

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

KENNETH MOREHOUSE,
Appellant

v.

D-09-410

TOWN OF WEYMOUTH,
Respondent

Appellant's Representative:

Pro Se
Kenneth Morehouse

Respondent's Representative:

Robert J. Leary, Chief
Weymouth Fire Department
636 Broad Street
Weymouth, MA 02189

Commissioner:

Christopher Bowman

DECISION

The Appellant, Kenneth Morehouse (hereinafter "Appellant" or "Morehouse"), pursuant to G.L. c. 31, § 43, appealed a decision of the Town of Weymouth (hereinafter "Appointing Authority" or "Weymouth" or "Town") to suspend him for two (2) days from his position as firefighter for filing a false workplace injury report. The appeal was timely filed and a full hearing was held by the Civil Service Commission (hereinafter "Commission") on February 1, 2010. The hearing was declared private as no party requested a public hearing. The hearing was digitally recorded.

FINDINGS OF FACT:

Based on the documents submitted and the testimony of:

For the Appointing Authority:

- Robert J. Leary, Fire Chief, Weymouth Fire Department;

For the Appellant:

- Kenneth Morehouse, Appellant;
- Paul Hammond, Captain, Weymouth Fire Department;
- Kevin Connelly, Firefighter, Weymouth Fire Department;

I make the following findings of fact:

1. The Appellant has been employed as a firefighter with the Town of Weymouth since September 2003. He has no prior disciplinary record. (Testimony of Appellant)
2. The Weymouth Fire Department has a set of Rules and Regulations. These regulations include standards relating to firefighter uniforms as well as personal grooming and hygiene. The regulations specify the proper length of facial hair. Short facial hair is required so that breathing apparatuses that are worn during certain emergencies can make an air-tight seal to the firefighter's face. (Exhibit 4, Testimony of Leary)
3. On October 22, 2004, Weymouth issued a memorandum to its firefighters on proper grooming. (Exhibit 5)
4. On October 7, 2009, Chief Leary observed that the Appellant had a mustache that Chief Leary believed was longer than permitted by the rules. Chief Leary informed the Appellant that his mustache was too long and instructed him to shave it before returning to work the following shift. (Testimony of Appellant; Testimony of Leary)

5. The Appellant trimmed his mustache while home between shifts. The length of the Appellant's mustache before and after trimming is unclear. However, the Appellant believed that he had shaved his mustache to an appropriate length. (Testimony of Appellant)
6. On October 9, 2009, Chief Leary informed the Appellant that his mustache was still too long. Chief Leary ordered the Appellant to immediately shave his mustache. (Testimony of Appellant, Connelly and Leary)
7. The tone of Chief Leary's voice and the directness of his order made it clear to the Appellant that the action was to be taken immediately. The Appellant usually shaves with an electric razor but did not have one with him at work. (Testimony of Appellant and Leary)
8. A section of the fire station has been closed for a few years and in that section is a locker room. The Appellant found a used razor in a locker. (Testimony of Appellant)
9. The Appellant used the razor to shave but was informed by Chief Leary that it was not short enough. The Appellant shaved a second time and that time Chief Leary was satisfied with the length. (Testimony of Appellant and Leary)
10. The Appellant testified that his face became irritated and he developed razor burn on his skin. (Testimony of Appellant)
11. The Appellant completed an injury report and an unprotected exposure form. The Appellant filed these reports with Training Officer Captain Starke but later withdrew the unprotected exposure form. (Exhibits 1 & 7 and Testimony of Appellant)
12. It is the practice of Weymouth, the union and retirement board to encourage firefighters to document every workplace injury or harmful exposure, so that

insurance will cover medical costs in the event that the firefighter develops future medical complications. Pursuant to the union contract, injury reports are signed and forwarded to the retirement board. (Testimony of Hammond, Testimony of Connelly)

13. Upon review of the Appellant's injury report, Chief Leary determined that the report was false because the Chief could see no way that shaving could result in a legitimate injury. Chief Leary did not sign the report and did not forward it to the retirement board. (Testimony of Leary)

14. Chief Leary suspended the Appellant for two days for filing a false report.
(Testimony of Appellant; Testimony of Leary)

15. The Appellant appealed the decision. Chief Leary held a hearing with the Appellant and Paul Hammond, a Weymouth captain and President of Union Local 1616.
(Testimony of Appellant and Leary and Hammond)

16. The hearing resulted in Chief Leary affirming the decision to suspend the Appellant.
(Testimony of Leary)

17. The Appellant appeal the Town's decision to the Commission.

CONCLUSION

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.”

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, 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)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service

Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the 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 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). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

The Town has not shown, by a preponderance of the evidence, that it had reasonable justification to suspend the Appellant for two (2) days. The Weymouth Fire Department has a set of Rules and Regulations that govern employee conduct and appearance. These regulations include detailing the acceptable length and patterns of facial hair allowed by firefighters. It is important that firefighters follow these regulations because long mustaches, goatees or beards may obstruct the rescue breathing apparatuses worn during some emergencies. It is the responsibility of Chief Leary and other supervising officers to ensure that all firefighters are ready and able to perform their job duties safely.

Disciplinary action may be appropriate where the regulations are violated. However, in the instant matter, the disciplinary action taken was not the result of the Appellant violating the regulations regarding his mustache length. Rather, Chief Leary suspended the Appellant for allegedly filing a false report. It is the practice in Weymouth to complete and submit a workplace injury report for any injury regardless of whether it appears to be trivial. This is necessary to document injuries or harmful exposures so that insurance will cover the firefighter in the event that a future complication arises. Here, although Chief Leary may have been skeptical about the Appellant's motive for submitting the injury report, he has not shown that it was a false report. Further, he had a responsibility to submit the injury report which he did not.

For these reasons, the Appointing Authority has not demonstrated by a preponderance of the evidence that there was reasonable justification to discipline the Appellant.

The Appellant's appeal under Docket No. D-09-410 is hereby *allowed*; the 2-day suspension is reversed and the Appellant should be reimbursed for any loss of any pay or benefits associated with this 2-day suspension.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, McDowell, Commissioners [Stein, Marquis – Absent] on August 26, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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 sent to:

Kenneth Morehouse (Appellant)

Chief Robert Leary (Appointing Authority)