

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BRIAN MARTIN,
Appellant

v.

D-17-030

DRACUT HOUSING AUTHORITY,
Respondent

Appearance for Appellant:

Brian W. Leahey, Esq.
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Appearance for Respondent:

Thomas E. Horgan, Esq.
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Commissioner:

Cynthia A. Ittleman

CLARIFIED AND FINAL DECISION

On February 16, 2017, the Appellant, Brian Martin (Mr. Martin or Appellant), pursuant to G.L. c. 31, s. 41A and G.L. c. 121B, s. 29, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Dracut Housing Authority (DHA or Respondent) to demote him from the position of Maintenance Supervisor to the position of Maintenance Laborer. A pre-hearing conference was held on March 13, 2017 at the Mercier Community Center in Lowell. Prior to the prehearing conference, the Respondent filed a Motion to Dismiss (Motion) alleging that the Commission lacks substantive jurisdiction on a public housing

authority's demotion of an employee and that the appeal was untimely. On March 31, 2017, the Appellant filed an opposition to the Motion (Opposition). On June 22, 2017, the Commission denied the Motion, ruling that the Commission does have jurisdiction to hear appeals regarding demotions of certain Housing Authority employees and ordered the case to go forward to a full hearing. Subsequently, counsel for the Appellant indicated that he would be filing a Motion for Summary Decision, pursuant to G.L. c. 31, s. 42, arguing that the Housing Authority failed to conduct a hearing prior to demoting the Appellant. That prompted a July 5, 2017 conference call between Commissioner Bowman and counsel for the parties.

As there was no dispute that the Housing Authority, believing that the Commission lacked jurisdiction over demotions, did not conduct a hearing prior to the demotion, the Housing Authority agreed to reimburse the Appellant for lost wages from January 9, 2017 (the date of the demotion) to July 5, 2017 (the date of the conference call). In exchange, counsel for the Appellant agreed to waive his Section 42 claim and move forward with a full hearing before the Commission under Section 43 regarding whether the Housing Authority had just cause to demote the Appellant.

The Section 43 hearing was held on August 28, 2017 at the Mercier Community Center and on October 30, 2017 at the Commission's Boston office.¹ Witnesses, except the Appellant and Respondent's Executive Director, Mary Karabatsos², were sequestered. Since neither party requested a public hearing, the hearing was conducted in private. The hearing was digitally recorded and both parties were provided with a CD of the hearing³. The parties filed post-

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² Ms. Karabatsos assisted counsel for the Respondent after she testified as the Respondent's first witness.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

hearing briefs on December 18, 2017. For the reasons stated herein, , the Appellant’s appeal is allowed in part. The discipline is modified from a demotion to a five (5)-day suspension.

FINDINGS OF FACT:

Forty-one (41) exhibits were entered into evidence.⁴ Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Mary Karabatsos, Executive Director, DHA
- Kelley Szymanski, Deputy Director, DHA
- Michael Hubert, Maintenance Laborer, DHA
- Jim Murphy, Maintenance Laborer, DHA

Called by the Appellant:

- Brian Martin, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, policies, and reasonable inferences from the evidence; a preponderance of credible evidence establishes the following facts:

Background

1. The Appellant was hired as a Maintenance Laborer by the DHA in 1997; as such, he is a tenured employee under G.L. c. 121B, s. 29. In November 2011, the Appellant was promoted to Maintenance Supervisor and he received appropriate training, including training pertaining to supervision. (Testimony of Appellant and Karabatsos; Ex. 42).

⁴ The proposed exhibits were numbered 1 to 51 but the parties agreed to delete proposed exhibits 24 through 41, retaining the numbers for proposed exhibits marked 42 and higher. Thus, the remaining exhibits entered into evidence at the hearing were Joint Exhibits 1 – 4, 12, 14, 20 – 23, 42 – 44, and 46 – 51; and Respondent’s Exhibits 5 – 11, 13, 15 – 19, 45, and 52 – 56. Respondent’s Exhibits 5 – 11 were entered into the record over the Appellant’s objection, which objection the Appellant asked to be noted in the record; so noted. Exhibit 23 was entered jointly in part (notes of January 9, 2017 and December 20, 2016 relating to the Appellant) and as Respondent’s Exhibit 23A (notes of September 9, 2016 relating to the Appellant). In response to my order at the hearing, the Respondent produced after the hearing Respondent’s Exhibits 57 (five (5) year employment contract between Respondent and Executive Director Karabatsos beginning 2017) and 58 (Executive Director Job Description).

2. At pertinent times, the DHA personnel included Ms. Karabatsos, Executive Director; Kelley Szymanski, Executive Assistant to the Director; a part-time receptionist; the Section 8 Administrator; a Maintenance Supervisor; and two Maintenance Laborers. (Testimony of Szymanski; Ex. 55)
3. Ms. Karabatsos has “general supervision over the administration of the authority’s business and affairs, subject to the direction of the Board Members of the Authority, ... [and is] ... the Authority’s chief administrative officer and shall be directly in charge of personnel and shall be responsible, subject to the review and approval of the Board, for the hiring and discharging of all personnel.” (Ex. 57; *see also* Ex. 58)
4. At pertinent times prior to January 23, 2017, the Maintenance Laborers were supervised by the Maintenance Supervisor and/or the Executive Director. (Exs. 44, 50 and 51)(emphasis added)
5. Mr. I worked in Maintenance at DHA for many years up until early 2015. Mr. I was the Maintenance Supervisor for a period of time, during which he supervised the Appellant. (Testimony of Karabatsos and Szymanski)
6. Mr. G worked in Maintenance at DHA for many years up until September 2015. Mr. G was the Maintenance Supervisor for a period of time, during which time he supervised the Appellant. (Testimony of Karabatsos and Szymanski)
7. The Appellant was appointed Maintenance Supervisor in 2011, after Mr. I and Mr. G had served as Maintenance Supervisors. (Testimony of Karabatsos)
8. In February 2015, Jim Murphy (Mr. Murphy) was hired as a DHA Maintenance Laborer, filling the vacancy left upon Mr. I’s departure. The Appellant supervised Mr. Murphy until January 2017. (Testimony of Murphy)

9. In October 2015, Mike Hubert (Mr. Hubert) was hired as a DHA Maintenance Laborer, filling the vacancy left upon Mr. G's departure. The Appellant supervised Mr. Hubert until January 2017. (Testimony of Hubert).
10. The DHA Maintenance personnel have a history of not getting along well. (Testimony of Karabatsos)
11. At various times during the Appellant's tenure as DHA Maintenance Supervisor (November 7, 2011 to January 9, 2017), morale was poor. (Testimony of Murphy, Hubert, Szymanski and Director Karabatsos).
12. DHA Maintenance staff does not have access to computers to obtain work orders. Until sometime in or about May 2016, the DHA Administrative office personnel would print out work orders and give them to the Maintenance personnel and/or giving the Appellant a master list of work orders. (Testimony of Karabatsos) The Maintenance personnel carried DHA cell phones for communication. (Testimony of Appellant)
13. Until in or about May 2016, the Appellant, as Maintenance Supervisor, would meet with Mr. Hubert and Mr. Murphy at the beginning of the day to distribute work orders to be addressed. (Testimony of Murphy and Hubert) However, this approach made it difficult for the administrative staff to monitor completion of work orders. (Testimony of Szymanski)
14. At various times when the Appellant was Maintenance Supervisor, Ms. Karabatsos would communicate with the Appellant on his DHA cell phone regarding work to be done and related matters. (Ex. 45)

December 1, 2011 Incident

15. On December 5, 2011, Mr. I, then a DHA Maintenance Laborer, submitted a written complaint to Ms. Karabatsos regarding a December 1, 2011 incident in which he felt that the Appellant's conduct was "threatening, intimidating and bullying".⁵ Mr. I signed the complaint and Mr. G signed it as a witness. (Ex. 5) This was not the first time that Mr. I had seen the Appellant behave in this manner. (Id.)
16. Specifically, the December 5, 2011 letter stated, in part, that after the Appellant informed Mr. I and Mr. G about upcoming work in some empty apartments and Mr. G and Mr. I had no response, the Appellant raised his voice and said, "what the fuck! Am I talking to my fucking self or what?" (Ex. 5) Mr. I asked the Appellant if he was serious or joking and the Appellant said, "your (sic) dam (sic) right I'm fucking serious". (Id.) Mr. G submitted a similar written complaint on his own. (Ex. 6)
17. On December 12, 2011, the Appellant filed a written response to the December 5, 2011 complaint stating that Mr. I (and Mr. G) did not respond to him when he mentioned the upcoming work in other apartments but denying that he used inappropriate language at that time. (Ex. 7) However, the Appellant testified at the Commission hearing that he had used the inappropriate language on December 1, 2011. (Testimony of Appellant)
18. On or about December 22, 2011, Ms. Karabatsos told Mr. G that she consulted an attorney about his complaint against the Appellant and she would speak to the Appellant and "tell him that inappropriate language is not acceptable. [She] also told

⁵ During her testimony, Ms. Karabatsos complained to me that the Appellant was staring at her as she testified. I asked Ms. Karabatsos if she felt intimidated. She stated that she felt uncomfortable because he was staring at her. I asked the Appellant to be sensitive to Ms. Karabatsos' concerns and he indicated that he would. Full Hearing recording at approximately 3 hours and 33 minutes.

[Mr. G] that work must progress and if the conflicts in the maintenance department impede work than (sic) progressive discipline will be the result. [She] explained to him that [the Appellant] is the Maintenance Supervisor whether he liked it or not.”

(Ex. 9) Ms. Karabatsos spoke to Mr. I and repeated the statements she had made to Mr. G. (Ex. 10) Ms. Karabatsos made contemporaneous notations dated December 22, 2011 indicating that she had consulted an attorney and spoken to Mr. G and Mr. I in this regard and put her notes in a file in her office, not the Appellant’s personnel file. (Testimony of Karabatsos) The Appellant did not receive copies of Ms. Karabatsos’ notations until he was demoted and requested them. (Testimony of Appellant)

19. On or about December 23, 2011, Ms. Karabatsos spoke with the Appellant about the December 5, 2011 complaint against him. (Testimony of Karabatsos) She told him that she had consulted an attorney for legal advice and that he advised her to speak with Mr. I, Mr. G and the Appellant separately. She further informed the Appellant that there would be no further action taken on the December 5 complaint, that she told Mr. I and Mr. G that “personnel issues will not impede work and that the three maintenance men will have to learn to work together”. (Ex. 11) Ms. Karabatsos added that, “if it was true that [the Appellant] swore at [Mr. I] that [the Appellant] needs to make sure that he does not use any inappropriate language in the future in the workplace.” (Id.) Ms. Karabatsos made contemporaneous notations that day regarding her conversation with the Appellant and put them in a file in her office relating to the Appellant. (Testimony of Karabatsos; Ex. 11)

September 2015 Events

20. Ms. Szymanski was promoted from Executive Assistant to Ms. Karabatsos to Deputy Director in September 2015. (Testimony of Szymanski) At that time, the Deputy Director job description did not include overseeing Maintenance staff. (Ex. 55) Since she was promoted, Ms. Szymanski has had a number of conversations with the Appellant in which he indicated his discontent with her promotion. (Testimony of Szymanski)
21. Also in September 2015, Ms. Karabatsos and/or Ms. Szymanski began scheduling mandatory end of day meetings several times per week to improve communication. The Appellant would attend these meetings and, at times, not participate and/or he would make negative comments about the meetings and/or personnel. (Testimony of Karabatsos)

November 19, 2015 Incident

22. At approximately 7:30 PM on Thursday, November 19, 2015, Mr. Murphy arrived at the Lo Kai restaurant where at least some of the DHA Board Commissioners, Ms. Karabatsos and Ms. Szymanski were gathered at an event for one of the DHA Board Commissioners. Mr. Murphy saw the Appellant as he was leaving the restaurant. Mr. Murphy extended his hand to greet the Appellant and the Appellant said to Mr. Murphy, "we have a big fucking problem you and I". (Testimony of Murphy) Mr. Murphy then attempted to ask the Appellant what he meant but the Appellant did not respond and brushed by Mr. Murphy. (Testimony of Murphy)

23. Earlier in the evening of November 19, 2015, the Appellant had an argument with Jim Murphy's father, Paul Murphy. Jim Murphy was not aware of the argument between his father and the Appellant that night. (Testimony of Jim Murphy)

24. Jim Murphy had confided in his father about how he felt about the manner in which the Appellant treated him (Jim Murphy). Jim Murphy did not ask his father to discuss the matter with the Appellant. (Testimony of Jim Murphy).

25. By letter dated November 20, 2015, the Appellant filed a complaint with Ms. Karabatsos alleging that the confrontation between the Appellant and Paul Murphy on November 19, 2015 at the Lo Kai restaurant had created a hostile work environment. Specifically, the Appellant's letter states, in part,

... when I was leaving the event ... I noticed [DHA] employee Jim Murphy's father, Paul Murphy. ... [Paul Murphy said] 'oh, I need to talk to you. ... I asked him 'what's up'? Paul replied, You can tell [a former DHA Commissioner] and your crew to leave my kid alone (or words to the affect). ... He said 'you called him a brown nose' and that I was using my position to harass him. ... I told him he was out of line having this conversation with me. I continued to tell him he was out of line. He said 'my kid is a gentleman, keep it up and I will kick your ass ... then we walked away ... when he stopped quick in front of me and I bumped into him. After we bumped he said, 'What, you want to go at it?'. I then said again 'you are out of line'. He started walking away saying, 'keep it up and I will have your job'. ...

I am concerned about this situation because since you have appointed Kelly (sic) Szymanski to the position of Deputy Director, employee Jim Murphy listens to what Kelly (sic) instructs him to do. As you know, I have expressed my concerns about employees Jim Murphy and Michael Hubert following the direction of Kelly (sic) and I don't know what is going on, where or what they are doing. I also expressed to Kelly (sic) that I thought that employee Murphy's father was telling him to listen to Deputy Director Szymanski and not to me. ...

... I now believe that Jim Murphy and his father Paul have created a hostile work environment for me by threatening my job. I am respectfully requesting that your (sic) take the necessary steps to correct this situation.

(Ex. 12)

26. Upon receiving the Appellant's November 20, 2015 complaint, Ms. Karabatsos contacted an attorney who had been retained by DHA, Mr. Horgan, for advice on how

to handle and process the Appellant's complaint. (Testimony of Karabatsos) On November 24, 2015, Ms. Karabatsos asked the Appellant to meet at her office, at which time she advised the Appellant that the DHA had asked Attorney Horgan to investigate his November 20, 2015 complaint. (Testimony of Karabatsos)

27. Attorney Horgan reviewed the Appellant's November 20, 2015 complaint and expressed his assessment of the matter to Ms. Karabatsos. (Testimony of Karabatsos) Thereafter, Ms. Karabatsos issued a written decision to the Appellant on December 1, 2015 stating, in part,

... Attorney Horgan reviewed your letter and responded stating that his assessment was that this situation did not rise to the level of a hostile work environment. He stated that the Massachusetts Commission Against Discrimination (MCAD) guidelines state that in order to create a hostile work environment the conduct must be hostile, intimidating, humiliating or offensive both from an objective and subjective perspective, and the alleged conduct must be pervasive and severe. This appears to be an isolated incident with the fellow employee's father. There is no evidence to suggest that it is anything more than that. At this point I've done my due diligence in investigating this incident in feel as though what happened was unfortunate and unnecessary, but there is no indication that a hostile work environment has been created.

Also, in response to your concerns that both Mike Hubert and Jim Murphy have been taking direction from Deputy Director Szymanski rather than you; as the maintenance supervisor the chain of command dictates that both Mike and Jim are under your direct supervision. The Dracut Housing Authority's organizational chart is as follows (sic) the executive director, Deputy Director, Maintenance Supervisor and Maintenance Staff. There will be times when both Mike and Jim are required to take direction from both Deputy Director Szymanski and myself. This is in no way meant to circumvent your position but rather to create an environment that works well together and is focused on the end result.

(Ex. 14)

April 2016 Incidents

28. On April 6, 2016, at approximately 2:00 p.m., Ms. Karabatsos had a meeting with the Appellant after he again complained that Mr. Hubert and Mr. Murphy were not listening to him and that he could not talk to them. (Ex. 15) Ms. Karabatsos informed

the Appellant that if he could not talk to his subordinates it would be impossible for him to properly supervise and lead and that he needed to improve on both of these managerial skills. (Testimony of Karabatsos; Ex. 15) Ms. Karabatsos made a contemporaneous notation about this discussion with the Appellant and put the notation in her file with other notations regarding the Appellant. (Id.)

29. On April 20, 2016, Ms. Karabatsos had a meeting with the Appellant to discuss the reason he had not signed the DHA's new credit card policy for supplies that the Board of Commissioners approved in February, 2016. (Testimony of Karabatsos; Ex. 16) The Appellant was the only DHA employee who had not signed the new credit card policy. (Testimony of Karabatsos; Ex. 16) Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. (Id.)

30. Ms. Karabatsos had a conversation with the Appellant on April 25, 2016 in which she again asked the Appellant to sign the new credit card policy or return his DHA credit card. The Appellant reiterated that he was unable to talk to his subordinates. Ms. Karabatsos again reminded the Appellant that he needed to improve his communication with his subordinates in order to be a proper supervisor and leader and that if he could not talk to his subordinates, he could not properly supervise. In response, the Appellant raised his voice at Ms. Karabatsos and she told him not to raise his voice at her. Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. The Appellant later signed the credit card policy/ (Testimony of Karabatsos; Ex. 17)

May 2016 Incidents

31. The Appellant went to Ms. Karabatsos' office on May 5, 2016 at or about 11:00 a.m., complaining again about Mr. Hubert and Mr. Murphy, this time stating that they were handling work orders on their own without telling him. He added that he had not yet seen them that day. Ms. Karabatsos again informed the Appellant that he needed to supervise and communicate with his staff. After a few words, the Appellant left the office and slammed the door. Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. (Testimony of Karabatsos; Ex. 18)
32. Following her May 5, 2016 meeting with the Appellant, Ms. Karabatsos believed that he was not adequately performing his duties as a maintenance supervisor and, despite repeated conversations with the Appellant regarding his managerial skills and work performance, his conduct and managerial skills had not improved. (Testimony of Karabatsos) However, other than repeatedly telling the Appellant to "supervise" and "lead" the Laborers, Ms. Karabatsos did not provide guidance about how to do so more effectively. (Testimony of Appellant)
33. On May 10, 2016, Ms. Karabatsos met with the Appellant and issued him a letter of reprimand that states, in part,

... This is an official written reprimand for your failure to not only perform the functions of your position appropriately, but also for the acts of insubordination that you continually engage in. Over the past three months you have informed me on at least three occasions that 'you cannot talk to Mike and Jim'. You have gone on to say 'that you do not know what they are doing or where they are'. The most basic skill of a maintenance supervisor is the 'ability to supervise and motivate others'. The fact that you have relayed to me that you are not able to "talk to your staff" leads me to the conclusion that your supervisory position is not being fulfilled. During these discussions, I have relayed to you that you need to 'supervise' and 'lead'. Unfortunately however, you repeatedly act out, in an

unprofessional manner to Deputy Director Kelley Szymanski and myself. Many of these incidents have become volatile, with you raising your voice and slamming doors as you leave the office.⁶ These occurrences have disrupted the professional atmosphere that the Dracut Housing Authority persistently strives for.

I am recommending that you attend anger management courses that will be paid for and provided to you by the Dracut Housing Authority, failure to do so will indicate to me that you are not taking this reprimand seriously.

This letter of reprimand, stands as a reminder that your position requires you ‘to supervise and lead’, it also demands professionalism while you fulfill your responsibilities as the maintenance supervisor. Any future incidents of insubordination or unprofessionalism will not be tolerated, and will result in additional disciplinary action up to and including the possibility of demotion. ... (Ex. 20)(emphasis added)

34. The Appellant refused to open this letter in Ms. Karabatsos’ presence and said to her, in part, “this is how it's going to be around here”, “you have no idea what's going on around here”, and “this is the beginning of an all-out war. I hope you don't think that I am going to take this sitting down”. (Ex. 19)⁷ On May 10, 2016, Ms. Karabatsos made a contemporaneous notation about this meeting with the Appellant and put the notation in her file with other notations regarding the Appellant. (Testimony of Karabatsos; Ex. 19)
35. The Appellant later informed Ms. Karabatsos in writing that he had attended an anger management course pursuant to the letter of reprimand and acknowledged that he had had conversations with Ms. Karabatsos regarding Ms. Szymanski’s assignment of work orders to Maintenance Laborers but he denied that he had not performed the function of his position appropriately and he denied that he had been insubordinate.

⁶ I note that Ms. Karabatsos’ notes report only one (1) instance in which the Appellant left Ms. Karabatsos’ office and slammed the door. (Ex. 18)

⁷ The Appellant’s Post-Hearing brief does not deny that he made such statements to Ms. Karabatsos. (Appellant Post-Hearing brief, p. 30)

The Appellant's letter further stated that he "respectfully disagree[d] with the content" of Ms. Karabatsos' reprimand letter. (Ex. 22)

36. Sometime in May 2016, per the order of Ms. Karabatsos, the responsibility for assigning work orders to Maintenance personnel was transferred from the Appellant to Ms. Szymanski. (Testimony of Szymanski and Karabatsos) This was done to establish a daily process/system to more efficiently monitor both the distribution and completion of the work orders. (Testimony of Szymanski)
37. Ms. Szymanski had a phone conversation with the Appellant on May 11, 2016 regarding the implementation of a new policy that would require all Maintenance staff to inform the DHA administrative office whenever they would leave the Town of Dracut to conduct official DHA business. (Testimony of Szymanski)
38. McCartin's Electrical Supply store is located in Lowell, Massachusetts and was routinely visited by the Appellant to purchase supplies for the DHA. With the implementation of Ms. Szymanski's new policy, the Appellant was required to advise Ms. Szymanski whenever he was going to McCartin's Electrical Supply store for work as well as what supplies he intended to purchase. The new policy was intended to create a more efficient work environment wherein the DHA administrative office would know the whereabouts of DHA employees and the amount of money being spent on work supplies. (Testimony of Szymanski)
39. When Ms. Szymanski informed the Appellant of the new policy over the phone, he angrily replied that he could not believe that they were having this conversation and that he now had to tell her when and why he was going to the supply store. The

Appellant then abruptly hung up the phone on Ms. Szymanski. (Testimony of Szymanski)

40. On May 16, 2016, the Appellant again voiced his dissatisfaction to Ms. Szymanski regarding the new policy and when she asked him what he was trying to purchase at McCartin's Electrical Supply that day, the Appellant stated words to the effect that someone was going after his job. (Testimony of Szymanski)

41. On May 17, 2016, at a meeting at the end of the day, the Appellant informed Ms. Karabatsos that he did not believe Mr. Murphy or Mr. Hubert should be taking any direction from her, that they should only take direction from him, and that he should be distributing the work orders. (Testimony of Karabatsos)

42. Ms. Szymanski also attended the end of day meeting on May 17, 2016. She also had a discussion with the Appellant at the meeting regarding oversight of the Maintenance staff. The Appellant told Ms. Szymanski that he believed the system for issuing work orders was not working and that she should not be calling Mr. Murphy or Mr. Hubert to do anything for the DHA. (Testimony of Szymanski)

December 20, 2016 Incident

43. On the morning of December 20, 2016, the Appellant went to Ms. Karabatsos' office complaining that Mr. Hubert had met with her the day before regarding an issue at the bathroom at a Myron Street property of the DHA. The Appellant complained to Ms. Karabatsos that Mr. Hubert should discuss the Myron Street property issue with him, not her. Ms. Karabatsos told the Appellant to supervise Mr. Hubert and discuss the matter with him. The Appellant complained to Ms. Karabatsos that it's always his fault, adding "you are not going to like it if I talk to him because I will be all over

him”. (Ex. 23) Ms. Karabatsos made contemporaneous notations that day regarding her conversation with the Appellant and put them in a file in her office relating to the Appellant. (Testimony of Karabatsos; Ex. 23)

44. At the end of the work day on December 20, 2016, the Appellant, Mr. Murphy and Mr. Humbert went to the administrative office, as scheduled, to discuss the work accomplished that day. Ms. Karabatsos made contemporaneous notations that afternoon regarding certain comments made at the meeting. Ms. Karabatsos’ notes state, in part,

[The Appellant] asked about one of the work orders that was done and wanted to know why he [the Appellant] was not aware of the work order. [Mr. Hubert] said to [the Appellant] that one of the residents had stopped him the day before to do some work. [Mr. Hubert] did the work and then requested a work order and that is why [the Appellant] did not know about it. [The Appellant] said that he was supposed to be delegating the work and that [Mr. Hubert] should not be taking it upon himself to do work orders that [the Appellant] has not seen. [Ms. Karabatsos] stated that [Mr. Hubert] completing the work order was fine and part of his job requirement. [The Appellant] said “how am I supposed to know what’s going on if I don’t see the work orders”? At that point, [the Appellant] started to get angry and [Mr. Hubert] began to say to [the Appellant] that he doesn’t even look at the work orders. ... [Mr. Hubert] told [the Appellant] ‘you are giving us more and more work but you are not doing any work’. ... [Ms. Karabatsos] told [Mr. Hubert] that he should stop talking at this point. [Mr. Murphy] was also present and he asked [the Appellant] ‘why the process of doing work orders had changed’. ... After some additional exchanges [the Appellant] told [Mr. Hubert] and [Mr. Murphy] ‘that he delegates the work and they should not do anything unless [the Appellant] tells them to’. At this point [Mr. Hubert] and [Mr. Murphy] left the office but upon leaving [Mr. Hubert] said to [the Appellant] ‘I wish that I could hand in three work orders a day ... [Ms. Karabatsos] told [Mr. Hubert] again that he should stop talking and leave – which he did.

[The Appellant] then said to [Ms. Karabatsos] ‘do you think it’s ok for [Mr. Hubert] to act that way’. [Ms. Karabatsos] said that no he should not be saying those things to you ... [Ms. Karabatsos] also told [the Appellant] the [Mr. Hubert] is frustrated. [Mr. Hubert] and [Mr. Murphy] are excellent workers and that [the Appellant] is a working supervisor and it does not appear as though he is doing as much as he should. [The

Appellant said [j]ust because they don't see me they think I am not working. At this point [Ms. Karabatsos] told [the Appellant] that [she did] not think that [the Appellant was] a 'good supervisor'. [She] told him that he has two really good workers and he should be taking advantage of their strengths but he does not do that. [She] then told him that [she] think[s] he is a 'bad supervisor' and that we have had these conversations on numerous occasions. [The Appellant] then told [Ms. Karabatsos] that [she] was a 'bad boss'. [The Appellant] said to me 'do you want to demote me is that what this is all about and if you do that be ready for what happens'. [Ms. Karabatsos] responded by saying to [the Appellant] 'is that a threat'? At that point [Ms. Karabatsos] told [the Appellant] that [she] had to leave and he left the office.

Based on these most recent incidents involving [the Appellant] ... [Ms. Karabatsos] did not feel as though the [DHA] is benefiting (sic) from [the Appellant] filling this position. [The Appellant] is unprofessional and insubordinate on a continual basis and should be demoted to the position of a maintenance staff person.

(Ex. 23)

45. On January 9, 2017, the DHA Board approved an "updated" Deputy Director Job

Description, adding that the Deputy Director "oversee[s]" Maintenance and administrative staff. (Ex. 46; cf. Ex. 55)

46. Also on January 9, 2017, Ms. Karabatsos issued a letter of reprimand to Mr. Hubert for

" ... insubordinate acts that occurred in my presence towards [the Appellant] on the afternoon of December 20, 2016 ... I believe that all public employees should act in a professional manner when engaging with supervisors, residents and the public"

(Ex. 48; Testimony of Karabatsos; *see also* Ex. 23)⁸

47. Further, on January 9, 2017, Ms. Karabatsos issued a letter to the Appellant demoting

him, stating, in part,

⁸ The Respondent argues that the Appellant could have disciplined the Maintenance Laborers whereas the Appellant alleges that he lacked such authority. The DHA Personnel Manual is unclear about how discipline is authorized. The Maintenance Supervisor job description states that the supervisor has such authority but the Appellant questions the validity of the job description, stating that it is undated and he did not sign it.

However, Ms. Karabatsos' job description indicates that she has disciplinary authority, subject to the Board's approval. In addition to issuing discipline to the Appellant, Ms. Karabatsos issued a written reprimand to Mr. Hubert. While there is no indication in the record that the Board explicitly approved the discipline issued by Ms. Karabatsos, presumably it would have taken action if it disapproved the discipline and there is no evidence in the record that it took such action.

This is an official letter of demotion from the position of maintenance supervisor to maintenance laborer. This demotion is based on continuous acts of insubordination, failure to fulfill your position requirements, specifically supervision and leadership, and an incessant display of disgruntlement and discontent in the workplace.

Over the past 14 months you've been reprimanded and reminded to change your behavior and your attitude toward your position, your subordinates, and your supervisors. I have previously given you a letter of reprimand regarding these same issues but your behaviors (sic) have not changed. I came to this decision based on the most recent acts of "insubordination and lack of leadership" that came to a head on December 20, 2016. Due to these incidents I believe that it is in the best interest of the Dracut Housing Authority that effective January 23, 2017 you be demoted to the position of maintenance laborer.

(Ex. 23)

48. At the January 23, 2017 DHA Board Meeting, the Board voted to approve an "updated Deputy Director Job Description", which added, "[o]versee administrative staff and maintenance staff." (Exs. 46 and 52)

49. The Appellant filed the instant appeal at the Commission on February 16, 2017.

(Administrative Notice)

Pertinent DHA Policies

50. The Personnel Policy of the DHA dated December 21, 2015, states,

"IMPORTANT NOTICE

The provisions of this manual or any similar written document developed or disseminated by the [DHA] ... are designed and intended to provide guidance and information and not create an employment obligation for the [DHA].

Only the Executive Director of the [DHA] is authorized to create an employment contract and a signed and written agreement is required to do so."

Article 3, in part,

"It is the policy of the [DHA] to promote a productive work environment and not to tolerate verbal or physical conduct by any employee which harasses, disrupts, or interferes with another's work performance or which creates an intimidating, offensive, or hostile environment.

Section 1 ... Harassment also refers to behavior, which is personally offensive, impairs morale, and interferes with the work effectiveness of employees.

No form of harassment will be tolerated ...

Section 6 ... If it is determined that inappropriate conduct has been committed by one of the [DHA's] employees, we will take such action as is appropriate under the circumstances. Such action may range from counseling to termination from employment, and may include such other forms of disciplinary action “

Article 4, in part,

Section 4.1 – General Policy:

“... conduct that interferes with operations, discredit the [DHA], or is offensive to tenants or fellow employees will not be tolerated.

Section 1 Employees are expected at all times to conduct themselves in a positive manner ...

(h) Treating all tenants, visitors, and fellow employees in a courteous manner;

...

(i) Refraining from behavior of conduct deemed offensive or undesirable ...

Section 2 The following conduct is prohibited and will subject the individual involved to discipline action, up to and including termination: ...

b) The use of profanity or abusive language ...

h) Threatening or intimidating management, supervisors, or fellow workers

...

Section 3 The examples in Paragraph (2), above, are illustrative of the type of behavior that will not be permitted

Article 17, in part,

Section 17.2 Employee evaluations will be conducted annually. Maintenance evaluations will take place in March ...

Section 17.4 ... “progressive discipline chart for major infractions”. The chart provides, in part, a first offense for “threatening or intimidating other DHA employees or residents” is subject to termination. A first offense for “Unprofessional conduct\harassment is subject to a three (3)-day suspension and upon a second such offense, an employee may be terminated. For “insubordination by refusing a supervisor’s order” a first time offense is subject to a three (3)-day suspension and a five (5)-day suspension for a second offense. For “failure to follow specific direction, on a first offense, the employee will receive a written warning and a second offense is subject to a three (3)-day suspension. For “inability to work harmoniously with all co-workers, is subject to a written warning for a first offense and a three (3)-day offense upon a second offense.

Section 17.6, in part, [a]n employee who gives unsatisfactory service or who has behaved in an unprofessional manner contrary to the interests of the [DHA] may be subject to dismissal by the Executive Director ...

(Ex. 2)(emphasis added)

Pertinent Statute

51. Section 7 of G.L. c. 121B provides, in part, that a housing authority may employ an executive director ... and such other ... employees as it deems necessary or proper, and shall determine their qualifications, duties, and compensation, and may delegate to one or more of its members, agents or employees such powers and duties as it deems necessary or proper” (Id.)

Applicable Law

The Commission’s authority in this matter is drawn from G.L. c. 121B, s. 29, which provides, in relevant part,

No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter.
Id.

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the actions taken by the appointing authority." Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997). *See* Watertown v. Arria, 16 Mass.App.Ct. 331 (1983). 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." Commissioners of Civ Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983).

The appointing authority's burden of proof is one of a preponderance of the evidence which 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 (1956). In reviewing an appeal under G.L. c. 31, if the Commission finds by a preponderance of the evidence that there was just cause for action taken against an Appellant, the Commission shall affirm the action of the appointing authority. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, s. 1.

Analysis

The preponderance of the evidence does not support the Housing Authority's decision to demote the Appellant from his position as Maintenance Supervisor, but, rather, supports a five (5)-day suspension. While the Respondent has shown that some, but not all of the charges against the Appellant are justified, they fall short of justifying a demotion. Only when the evidence establishes that an employee's behavior or performance cannot be remediated may an employee be removed from his position. For the reasons discussed below, the Respondent has

not shown that. Rather, based on the limited charges which have been proven, a short, five (5)-day suspension is justified. My conclusion is based, in part, on my concerns about some of the evidence the Respondent relied on about which the Appellant had inadequate notice. G.L. c. 149, s. 52C request that, “ ... An employer shall notify an employee within 10 days of the employer placing in the employee’s personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee’s qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action” Id.

For example, the Respondent relied on Ms. Karabatsos’ notes, and other evidence to demote the Appellant, alleging that the Appellant had exhibited misconduct such as regularly arrive late to work, once allegedly called the Laborers “brownnosers”, putting in little effort in to his own work on work orders, telling the Laborers to slow down, and allegedly sitting around watching others work. It is clear that the Appellant had **no** knowledge of these allegations at the time and had no opportunity to respond thereto. Further, these assertions appear to constitute “piling on”, in an attempt to unfairly bolster the Respondent’s position. For these reasons, I find that the Respondent’s reliance on such other matters violated basic merit principles and did not support the Respondent’s actions.

As referenced above, the preponderance of the evidence did support some instances of misconduct. The Appellant’s language and approach as a supervisor were unprofessional on certain occasions. The Appellant challenged the authority of Ms. Karabatsos and Ms. Szymanski. The Appellant’s conduct in these regards was inappropriate under the terms of the DHA Personnel Policy noted herein and it undermined Ms. Karabatsos’ contractual authority under the DHA Board and her authority pursuant to her job description.

The Appellant was aware of the allegations of inappropriate language (including swears) he used on different occasions and his failure to sign the credit card policy in a timely manner. Although he was not informed that Ms. Karabatsos prepared notes of their interactions leading to his demotion, he was aware of his interactions with her in these regards, as reflected in her notes and in both of their testimonies. Consequently, I find that the Respondent's reliance upon Ms. Karabatsos' notes in support of these incidents was not unfair, nor a violation of basic merit principles.

I also considered the Appellant's argument that attempts to discipline him are the result of the Respondent's one-sided response to problems, wrongly blaming only him for such problems. While it is accurate that Ms. Karabatsos did not provide the Appellant with specific guidance about improving his supervisory functions, she afforded him the opportunity to respond in writing to the 2011 complaint against him. When the Appellant complained of a hostile work environment after an altercation with Mr. Murphy's father at the Lo Kai restaurant, Ms. Karabatsos sought advice from counsel, who reported back to Ms. Karabatsos and Ms. Karabatsos informed the Appellant in writing that his complaint had been reviewed but was denied. When Mr. Hubert spoke inappropriately to the Appellant in front of Ms. Karabatsos, she verbally instructed Mr. Hubert to stop and then issued a letter of reprimand to him. When the Appellant complained to Ms. Karabatsos that Mr. Hubert and Mr. Murphy were not responding to him, Ms. Karabatsos told Mr. Hubert and Mr. Murphy that they were to respond appropriately to the Appellant, whether they liked it or not. As a result, I find that the Appellant's arguments conflict with the preponderance of the evidence and lack merit.

Going forward, however, in order to establish just cause to discipline Mr. Martin for deficiencies as a manager (i.e. to demote him), the Housing Authority must provide him with

guidance as to the duties and standards he is expected to meet, document all future incidents that fall below those expectations, promptly notify Mr. Martin of these incidents, and afford him a reasonable opportunity to correct the deficiencies.

Conclusion

Accordingly, for the above stated reasons, the Appellant's appeal is allowed in part. The discipline is modified from a demotion to a five (5)-day suspension. The Appellant shall be reinstated to Maintenance Supervisor without any loss of pay or other benefits, except for those associated with the five (5)-day suspension.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Ittleman, Commissioner – Yes; Stein, Commissioner – Yes; Tivnan, Commissioner – Yes; Camuso, Commissioner - No⁹) on April 11, 2019. (Note: This Commission decision was initially issued by the Commission on March 14, 2019. This clarified decision is being voted on and issued on April 11, 2019)

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 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. 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:

Brian W. Leahey, Esq. (for Appellant)
Keith J. Nicholson, Esq. (for Respondent)

⁹ Commissioner Camuso voted no as he believes that the appropriate discipline here is a written warning, as opposed to a five (5)-day suspension or demotion.

Thomas E. Horgan, Esq. (for Respondent)