

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

THOMAS SYLVIA,
Appellant

v.

D-14-43

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Joseph Delorey, Esq.
AFSCME Council 93
8 Beacon Street, 7th Floor
Boston, MA 02108

Appearance for Respondent:

Elizabeth Treadup Pio, Esq.
City Hall, Room 203
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein.¹

DECISION

On February 12, 2014, the Appellant, Thomas Sylvia (“Mr. Sylvia”), pursuant to G.L.c. 31, §§ 41-43, filed an appeal with the Civil Service Commission (“Commission”) from a decision of the city of New Bedford (“New Bedford”), suspending him from his employment for five (5)-days as a Motor Equipment Operator (“MEO”) for the New Bedford Department of Facilities and Fleet Management (“DFFM”). A full hearing was held at the University of Massachusetts School of Law in North Dartmouth, on March 14,

¹ The Commission acknowledges the assistance of Law Clerk Craig E. Reeder, in the drafting of this decision.

2014. The hearing was declared private and the witnesses were sequestered. The hearing was digitally recorded and copies were sent to the parties. New Bedford submitted a proposed decision to the Commission and Mr. Sylvia did not.

FINDINGS OF FACT

Eight (8) exhibits were entered into evidence at the hearing. Based upon these exhibits, the testimony of the following witnesses:

Called by the Appointing Authority:

- Carlos Araujo, Garage Superintendent
- Richard Correira, Highway Superintendent
- John Perry, Superintendent

Called by the Appellant:

- Appellant, Motor Equipment Operator
- David Pilling, Diesel Engine Repairman

and inferences reasonably drawn from the credible evidence, I make the findings of fact set forth below:

1. Mr. Sylvia has been employed by New Bedford as an MEO since December 17, 1986. He was a permanent, tenured civil service employee at the time of his five (5) day suspension. (Stipulation of Fact; Exh. 1)
2. During Mr. Sylvia's tenure with New Bedford, he received eighteen (18) written warnings for the following reasons: tardiness, absenteeism, not following orders, leaving work without permission, substandard work, and bad work conduct. (Exh. 6)
3. Mr. Sylvia served: a one (1) day suspension on May 1, 1992, for absenteeism, a one (1) day suspension on September 10, 1997, for tardiness, and a one (1) day suspension on September 11, 1997, for not following directions. (Exh. 6)

4. The three most recent employee written warning records for Mr. Sylvia are dated: May 21, 2014 for tardiness, July 29, 1997, for a smoking policy violation, and July 26, 1997 for leaving work without permission. (Exh. 2)
5. On the night of January 21, 2014, Mr. Sylvia was called into work because of a snow storm. It was Mr. Sylvia's job to operate a snow plow during snow emergencies. Mr. Sylvia started to plow snow at or around 8:30 p.m. (Exh. 7; Testimony of Appellant)
6. The total snowfall from the snow storm on January 21-22, 2014, was ten (10) inches. (Stipulation by Parties)
7. Mr. Sylvia was driving snow plow truck number 10. The truck is a pickup truck with a snow plow attached to it. (Testimony of Appellant)
8. Mr. Sylvia was the only operator of truck 10. (Testimony of Appellant)
9. Mr. Sylvia was operating the truck as part of a team. There were a total of three (3) vehicles used in Mr. Sylvia's team. Mr. Sylvia was in the third or last position and it was his job was to push the snow as close to the curb as possible or to push the snow up onto the curb. Mr. Sylvia was also responsible for clearing intersections when snow would be pushed onto the road from the other two vehicles on the team. (Testimony of Appellant, Carlos, and Araujo)
10. "Skids" were not attached to Mr. Sylvia's plow. Skids prevent the blade of the plow from being in direct contact with the ground. (Testimony of Appellant, Carlos, Araujo, and Perry)
11. Snow plow operators can adjust the height of the snow plow while being inside the truck. (Testimony of Araujo)

12. On January 21-22, 2014, Mr. Sylvia had to return to the garage three (3) times for repairs. (Testimony of Appellant)
13. The Mechanics Reports state that during the storm on January 21-22, 2014, there were five (5) reports that pertained to plow “A-frames”.² (Stipulation by Parties)
- a. The first is for truck 10, for a broken snow plow A-frame.
 - b. The second is for truck 10, for a broken snow plow A-frame.
 - c. The third is for truck 10, to weld the snow plow A-frame as needed and to repair plow lights.
 - d. The fourth was for truck 49, for a broken snow plow A-frame.
 - e. The fifth was for truck 363, for a broken snow plow A-frame.
14. A-frames are an A-shaped metal apparatus that attaches the snow plow to the truck. The bottom of the A, the wide end, is attached to the truck. The top end is attached to the snow plow with a coupling and pivoting pin. (Testimony of Araujo)
15. Snow plow A-frames are damaged from hitting manholes, excess speed, and or hitting curbs. (Testimony of Araujo)
16. A-frames can be repaired, by welding, when the coupling apparatus is not broken. When the coupling apparatus is broken, the A-frame cannot be repaired and must be discarded. (Testimony of Araujo)
17. The first A-frame attached to Mr. Sylvia’s truck was used in prior storms. (Testimony of Perry)
18. The first A-frame was broken from prior storms. (Testimony of Perry)
19. The second A-frame that was attached to Mr. Sylvia’s truck was brand new. (Testimony of Perry and Araujo)

² Times were not indicated on the Mechanics Reports.

20. Mr. Sylvia broke the second A-frame, which required him to have a third A-frame attached to his truck. (Testimony of Araujo and Perry)
21. Mr. Sylvia returned to the garage a third time for a broken light. Upon inspecting the vehicle, there was damage to the A-frame which required welding. Broken lights are common because they are made of plastic. (Testimony of Araujo)
22. During the snow storm on January 21-22, 2014, Mr. Sylvia was the only driver who broke an A-frame and had to have one welded. (Stipulation of Parties)
23. Multiple A-frame incidents are not the result of normal use or normal wear and tear. (Testimony of Araujo, Correira, and Perry)
24. By letter dated January 24, 2014, Mr. Sylvia was notified that a hearing would be conducted and that a five (5) day suspension was contemplated. (Exh. 3)
25. As a result of a hearing conducted on January 28, 2014, Mr. Sylvia was notified, by a letter dated January 30, 2014, that Mr. Sylvia would be suspended for five (5)-days. The reason for the suspension was: Careless and Misuse of city property. (Exh. 4)

Applicable Law

Pursuant to G.L. c. 31, § 43, a “person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . .” The statute provides, in pertinent part:

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 the 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 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.” Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Comm’rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (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. of Brockton v. Civil Serv. Comm’n, 43 Mass.App.Ct. 486, 488 (citing Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)).

Finally, Section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification).

In deciding to exercise discretion to modify a penalty, the commission’s task “is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Service

Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

“After making its de novo findings of fact, the commission must pass judgment on the penalty imposed, a role to which the statute speaks directly. G.L.c.31,§43. . . .Here, 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.’ ”

Id. See also Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.”)

Thus, when it comes to the review of the penalty, unless the Commission’s findings of fact differ materially and significantly from those of the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation.”. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796 (2004) (modification of 10-day suspension to 5 days unsupported by materi-al difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension); cf. School

Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (modification of discharge to one-year suspension upheld); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (modification of discharge to 18-months suspension upheld); Trustees of the State Library v. Civil Service Comm'n, 3 Mass.App.Ct. 724 (1975) (modification of discharge to 4-month suspension upheld).

Analysis

Applying these principles to the facts of this appeal, I conclude that New Bedford established just cause to discipline Mr. Sylvia by suspending him for five (5) days.

From the Mechanics Report produced by stipulation, it is clear that Mr. Sylvia did not break three (3) A-frames. The Mechanics Report states that two (2) other drivers went to the garage to replace a broken A-frame from the snow storm on January 21-22, 2014. The Mechanics Report also states that Mr. Sylvia's truck was in the garage three (3) times for repairs.

As testified to by Superintendent John Perry, Mr. Sylvia was not responsible for the first broken A-frame. The Superintendent testified that the A-frame was damaged from its previous use. Because Mr. Sylvia was not responsible for breaking the first A-frame, he cannot be held responsible for that damage. Thereafter, a new A-frame was attached to Mr. Sylvia's truck.

Mr. Sylvia had to return to the garage later that morning to replace the second A-frame. The A-frame's coupling was broken, meaning the A-frame could not be repaired and had to be replaced. A new A-frame was attached to Mr. Sylvia's vehicle and he proceeded to work.

Later that night, Mr. Sylvia returned to the garage to fix a broken light. The lights are made of plastic and break easily. In the process of fixing the broken light, the mechanic noticed that the A-frame was damaged and required welding. The A-frame was welded and Mr. Sylvia finished the rest of his shift.

The written warning record prepared by Superintendent Perry states: "During snow storm 2 A-frames for plow were destroyed then came in 3rd time to weld brand new plow." Based upon the testimony of the Superintendent, Mr. Sylvia did not break two (2) A-frames. Mr. Sylvia was only responsible for breaking one (1) A-frame.

Since the facts as found by the Commission vary from those determined by the Appointing Authority, the City of New Bedford, the Commission considers whether the discipline imposed should be vacated or modified.

The evidence established that Mr. Sylvia was responsible for one (1) broken A-frame and one (1) A-frame requiring repair. The evidence also established that Mr. Sylvia was not responsible for the first A-frame and that two (2) other individuals broke A-frames on January 21-22, 2014. All of the testimony presented to the Commission was based upon the assumption that the DFFM had never witnessed three (3) broken A-frames in one night. Mr. Sylvia's written warning record, from which the suspension was based, also indicates that Mr. Sylvia was responsible for two (2) broken A-frames and one (1) requiring welding.

Although Mr. Sylvia was not responsible for the three (3) incidents, but only responsible for two (2) of the incidents, and taking into account that two (2) other individuals each broke an A-frames that night, Mr. Sylvia's five (5) day suspension was warranted and should not be modified.

Although the Commission finds facts that differ from the Appointing Authority, New Bedford, the Commission finds that the facts are not materially and significantly different from New Bedford's findings. Taking into account Mr. Sylvia's discipline history and that he was responsible for breaking one (1) A-frame and requiring one (1) A-frame to be repaired, is evidence of carelessness and misuse of city property.

CONCLUSION

Accordingly, the appeal of the Appellant, Thomas Sylvia, is hereby *denied*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on December 11, 2014.

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 to:

Joseph Delorey, Esq. (for Appellant)

Elizabeth Treadup Pio, Esq. (for Respondent)