

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

ANTONIO FONSECA,
Appellant

v.

Case No. D-03-2

CITY OF HOLYOKE
BOARD OF PUBLIC WORKS,
Appointing Authority

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Antonio Fonseca (hereinafter "Appellant"), is appealing the decision of the Respondent, City of Holyoke Department of Public Works as Appointing Authority, suspending him for three (3) days without pay from his employment as a Heavy Motor Equipment Operator due to his carelessness in the

use of Department of Public Works (hereinafter “DPW”) property, occurring on October 7, 2002 at the DPW Fuel Depot in Holyoke, Massachusetts. The Appellant filed a timely appeal. A hearing was held by the Commission on December 13, 2006 at 10:00 a.m. at Holyoke City Hall. Witnesses were not sequestered. One tape was made of the hearing. As no notice was received from either party, the hearing was declared private. Following the hearing, the parties submitted Proposed Decisions as instructed.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1 – 11 and Appellant’s Exhibits 1 & 2) and the testimony of William D. Fuqua, DPW General Superintendent; David Moore, Commissioner of the Holyoke Board of Public Works; Michael Gallagher, President of the Holyoke Employee’s Association; and the Appellant, I make the following findings of fact:

- (1) The Appellant was a tenured civil service employee in the position of a Heavy Motor Equipment Operator at the time of the alleged incident, October 7, 2002, for which he was disciplined. He had been employed by the Respondent since 1994. (Joint Exhibit 4 and Testimony of Appellant).
- (2) The Appellant was an experienced operator of the DPW Trackless Tractor, having been assigned to its operation since the Tractor was purchased in 1997. The Appellant testified that approximately 95% of his duties involved his use of the Tractor. (Testimony of Appellant and Fuqua)
- (3) On October 7, 2002, the Appellant, while driving the DPW Trackless Tractor, drove into a city light post located within the DPW Fuel Depot property causing damage to

the DPW's Trackless Tractor in the amount of three thousand five hundred and forty-two dollars (\$3,542) and damage to the city light post. (Joint Exhibits 1, 3, and 9 and Testimony of Fuqua and Appellant).

- (4) A "Vehicle or Equipment Accident/Incident Report" was prepared and signed on that same day, October 7, 2002, by Working Foreman Ken Buxton, the Appellant's supervisor. (Joint Exhibit 1 and Testimony of Fuqua and Appellant).
- (5) The "Vehicle or Equipment Accident/Incident Report" was also signed by the Appellant and indicates in part that the Appellant was "in the gate turning right toward gas pump and the side arm [of the Trackless Tractor] hit the light post (first light post) and did damage to light post and the arm of Trackless. Fonseca A. [Appellant] said he misjudge[d] his distance." (Joint Exhibit 1).
- (6) The Appellant and Mr. Fuqua both testified that the Appellant had driven the Trackless Tractor in and out of the Fuel Depot numerous times over the years. Mr. Fuqua testified that the entrance gate to the Depot was forty (40) feet wide and easily accessible by the Trackless Tractor. Mr. Fuqua also testified that the light post in question was "well out of the way of the gate". Photographic evidence supports his contention that the light post stands alone, well inside and away from the gate, to the right of entering vehicles and out of the obvious path of traffic. There is also a light post inside the gate to the left of entering vehicles. It is located equidistant from the gate as the light post to the right. Both posts are tall and plainly visible. (Joint Exhibit 9 and Testimony of Appellant and Fuqua).
- (7) I found Mr. Fuqua to be a very credible witness. He exhibited a professional demeanor and answered all questions patiently and forthrightly. His testimony

about the size of the Depot area and the entrance gateway was credibly supported by photos submitted as documentary evidence. His description of the dimensions of the Depot area was buttressed by the fact that he assisted in designing the area. He testified that the Appellant was well used to operating the Trackless Tractor while confronted with various obstructions such as street lights, telephone poles, fire hydrants and other such impediments. (Joint Exhibit 9 and Testimony and Demeanor of Fuqua).

(8) The Appellant's testimony that he never saw the light post that he hit was unconvincing. He testified at hearing that he never said he "misjudged" the distance between the Trackless Tractor and the light post because he never saw the post and had no idea light posts were in the lot. It is unreasonable to believe that the Appellant was not knowledgeable of the presence of light posts in the Depot area. Moreover, his testimony directly contradicts the account of the incident at the time which is captured on the "Vehicle or Equipment Accident/Incident Report" that was prepared immediately following the accident and which quoted the Appellant as saying he did "misjudge" the distance. I assign greater weight on this point to the report than to the Appellant's recollection. (Testimony of Appellant and Joint Exhibit 1)

(9) The Appellant testified that he entered the gate by taking a left hand turn from his direction of travel. That would have placed the gate and the light post within his field of vision out of the left side of the Trackless Tractor as he approached the gate to take a left hand turn. The field of vision on the Appellant's left side was not obstructed by the side/mower arm. The side/mower arm was located on the right

side of the vehicle and did obstruct the field of vision to the right side of the vehicle.

(Testimony of Appellant, Joint Exhibit 9 and Appellant's Exhibit 2)

(10) The Appellant testified that he needed to use the restroom located at the Depot at the time of the accident. He stated that he had never had to use the restroom at the Depot before. The restrooms are located inside the facility to the right, as one enters through the gate, and then straight ahead in offices behind the fuel pumps. The Appellant stated that he entered the gate and took a right hand turn towards the restrooms. It was at this point that he struck the light post with the mower arm on the right side of the vehicle. I find that the Appellant knew of the presence of a light post in that part of the facility and, even with obstructed vision, did not have to exercise an unreasonable amount of care to avoid striking the light post with the side/mower arm of the vehicle. (Testimony of Appellant and Fuqua and Joint Exhibit 9)

(11) In a letter dated October 10, 2002, the Appellant was suspended without pay for three (3) days and charged by written notice with the violation of the rules and regulations of the DPW, in particular, "Section II (a) Carelessness in the performance of duties assigned or in the care or use of DPW and city property," for the October 7, 2002 incident in which the Appellant was driving the Trackless Tractor on DPW Fuel Depot property hitting a city light post causing damage to the light post and to the Trackless Tractor. (Joint Exhibit 4).

(12) Section II of the General Conduct Rules and Regulations provides in relevant part that:

1. "The following offenses may be cause for a suspension up to five days or discharge based upon

the circumstances surrounding the incident. Employees suspended for violations of this section will be reinstated on a last chance basis. A repeat of a similar offense will be cause for discharge.” (Joint Exhibit 8).

(13) A letter of appeal to the Board of Public Works was submitted by the Appellant dated October 15, 2002. (Joint Exhibit 5).

(14) On October 17, 2002, Doug Reynolds, then DPW Safety Officer, completed the Safety Officer Assessment which was submitted to the DPW General Superintendent. (Joint Exhibit 2). Pursuant to the Safety Officer Assessment, the Appellant violated two (2) DPW Safety Rules (6.23 and 6.39):

- ii. “operate the equipment/vehicle with due regard to road conditions, visibility, weather and traffic, and maintain a sufficient clear distance ahead to meet any emergency”
- iii. “when entering or leaving any building, enclosure, alley or street where vision is obstructed, a complete stop shall be made and the operator/driver shall proceed with caution.” (Joint Exhibit 2).

(15) The Appointing Authority hearing before the Board of Public Works, in accordance with G.L. c. 31, § 41, was held on October 21, 2002 in Executive Session. The Safety Officer Assessment was admitted as evidence. (Joint Exhibits 2 and 6).

(16) The Board of Public Works voted “to uphold three day suspension, to pay holiday [wage] and amend Section II violation to Section I due to the nature of this case.” (Joint Exhibits 6 and 7).

(17) The Appointing Authority deemed the offense to be carelessness in the use of DPW property meriting a three (3) day, unpaid suspension but was lenient in that it reduced the violation from a Section II violation to a Section I violation so that a

future such incident would not result in possible immediate termination. (Testimony of Moore).

(18) On or about December 23, 2002, the Appellant appealed the Appointing Authority's decision to the Civil Service Commission ("CSC").

CONCLUSION:

The role of the Civil Service Commission (hereinafter "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). 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." City of Cambridge 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 proper inquiry for determining if an action was justified is, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the 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). This burden must be met by a preponderance of the evidence. G.L. c. 31, §43.

The Respondent did show by a preponderance of the evidence that it had just cause to suspend the Appellant from employment for a period of three (3) work days, without pay.

On October 7, 2002, the Appellant while operating a trackless tractor, turned right into the DPW Fuel Depot property and hit a light post cracking the base of the light post and causing damage to the Trackless Tractor in an amount of three thousand five hundred and forty-two dollars (\$3,542). The Appellant admitted colliding with the light post but asserted that he “misjudged his distance” and hit the light post. A “Vehicle or Equipment Accident/Incident Report” recording the Appellant’s assertion was completed on that same day, October 7, 2002, by Working Foremen Ken Buxton, the Appellant’s supervisor.

The Appellant was initially suspended by the DPW General Superintendent, for three (3) days without pay due to “carelessness in the use of DPW property”, a violation of Section II of the Department’s General Conduct Rules and Regulations. Section II violations provide the Appointing Authority with the grounds for suspension up to five (5) days or discharge, based upon the circumstances surrounding the incident. Because his suspension took effect the day after a holiday, the Appellant also forfeited his holiday pay per the collective bargaining agreement. Given that the nature of the incident involved carelessness, the DPW General Superintendent cited him for a Section II violation.

The Appellant appealed his three (3) day suspension to the Board of Public Works who upheld the three (3) day suspension but converted it to a Section I offense. The conversion from Section II to a Section I offense limited discipline for similar offenses in the future. For a

Section II violation, “A repeat of a similar offense will be cause for discharge.” Whereas, Section I offenses provide a six (6) month probationary window in which the discipline can continue after which “all previous warning notices and/or suspensions will be rendered inactive.” The Board of Public Works also voted to re-pay the Appellant the holiday pay that was initially withheld because his suspension took effect the day after a holiday.

Based on the facts presented, there was just cause to discipline the Appellant and, therefore, discipline was warranted. The three (3) day suspension was justified based on the seriousness of the conduct under the DPW Rules and Regulations. At the time of the October 7, 2002 incident, the Appellant had been involved in at least two (2) previous accidents for which he was not disciplined because they were not determined to be careless. However, the Appellant’s conduct on October 7, 2002 was careless in his operation of the Trackless Tractor. There was no evidence that there were any people in the way that he was trying to avoid. He had driven into that particular location numerous times before. He had an awareness of the light posts at the Depot and is able to avoid the light posts on public streets, as there was no record of him having hit a light post in the past. He had numerous years of experience driving the Trackless Tractor and there existed such a wide area to maneuver the Trackless Tractor around the light post on October 7, 2002, that there can be only one conclusion and that is that his actions were careless in violation of DPW Rules and Regulations which authorize the three (3) day suspension.

Although the Board determined that the Appellant was careless in the operation of the Trackless Tractor and a three (3) day suspension was warranted, the Board converted the Section II offense to a Section I offense in an attempt at leniency to the Appellant’s benefit so that a

subsequent such incident would not result in a discharge and the incident would only result in a six (6) month probationary period for further disciplinary incidents. Considering the totality of the circumstances of this incident, the Respondent was justified in imposing the stated discipline.

For all of the above stated findings of fact and conclusion, the Commission determines that by a preponderance of evidence there is just cause for the three (3) day suspension from employment without pay by the Respondent. Therefore, the appeal on Docket No. D-03-2 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Guerin, Marquis and Bowman, Commissioners)
[Taylor, Commissioner absent] on March 22, 2007.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) days of receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of M.G.L. c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under Section 14 of Chapter 30A 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:

Melissa M. Shea, Esq.
John Connor, Esq.