

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ANTHONY MONIZ,
Appellant

v.

D1-11-296

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Paul M. Stein

DECISION AFTER REMAND

The Appellant, Anthony Moniz, duly filed this appeal with the Civil Service Commission (Commission) against the City of New Bedford (New Bedford), as Appointing Authority for New Bedford Airport, challenging the Appellant's termination as a diesel repair mechanic. By Decision dated June 27, 2013, the Commission Majority (by 3-2 vote)¹ allowed the appeal, in part, modifying the Appellant's termination to a suspension of 21 months, from which New Bedford duly sought judicial review. By "Memorandum and Order Pursuant to Rule 1:28", the Appeals Court vacated the Commission's Decision and remanded the case to the Commission for further proceedings to "reexamine whether there is any basis for modification of the decision to discharge" the Appellant. New Bedford Airport Comm'n v. Civil Service Comm'n, 89 Mass.App.Ct. 1127*6,51 N.E.3d 510 (2016) (Appeals Court Opinion)

¹ Following the Commission's Decision, Commissioners Tivnan and Camuso were appointed to replace Commissioners McDowell (who voted with the Majority) and Marquis (who voted with the Minority)

After a status conference was held on August 5, 2016 at the UMass School of Law in Dartmouth, the parties waived further hearing and oral argument. The matter is now before the Commission on the supplemental briefs submitted by the parties to the Commission on December 16, 2016, together with the “Parties Corrected Stipulation of Facts” (*Stip.*). The Commission also takes administrative notice of the Appendix (A.1-A.686) filed in the Appeals Court, which includes the Administrative Record (A.7-A.290) of the Commission’s original proceedings in this appeal (A.7-A.290) and the Transcript of the original Commission hearing (A.293-A.686).

ANALYSIS

Scope of Review On Remand

The Appeals Court Opinion sustained the original Commission’s Majority Decision insofar as the Majority concluded that New Bedford had established just cause for discipline on only some, and not all of the charges of misconduct asserted against Mr. Moniz. In particular, the Appeals Court Opinion sustained the Commission Majority’s conclusion that New Bedford had failed to establish that Mr. Moniz had committed any of the three “most serious” charges of misconduct that involved alleged acts of harassment or other workplace violence directed at his supervisor Thomas Vick, and also had failed to establish that Mr. Moniz had committed the alleged misconduct involving the alleged falsification of his time logs. (*Appeals Court Opinion, 89 Mass.App.Ct. 1127*2, *5; A.207-A.209 [Commission Majority Decision]*)

The Appeals Court Opinion also sustained the Commission Majority’s conclusion that New Bedford did establish just cause to discipline Mr. Moniz for (1) “minor” violations wearing T-shirts to work rather than a collared shirt as Mr. Vick required; (2) dilatory behavior in completing his assignment to paint several snow plows; and (3) neglect in maintenance of the

two generators that provided emergency back-up to the airport's runway and tower lights. (*Appeals Court Opinion, 89 Mass.App.Ct. 1127*2; A.209 [Commission Majority Decision]*)

Finally, the Appeals Court Decision took note of the Commission's findings of fact (that both the Commission Majority and Commission minority adopted) that Mr. Moniz had "spoken disrespectfully about his supervisor, asking another employee if she had heard how he [Moniz] had "pissed off 'Chiefie' ", and had refused to sign the September 14, 2011 written warning he received from Mr. Vick and "threw it back" at him, as well as the Commission Majority's conclusion that Mr. Moniz's actions, while not sufficient to amount to harassment or workplace violence, did "carry a thread of an insubordinate spirit that cannot be tolerated in the public service." (*Appeals Court Opinion, 89 Mass.App.Ct at 1127*2; A. 202-A.203, A.211 [Commission Findings and Majority Decision]*)

The Appeals Court Opinion found that the Commission Majority committed an error of law in two respects material to the Majority's conclusion that principles of progressive discipline warranted a modification of the discipline from a termination to a suspension of 21 months:

- (1) The Majority conclusion erroneously rested on the premise that, prior to September 2011, Mr. Moniz had received "only warnings" and "New Bedford's choice not to carry through with any more significant progressive discipline beyond a warning since 1999 for any of Moniz's subsequent offenses is an additional factor to be properly considered in fashioning appropriate progressive discipline." (*Appeals Court Opinion, 84 Mass.App.Ct.at 1127*5; A.211 [Commission Majority Decision]*) The Appeals Court Opinion cited the Commission's Findings of Fact that, in fact, Mr. Moniz was once suspended for one day in April 2011 for failing to show up for work. (*Appeals Court Opinion, 84 Mass.App.Ct.at 1127*5 & *6; A.198, ¶6 [Commission Findings]*)

(2) The Commission’s Findings of Fact and Majority Decision were “unclear as to whether Vick knew about the failure to maintain the generators, but chose not to include the generators in the (final September 2011) warning, or whether Vick learned of the failure to maintain the generators after the warning had been given. This omission is material to judicial review of the commission’s decision to reduce the penalty.” (*Appeals Court Opinion, 84 Mass.App.Ct.at 1127*5 & *6*)

Accordingly, the Appeals Court Opinion vacated the Commission’s Decision and remanded the appeal to the Commission with the instruction to “reexamine whether there is any basis for a modification of the decision to discharge Moniz” after taking account of the errors stated above in the original Commission Decision. (*Appeals Court Opinion, 84 Mass.App.Ct.at 1127*6*)

Reexamination of Issues

First, the Appeals Court Opinion correctly identified a discrepancy between the Commission’s Findings of Fact concerning the prior discipline received by Mr. Moniz and the description of that prior discipline contained in the Commission’s Majority Decision. In fact, between March 1999 and his termination in September 2011, Mr. Moniz had been disciplined five times by prior supervisors and once by Mr. Vick. Five of these disciplines were verbal or written warnings, but one (April 2011) did impose a one-day suspension. Although the Findings of Fact are accurate, the Majority Decision’s conclusion was not consistent with those findings. The discrepancy, however, does not materially change the rationale of the Commission Majority that, under basic merit principles that govern civil service disciplinary matters, it is rarely appropriate progressive discipline to terminate an employee who has previously received no more than the least severe level of discipline, be it a warning or one-day suspension.²

² The termination of an employee for a “first offense” of a serious violation of the workplace harassment or workplace violence rules would present a different scenario, but that is not the case here.

Second, reexamination of Mr. Moniz's misconduct related to his neglect of duty to maintain the airport generators demonstrates that, in fact, his neglect was limited to a failure to attend to the replacement of a battery in one of the generators, prior to the September 2011 warning which had broken down sometime on or around the time of Hurricane Irene at the end of August 2011. The parties stipulated that at the time Mr. Vick gave Mr. Moniz the September 14, 2011 written warning, "Vick was aware that Moniz had not inspected the airfield generator on a weekly basis as required" (Stip., ¶3,¶4) A review of the evidence demonstrates that, prior to issuing Mr. Moniz the September 14, 2011 written warning, Mr. Vick had reviewed all of Mr. Moniz's daily work logs, noted that Mr. Moniz had just replaced the defective generator battery (September 13), but also noted that the work logs indicated that it had taken Mr. Moniz more than two weeks to accomplish this task, although Mr. Moniz was responsible to check the generators weekly. (A.70-A.106 [Daily Logs]; A.379-A.385, A.401-A.403, A.435, A.486-A.494, A.531-A.532 [Vick Testimony]; A.595-A.599, A.337 [Moniz Testimony]) In addition, the evidence established that upon receiving his September 14, 2011 written warning, Mr. Moniz returned to the generator the next day, checked on the repair and found it was "fine". (A.104 [Daily Log]) In sum, my thorough examination of Mr. Moniz's neglect of the generators actually demonstrated that, as to that problem, the September 14, 2011 written warning already had its intended remedial effect.

Thus, after reexamination, neither of the errors identified in the Appeals Court decision, after reexamination, change the original conclusion of the Commission Majority that the lack of any significant effort at progressive discipline and the nature of the limited misconduct for which Mr. Moniz was actually found responsible, did justify discipline but not termination. The Commission's Decision should stand as originally determined by the Majority, and the termination is modified to a suspension of 21 months.

CONCLUSION

Accordingly, for the reasons stated, after reexamination, the appeal of the Appellant, Anthony Moniz, under Docket No. D1-11-296 is *allowed, in part*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By [3-2] vote of the Civil Service Commission (Bowman, Chairman [AYE]; Camuso [NO], Ittleman [AYE], Stein [AYE] & Tivnan [NO] Commissioners on February 16, 2017.

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)(l), 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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Joseph Delory, Esq. (for Appellant)
Eric Jaikes, Esq. (for Respondent)