

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

THOMAS MEHAN,
Appellant

v.

D-11-341

CITY OF LYNN,
Respondent

Appearance for Appellant:

Joseph L. DeLorey, Esq.
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34 Mulberry Street
Boston, MA 02108

Appearance for Respondent:

David Grunebaum, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

The Appellant, Thomas Mehan (hereafter “Appellant” or “Mr. Mehan”), pursuant to G.L. c. 31, § 43¹, duly appealed to the Civil Service Commission (hereafter “Commission”) on November 30, 2011, opposing the decision of Judith Flanagan Kennedy (hereinafter “Mayor),

¹ At the hearing, the Appellant sought to amend the appeal by adding that the City of Lynn violated G.L. c. 31, § 42 in that the decision to suspend the Appellant’s employment was issued in an untimely manner following the local hearing. At the hearing, the parties were advised they may address the motion to amend in their recommended decisions. In his recommended decision, the Appellant states that he has decided not to further pursue the motion to amend. The City of Lynn objects to the motion itself as untimely. Given the Appellant’s decision not to pursue the motion to amend, it is moot.

Mayor of the City of Lynn (hereafter “the City”) and Appointing Authority, placing him on a three (3) day suspension as an employee of the Inspectional Services Department (hereafter “the Department”) for the City. A prehearing conference was held on January 24, 2012, and a full hearing was held on May 5, 2012. The witnesses were sequestered during the full hearing, with the exception of the Appellant. As no notice was received from either party, the hearing was declared private. Thereafter, the parties submitted proposed decisions. The full hearing was recorded and a copy of the recording was sent to each of the parties and was made part of the record. For the reasons stated herein, the appeal is denied.

Based on the nineteen (19) exhibits entered into evidence, one (1) document marked for identification, and the testimony of:

For the Appointing Authority:

- Bernadette Stamm, Principal at Drewicz School in Lynn;
- Michael Donovan, P.E., Director of Lynn Inspectional Services Department and Building Commissioner;

For the Appellant:

- Thomas Mehan, Appellant;

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

1. Mr. Mehan is a junior building custodian at the Department; he was appointed in August, 1998.² At all pertinent times, Mr. Mehan was assigned to the Callahan School, working the 3:00 p.m. to 11:00 p.m. shift. At the time of the events indicated herein, Mr. Mehan's children were attending school in the City. (Testimony of Appellant)
2. Mr. Michael Donovan is the Director of Inspectional Services and the Building Commissioner for the City. He has been the Director of the Department since 2004 and he has worked for the City for fifteen (15) years. (Testimony of Mr. Donovan)
3. In 2006, custodians in the City's school department were merged into the Inspectional Services Department and Mr. Donovan assumed direct responsibility for the school custodians. (Exhibit (hereinafter "Ex.") 10)
4. Between 2007 and 2010, the Department issued three (3) notices informing custodians that they are not to enter a building to which they are not assigned, that they are not to enter a building to which they are assigned in non-working hours unless they are assigned to an overtime project or with the permission of a supervisor, and that they would face discipline if they were found in a building in violation of this policy. (Exs. 17 - 20)
5. Ms. Bernadette Stamm is the principal at the Drewicz Elementary School in Lynn ("Drewicz School"). As of the time of the Commission's full hearing, Ms. Stamm had been the principal at the Drewicz Elementary School for approximately four (4) years. She has been employed by the City for approximately forty-two (42) years. (Testimony of Ms. Stamm; Ex. 10)

² The Appellant's recommended decision states that the Appellant has been employed as a junior building custodian in August of 1993. The Appellant testified that he began working for the City in August, 1993 and the City's recommended decision states that the Appellant was appointed in August, 1998. Therefore, I understand that the reference in the Appellant's recommended decision to 1993 should be 1998.

6. For safety reasons, school visitors are required to go to the school office to sign in when they arrive and to sign out when they leave. (Testimony of Ms. Stamm; Ex. 10) The City's school department takes security very seriously. (Testimony of Mr. Donovan)³
7. On May 30, 2011, Mr. Mehan was served with a domestic violence restraining order that precluded him from going home. As a result, Mr. Mehan slept in his car. (Testimony of Appellant)
8. On May 31, 2011, Mr. Mehan entered the Drewicz School, at which he was not assigned, at a time when he was not working, seeking to speak to Mr. Matt Breen, a custodian in the Drewicz School and Executive Board Member of the Union. On May 31, 2011, Mr. Breen was acting senior custodian at the Drewicz School. (Testimony of Appellant; Ex. 10)
9. Upon entering the Drewicz School, the Appellant asked a school secretary if Mr. Breen was there. The Appellant wanted to see Mr. Breen to discuss contingency plans, such as health insurance, and/or union business, in view of the restraining order that had been served on him. The school secretary told Mr. Mehan that Mr. Breen was not there. Mr. Mehan left the school, neither signing in nor signing out. (Testimony of Appellant; Ex. 10)
10. On June 1, 2011, Mr. Mehan again entered the Drewicz School, at which he was not assigned and at a time when he was not working, seeking to speak to Mr. Breen. (Testimony of Appellant)
11. While Mr. Mehan was in the Drewicz School on June 1, 2011, someone called Ms. Stamm, the principal, and said that there was a strange man in the building. Ms. Stamm met with Mr. Mehan, who looked very disheveled, as if he had slept on the beach. Ms.

³ There was no document provided at the hearing indicating the need to sign-in and sign-out of school buildings.

Stamm had an “ill feeling” about the Appellant being at the Drewicz School. She asked Mr. Mehan for his identification. Mr. Mehan had a visitor’s lanyard and showed Ms. Stamm his identification, which was apparently not on the lanyard. Ms. Stamm told Mr. Mehan to button his shirt, and he did so. Mr. Mehan then signed in and said he wanted to speak to Mr. Breen. Ms. Stamm told Mr. Mehan that she would locate Mr. Breen; she located Mr. Breen and he and Mr. Mehan talked. Mr. Mehan was not disrespectful toward Ms. Stamm and he did as she asked. Mr. Mehan did not sign-out of the school that day. Thereafter, Ms. Stamm emailed two people about the Appellant’s appearance at the Drewicz School. (Testimony of Ms. Stamm; Ex. 11)

12. Specifically, on June 1, 2011, at 11:51 a.m., Ms. Stamm sent an email message to Tom Kench (Assistant Supervisor of Custodians and Maintenance) and Dennis Camilio (also Assistant Supervisor of Custodians and Maintenance) stating,

“Gentleman (sic),

I wanted you to know that a man arrived at my door today that was completely disheveled looking. His shirt was unbuttoned. He looked like he has slept on the beach last night. He did not have a LPS badge showing. He did have a red visitor cord with no ID attached. When I asked him who he was he then showed me his LOP picture. I had to tell him that he does not come into a building with an unbuttoned shirt and chest showing.

He wanted to see the custodian but he did not want me to call him because it was not an emergency. I told him that I would call and that we don’t have people roaming the building looking for people who could be anywhere.

I was informed that he was here yesterday but I was not in the building at the time. According the (sic) Ms. Halas he looked the same yesterday. He did not sign in until I told him he had to.

Bernie Stamm” (Ex. 11)

13. Mr. Camilio forwarded the email message to Mr. Donovan, sending copies to Dottie Thibodeau, Butch Barnes, Thomas Kench and Richard Connick (a supervisor). (Exs. 10 and 11 (There is no record of the job titles for Ms. Thibodeau and Mr. Barnes.)) This email message, dated June 1, 2011, 1:16 p.m., states,

“Mike,

The following e-mail was sent to me by the principal of Drewicz School. Upon review of Mr. Mehan’s file he already has a letter written by you dated December 5, 2009 warning him about this kind of behavior. I believe the appropriate action should be suspension.

Dennis” (Ex. 11)

14. By letter dated June 6, 2011, Mr. Donovan informed the Appellant that he was being suspended for three days for entering the Drewicz School, to which he was not assigned and during non-work hours on May 31 and June 1, 2011, without authorization and without signing in, and although he had been repeatedly informed otherwise. Specifically, the letter states that, “Your actions in this matter were insubordinate, disruptive to the operations of the Drewicz School and cannot be tolerated.” (Ex. 5) This letter also advised the Appellant of his right to request a civil service hearing, pursuant to G.L. c. 31, §§ 41-45 (attached), within forty-eight (48) hours of receipt of the letter.

(Ex. 5)

15. Mr. Donovan imposed the three-day suspension on the Appellant because this was the third incident in which the Appellant appeared in a building to which he was not assigned, it was not during his 3:00 p.m. to 11:00 p.m. shift, and he did not have the permission of a supervisor. (Testimony of Mr. Donovan)

16. The first two times the Appellant appeared in a building in this manner resulted in two warnings to the Appellant indicating that he had violated the policy barring custodians from entering buildings as indicated. (Testimony of Mr. Donovan; Exs. 1, 13)

17. By an undated letter from the Appellant to Mr. Donovan, referencing Mr. Donovan's December 5, 2009 letter to the Appellant, the Appellant wrote, *inter alia*,

When I received your letter of December 5, via Certified Mail no less, I told myself that I would not lower myself, once again, to your simple-minded management style of fear and intimidation. ... Given the severity of the issue involved and the implicit threat of prosecution, I felt it necessary to consult legal counsel. And though it was not easy finding attorneys capable of dealing with this issue in the context of the mentality from which it proceeds I was, after a lengthy and exhaustive search, finally able to locate competent counsel with the Second Grade Mock Trial Team at Lincoln School. ... In other words, I have no intention of complying with this foolishness of a concocted 'policy' and can assure you that as the parent of three children in three different public schools in West Lynn that you will most certainly continue to see me in one building or another. ... (Ex. 1)

18. The Appointing Authority's hearing officer conducted a hearing regarding the three-day suspension. After the Appointing Authority's hearing, the hearing officer recommended that the Mayor uphold the three-day suspension. The Mayor subsequently upheld the suspension. This appeal followed. (Exs. 3, 6 – 10; Administrative Notice)⁴

19. At the relevant times, there were approximately one hundred and ten (110) custodians in the City buildings and schools. One other person has been disciplined for appearing in a school building to which she was not assigned, during her off-duty hours, and without

⁴ At the Commission hearing, there was a question of whether a previous matter, relating to a June 11, 2010 written warning to the Appellant regarding improper use of emergency vacation time concludes, "This correspondence is a written reprimand and will remain in your personnel file for a one year period." (Ex. 14). The one-year period would expire June 11th (or 12th), 2011 but the matter that is subject of this appeal occurred on May 31 and June 1, 2011, before the end of the one year period. Therefore, the City could discipline the Appellant considering the June 11, 2010 warning.

authorization. That person received either a verbal or written warning and the school re-keyed the building afterward. (Testimony of Mr. Donovan)⁵

Applicable Law

G.L. c. 31, § 43, provides:

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

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." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n., 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev.den.*, 426 Mass. 1102, 687 N.E.2d 642(1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427(1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n., 43 Mass.App.Ct. 486,

⁵ There was no evidence indicating whether the other custodian who received a written or verbal warning had received other prior discipline.

488, 684 N.E.2d 620, *rev.den.*, 426 Mass. 1104(1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408(1983).

Credibility

The Appellant testified with emotional difficulty on direct examination. Recalling the events of May 31 and June 1, 2011, and having received a domestic violence restraining order on May 30, 2011, he testified that because of those events, he had come to understand “in a very visceral way” the importance of a friendly face in difficult times, implying that those events were behind him or that he has learned from the events. However, on cross-examination the Appellant was combative and very bitter, not unlike the very bitter tone in his letter responding to Mr. Donovan’s December 5, 2009 letter. To his credit, the Appellant admitted that he appeared at the Drewicz School on May 31 and June 1, 2011 when he should not have but he appeared to believe, in effect, that extenuating circumstances excused his appearances and conduct at the Drewicz School. In addition, the Appellant testified inconsistently with regard to school security. On one occasion, he testified that schools do not pay attention to security matters, such as requiring visitors to sign in and out of the schools. On another occasion, the Appellant testified that school security is important. As a custodian for a number of years and as the father of three children attending City schools, it is not credible for the Appellant to suggest that the schools do not pay attention to security. In view of the foregoing, the Appellant’s testimony was only moderately credible.

Principal Stamm testified that, as the Drewicz School principal for four years at the time with a total of forty-two years of employment with the City, she knows that it is school policy that visitors are required to go to the school office when arriving and leaving and that visitors must sign in and out for security reasons. Ms. Stamm was at the Drewicz School on June 1,

2011 and comfortably recalled certain details, for example, regarding when she saw the Appellant, his appearance, his request to talk to the custodian, whether the Appellant had signed in and out, how she knew that the Appellant was in the school the day before, and that she sent an email message regarding the Appellant's appearances at the Drewicz School. Ms. Stamm admitted, without reservation, when she did not have the answers to questions on examination, such as whether she knew which door the Appellant entered the school. Her testimony did not exhibit a bias against the Appellant. For these reasons, Ms. Stamm's testimony was credible.

Mr. Donovan testified knowledgably about the function of the Department within the City, transitions in the City regarding custodian functions, and related personnel matters. Specifically, Mr. Donovan testified about the policies applied to custodians and housekeepers for several years, citing the provisions indicating that custodians shall not enter a non-assigned building; that custodians shall not enter an assigned building during nonworking hours unless they are assigned overtime projects or they have the permission of a supervisor. Mr. Donovan also recalled information about the two previous occasions on which the Appellant wrongly entered other schools, that he had sent the Appellant a letter about one of the two other occasions and that he sent the Appellant a written reprimand regarding the other entry, as well as other matters involving the Appellant. Mr. Donovan acknowledged that he did not recall certain details of his actions in response to Principal Stamm's email message and before issuing the three-day suspension to the Appellant, although he generally relies on one of the supervisors (Mr. Connick or Mr. Camilio) to investigate and report on such matters. When asked if there are other custodians who have not adhered to the Department policy and school security, Mr. Donovan testified that was only one and acknowledged that that person was given a warning, not a suspension. However, when pressed on this topic, Mr. Donovan grew agitated and

subsequently testified inconsistently that there may be other instances in which custodians did not sign in and out of schools of which he was not aware. For these reasons, Mr. Donovan's testimony was credible for the most part.

Argument

The Appellant argues that the City lacks just cause for the three-day suspension because his actions do not constitute substantial misconduct that adversely affected the public interest by impairing the efficiency of public service. The Appellant asserts that although he entered the Drewicz School on May 31, 2011, it was for a valid reason involving extenuating circumstances that he wanted to discuss with Mr. Breen and he left when he was told that Mr. Breen was not in the building. When he entered the school on June 1, the Appellant argues, it was again for a valid reason involving extenuating circumstances that he wanted to discuss with Mr. Breen, Principal Stamm gave him permission to speak to Mr. Breen, and he cooperated with Principal Stamm's requests. In light of the foregoing, the Appellant asserts that his conduct did not constitute substantial misconduct that adversely affected the public interest by impairing the efficiency of public service and that his appeal of the three-day suspension should be granted.

The City argues that its decision to suspend the Appellant for three days is supported by just cause. Specifically, the City asserts that it acted based on the Appellant's record of discipline and "serious misconduct" involving his entrance into other schools when he was unauthorized to do so, the Appellant sent the City a "facetious and insubordinate response" to the City's Dec. 5, 2009 letter concerning his wrongful entry into one of the schools, the Appellant was not authorized to enter the Drewicz School on May 31 and June 1, 2011, the Appellant has been subject to warnings and reprimands relating to attendance, and the Appellant's conduct reflects a "pattern of extensive, progressive discipline which has failed to

correct misconduct.” (AA Recommended Decision, p. 8) Therefore, the Appointing Authority asks the Commission to uphold its three-day suspension and deny the appeal here.

Analysis

The Inspectional Services’ Department policy provides, in pertinent part, that no custodian shall enter a building to which they are not assigned and shall not enter buildings during non-working hours for any reason other than an assigned overtime project or with permission of a supervisor and that violators are subject to discipline. (See Exs. 17 – 20) The Department policy was issued three times between 2007 and 2010. In addition, the Appellant previously received two written warnings about his violation of the policy. Nonetheless, the Appellant entered the Drewicz School on May 31, 2011, appearing disheveled and without having signed in or out. At the time, the Appellant was assigned to the Callahan School, not the Drewicz School. Since the Appellant reported speaking with someone at the Drewicz School on May 31 to ask if Mr. Breen was available, it appears that school was in session, which precedes the Appellant’s 3:00 p.m. to 11:00 p.m. shift. The Appellant was not authorized to enter the school on that date. Thus, the Appellant violated the Department policy when he entered the Drewicz School on May 31, 2011. That the Appellant left the school when he asked to speak with Mr. Breen and was told that Mr. Breen was not available does not undo the fact that he entered the building in violation of the Department policy. The Appellant’s conduct on May 31, 2011 also contravened the City school policy that requires visitors to sign in and out of school buildings.

The Appellant also entered the Drewicz School on June 1, 2011 before noon, again appearing disheveled, and at a time when he was not authorized to do so under the Department policy. Again, the Inspectional Services’ Department policy indicates that custodians shall not

enter a building to which they are not assigned and shall not enter buildings during their non-working hours for any reason other than an assigned overtime project or with permission of a supervisor. (See Exs. 17 – 20) The Appellant was not assigned to the Drewicz School on June 1, 2011 and he entered the school during his non-work hours. He had received notice of the Department policy three times between 2007 and 2010 and received two previous written warnings regarding his violation of the Department policy. Notwithstanding the three notices of Department policy and previous written warning in this regard, the Appellant appeared at the Drewicz School on June 1. The Appellant encountered Principal Stamm in the Drewicz School on June 1. Ms. Stamm reported that the Appellant’s appearance gave her an “ill feeling”. After verifying his identification, Principal Stamm directed the Appellant to sign into the building and arranged for him to meet with Mr. Breen, as he requested. The Appellant did not sign out when he left. The Appellant’s entry into the Drewicz School on June 1 violated Department policy and the school visitor policy.

There is no question that the Appellant’s conduct on May 31 and June 1, 2011 constitutes substantial misconduct that adversely affected the public interest by impairing the efficiency of public service. On the two days, the Appellant entered a school to which he was not assigned, during his non-work hours, and he appeared disheveled, looking to Ms. Stamm as if he had slept on the beach and giving her an “ill feeling.” Indeed, Ms. Stamm had to instruct the Appellant to button his shirt. There can be no question that the Appellant was aware of the Department policy, that he knew his conduct contravened the Department policy, and that his conduct would result in discipline. The Appellant’s bitterness in response to the Department’s previous written warning concerning the Department policy and in his testimony in this case is troubling. A preponderance of the evidence establishes that the City was justified in its actions and that it

employed progressive discipline. There was no bias or other inappropriate motivation involved in the City's discipline of the Appellant in this regard.

Conclusion

The City having established, by a preponderance of the evidence, that it had just cause to suspend the Appellant for three days, the appeal is hereby denied.

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on November 29, 2012.

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)(1), 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:

Joseph L. DeLorey, Esq. (for Appellant)

David F. Grunebaum, Esq. (for the Appointing Authority)