, 2004, when the Appellant saw an employee using a telephone for which he was unaware the employee had permission to use, the Appellant stormed into the office and started yelling profanities at the employee. The Appellant grabbed another phone and started pressing all of the buttons on the phone and finally hung up

on the individual the employee was talking to. The employee attempted to explain the reason for his call, and that he had been granted permission to use the phone. The Appellant responded, "... I'm fucking in charge." The employee felt threatened and feared for his safety. This incident is particularly alarming and indicates a complete lack of judgment. Normally, in such a situation, one would expect a supervisor to go into the office and inquire if the subordinate had permission to use the phone, and to call the person who allegedly granted permission if there was any doubt as to whether permission was granted. Instead, the Appellant started screaming at the employee before even inquiring whether he had permission, swore at the employee and ultimately hung up the phone. The Appellant's conduct in this regard was inexcusable. The Appellant testified that he made no attempt to determine whether the employee had permission and/or why the employee was making the call.

The three incidents above indicate a complete lack of control, lack of supervisory judgment, and lack of remorse for his actions. The Appellant's supervisory position placed him in a position of authority. The Appellant used this authority to intimidate and threaten his subordinates. The Appellant's conduct shows that he is not an appropriate individual to hold a supervisory position at his present employment.

The City of Pittsfield has proven, by a preponderance of the evidence, that it had just cause for demoting Mark Fresia and there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon him. The Appellant's appeal under Docket No. D-04-359 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4-1 vote of the Commission

Bowman, Chairman: YES
Guerin, Commissioner: YES
Marquis, Commissioner: YES
Taylor, Commissioner: YES
Henderson, Commissioner: NO

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. 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:

Joseph DeLorey, Esq. (for Appellant)

Fernand Dupere, Esq. (for Appointing Authority)