

I.

A.

The Commission's findings may be summarized as follows. Mullen was first employed by ACHA as a Maintenance Supervisor working from 8:00 a.m. to 4:30 p.m. with a half-hour for lunch. In February 2007, Mullen's position was reclassified to Facilities Manager, and his hours changed from a 40-hour week to a 35-hour week or from an eight-hour day to a seven-hour day. The business hours of Mullen's department are from 8:00 a.m. to 4:30 p.m.

In his position as a Facility Manager, ACHA's property managers submitted requests to him and his assistant, John Owen (Owen), to dispatch tradesmen to perform maintenance work at the properties. Mullen also provided oversight and supervision of the tradesmen, coordinated various inspections, and

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appropriate, the commission may order reinstatement, with the payment of so much of the salary or wages lost, including employee benefits, as the commission may in its discretion award.

Thus, "the Commission may modify the appointing authority's disciplinary action in an appropriate case, even where the underlying charges against the civil service employee are proven." *Department of Corrections v. State Civil Service Commission (Mason)*, 837 A.2d 1273, 1277 (Pa. Cmwlth. 2003) (citations omitted). However, the Commission's authority is not without boundaries, in that it needs to be "appropriate." *Id.* The appropriateness of a modification has been considered under an abuse of discretion standard. *Department of Corrections v. Roche*, 654 A.2d 64, 68 (Pa. Cmwlth.), *appeal denied*, 541 Pa. 644, 663 A.2d 695 (1995). An abuse of discretion is not merely an error in judgment; rather, "[a]n abuse of discretion occurs if, in reaching a conclusion, the law is overridden or misapplied or judgment exercised is manifestly unreasonable or is the result of partiality, prejudice, bias, or ill will." *Henderson v. Unemployment Compensation Board of Review*, ___ A.3d ___, ___ (Pa. Cmwlth., No. 1332 C.D. 2012, filed October 8, 2013), slip op. at 16.

responded to a number of “call outs” or emergency situations at the properties after 4:30 p.m. Mullen was not required to work the same eight-hour schedule as the tradesmen because he would have already distributed the tradesmen’s work assignments, but had to be available when necessary and worked whatever hours his job required even if that required working to 10:00 p.m. He never left ACHA with his work undone and he rarely took vacation or sick leave. As to the number of hours worked, ACHA’s practice is to have its employees record the number of hours worked on their time sheets but not the start and end times. As salaried employees, Mullen and Owen were supposed to work 35 hours a week, but they actually worked 40 hours a week, the same as the tradesmen, so they worked at least ten extra hours in every biweekly pay period.

Mullen reported directly to ACHA’s Assistant Executive Director Y. Beverly Moore (Moore) until an Associate Director of Facilities Management, Paul Reiber (Reiber), was hired in April 2012. Reiber does not need to be at ACHA to supervise the tradesmen who work until 4:30 p.m. because he is available by telephone and a property manager is typically with them, and Owen scheduled the tradesmen and was at ACHA until 4:30 p.m. Reiber works from 8:00 a.m. to 4:00 p.m. plus overtime as needed.

B.

The events that led to his termination occurred from January to February 2010. On three or four occasions, Mullen left his job at ACHA at 3:00 p.m. to perform private kitchen remodeling work at Moore’s residence. Mullen worked on the kitchen on two Sundays as well. Mullen also performed work on her roof on his

lunch hour and on a Sunday. He did not work on Moore's kitchen on weekday mornings. He stopped at the house one morning at 6:30 a.m. to measure plywood and arrived to work at ACHA by 8:00 a.m.

Mullen did not ask Moore if he could leave ACHA at 3:00 p.m. to work on her kitchen and she was not present when he performed the work. She opined that there was no reason why Mullen could not leave ACHA after 3:00 p.m. to work on her kitchen if all his work was done, and noted that he also left work at 3:00 p.m. in the summer to go to his cabin. Mullen told Moore when he left for his cabin and she did not object, given that he did not often take time off and he worked extra hours. Moore also allowed another employee, Frank Magliocco, to work from 8:00 a.m. to 4:00 p.m. or 7:00 a.m. to 3:00 p.m. in the summer so that he could be with his children.

While Mullen used an ACHA vehicle to perform the work, he switched vehicles with Owen because his vehicle had ACHA identification and he did not want anyone to see a vehicle with ACHA identification at Moore's house. The ACHA's monthly vehicle log for Owen's vehicle shows that on February 2, 2010, from February 4 to 12, 2010, February 26 to March 1, 2010, March 26, 2010, and April 30 to May 6, 2010, Mullen initialed the log as the vehicle's driver. While the vehicle log required additional information regarding mileage, gas, destination and trip purpose, Mullen did not record the destination when he took it to Moore's house because the trips occurred after hours even though he conceded that he should have. Moore gave Mullen a check dated March 4, 2010, to pay for his work on her kitchen. He had completed the work except for tiling a center countertop.

C.

The Department of Housing and Urban Development (HUD) annually inspects ACHA's properties and issued a poor score in 2012. In May 2012, Mullen sent ACHA's Deputy Executive Director/General Counsel John Joyce (Joyce) a letter to explain the circumstances underlying the poor inspection because Mullen believed that he was being unfairly blamed for the score. In July 2012, Mullen met with Joyce and ACHA's Executive Director Frank Aggazio (Aggazio) regarding the letter.

In July 2012, ACHA's Network Manager Jeffrey Kier (Kier) read a three-page document on Mullen's desk while he was installing Microsoft Office on Mullen's computer. The document contained three lists accusing ACHA of improper conduct. The lists represented notes that Mullen intended to take to a meeting with another agency and included, "Working on Ms. Moore's kitchen on county time." Kier copied the document and it was ultimately sent to Joyce and the ACHA's Assistant General Counsel Tom McPoyle (McPoyle).

By e-mail dated August 3, 2012, Mullen indicated to Aggazio, Joyce and McPoyle that he would take his concerns to other parties and address the ACHA Board with his concerns because ACHA was ignoring his "complaints and concerns." In a letter dated August 17, 2012, Joyce responded to the e-mail and stated that Mullen's letters have made clear Mullen's disappointment over not being chosen for Reiber's position and he asked Mullen to bring instances to his attention where employees are performing or directed to perform work unrelated to ACHA's mission. By e-mail that same day, Mullen asked McPoyle to clarify whether he was supposed to work an eight- or a seven-hour day; McPoyle did not respond to the e-mail.

In September 2012, Joyce instructed McPoyle to investigate Mullen's alleged work on Moore's kitchen on county time. The ACHA Employee Handbook prohibits outside employment that results in a conflict of interest with ACHA duties; involves income or gain for materials or services rendered in connection with ACHA duties; or that negatively affects the performance of ACHA duties. McPoyle interviewed Mullen, Moore, Kier, Reiber, Owen and two others. During his interview, Mullen said that his work on Moore's kitchen might have been on ACHA time, but he did not know exactly what his hours of work for ACHA were.

On October 10, 2012, ACHA placed Mullen on administrative leave, noting that it was investigating reports that he performed work at Moore's house on ACHA time. On October 26, 2012, ACHA terminated Mullen's employment because he "performed work or services related to home remodeling or repair projects" at Moore's residence "while on company time." (Reproduced Record (R.R.) at 7a, 863a).

II.

Mullen appealed his removal to the Commission. Where an employee alleges the appointing authority lacked "just cause" for removal under Section 807 of the Act,² the Commission hearings are governed by Section 951(a) of the Act³ and

² Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §741.807. Section 807 states that "[n]o regular employe in the classified service shall be removed except for just cause."

³ Added by the Act of August 27, 1963, P.L. 1257, *as amended*, 71 P.S. §741.951(a). Section 951(a) provides that any regular employee in the classified service who has been permanently separated may appeal in writing to the Commission within 20 calendar days of receipt of notice of the action from the appointing authority. *Id.*

Section 105.15 of the Commission’s regulations, 4 Pa. Code §105.15. *Chittister v. State Civil Service Commission (Department of Community and Economic Development)*, 789 A.2d 814, 817-18 (Pa. Cmwlth. 2002). The burden of proving a *prima facie* case of just cause is upon the appointing authority. Section 105.15(a) of the Rules of the Civil Service Commission;⁴ *Thompson v. State Civil Service Commission (Beaver County Area Agency on Aging)*, 863 A.2d 180, 184 (Pa. Cmwlth. 2004), *appeal denied*, 583 Pa. 685, 877 A.2d 463 (2005). Just cause for removal must be merit-related and touch upon the employee’s competency and ability. *Id.* Merit-related criteria include whether the employee failed to properly execute his work duties or has acted in such a way that hampers or frustrates the execution of his duties. *Id.* The question of whether an employee’s actions constitute “just cause” for removal is a question of law that will be fully reviewed by this Court in this appeal. *Ellerbee-Pryer v. State Civil Service Commission*, 803 A.2d 249, 253 n.2 (Pa. Cmwlth. 2002).

Hearings were conducted before Commissioner Odelfa Preston. The facts set forth above come from the testimony of Owen, Reiber, Kier, McPoyle and Joyce who testified for ACHA and Mullen, Moore, and James Bulls (Bulls), Director

⁴ Section 105.15(a) states:

(a) The appointing authority shall go forward to establish the charge or charges on which the personnel action was based. If, at the conclusion of its presentation, the appointing authority has, in the opinion of the Commission, established a *prima facie* case, the employee shall then be afforded the opportunity of presenting his case.

4 Pa. Code §105.15(a).

of Housing Management Operations who testified on behalf of Mullen and whom the Commission found credible.

In June 2013, Commissioner Preston and Commissioner James Martin issued an Adjudication disposing of Mullen's appeal. The Commission rejected ACHA's argument that Mullen necessarily performed the work on ACHA time because his work hours were 8:00 a.m. to 4:30 p.m. because those are the business hours of his department and the hours of the tradesmen that he supervised. The Commission found credible Moore's testimony that the tradesmen work throughout Allegheny County and Mullen's absence from ACHA did not affect his ability to supervise them because he was always available to them by telephone. (R.R. at 550a-553a, 560a-562a). The Commission noted Bulls' testimony that the tradesmen were directly supervised by the property managers who were supervised by him. (*Id.* at 567a-569a). The Commission also noted Reiber's corroborating testimony that he does not need to be at ACHA until 4:30 p.m. to supervise the tradesmen because he is available by telephone, a property manager is usually with them, and Owen is there until 4:30 p.m. (*id.* at 123a-125a); and McPoyle's testimony that Reiber could leave ACHA at 4:00 p.m. because he could rely on Owen to supervise the tradesmen. (*Id.* at 226a-229a). The Commission cited the testimony of Owen, Moore, Bulls and Mullen that he worked many extra hours responding to call outs before 8:00 a.m. and after 4:30 p.m. (*id.* at 81a-82a, 346a-348a, 499a, 508a-509a, 573a-574a, 577a); and Moore's testimony that it didn't matter to him how many hours he worked to get a job done and his testimony that she allowed him to leave at 3:00 p.m. in the summer because he worked so many hours for ACHA. (*Id.* at 503a-507a, 367a-369a).

As the Commission explained:

It is not clear exactly how many hours [ACHA] expected Mullen to work. On August 17, 2012, [Mullen] sent McPoyle an e-mail asking him to clarify whether he was supposed to work an eight or a seven hour day, but McPoyle never replied. Owen, Moore, and [Mullen] testified that as a management employee, [Mullen] was supposed to work a seven hour day, even though the tradesmen he supervised worked an eight hour day. Other [ACHA] supervisors work seven hour days even though their subordinates work eight hour days. Nevertheless, Owen testified that he and [Mullen] actually work the same eight hour days as the tradesmen, which meant that they worked ten extra hours each biweekly pay period. We calculate that if [Mullen] was supposed to work at [ACHA] until 4:30 p.m., but he left at 3:00 p.m. on the three to four days that he worked for Moore, that is six hours of his services that [ACHA] lost. But in view of Owen's testimony, it appears that even if [Mullen] left at 3:00 p.m., he still worked four extra hours for [ACHA].

(R.R. at 886a) (citations and footnote omitted).

The Commission also rejected ACHA's argument that Mullen knew that he was working at Moore's house on ACHA time based on his purported admissions and his use of Owen's vehicle when he went to work on Moore's house. The Commission explained that while Mullen explained to Owen and McPoyle that he did not want Moore's neighbors to see an ACHA vehicle at her house, (R.R. at 61a, 176a), "it does not necessarily follow that the switch indicates that [Mullen] knew that he was there improperly on [ACHA] time." (*Id.* at 887a). The Commission found credible Mullen's testimony that he did not tell Reiber or Owen that he worked on Moore's house on ACHA time or that he wanted to hurt her, (*id.* at 381a-387a),

and rejected as not credible the testimony of Reiber and Owen to the contrary. The Commission found that Mullen prepared the note regarding working on Moore's kitchen on ACHA time for a meeting with an outside agency and accepted as credible his testimony that "he meant to discuss his fear with the agency that he might have done something wrong in working on Moore's kitchen, not that he actually did." (*Id.* at 388a-391a, 888a). The Commission did not believe that Mullen refused to tell McPoyle when he worked on Moore's kitchen, noting that McPoyle testified that he specifically asked Mullen if he worked on Moore's kitchen on "county time" and Mullen replied that his work "might have been" on "county time," but Mullen did not know exactly what his hours of work were at ACHA. (*Id.* at 166a-168a). Finally, the Board found that ACHA presented no evidence showing that Mullen's leaving ACHA at 3:00 p.m. to work on Moore's kitchen affected ACHA's operations in violation of ACHA's policy that prohibits outside employment that negatively affects the performance of ACHA duties. (*Id.* at 888a).

Based on the foregoing, the Commission concluded:

[ACHA] did not meet its burden to show that [Mullen] worked for Moore at times when he was supposed to be working for [ACHA]. The credible evidence in this case leads inescapably to a conclusion that [Mullen]'s assigned work schedule and actual work hours were often not coterminous. While one can draw a reasonable inference from his assigned work schedule that [Mullen] should have been "on duty" for [ACHA] every afternoon at 3 p.m., it is equally clear that this was often not the case because of the actual hours he worked outside his schedule. It was incumbent on [ACHA] to prove to this Commission that on specified days it was more likely than not that [Mullen] worked on Moore's kitchen using hours for which he was simultaneously being compensated by his employer.

Unfortunately, no conclusive evidence was offered on this point sufficient to overcome [Mullen]’s credible denial that he abused his employer’s policy or trust in this way. Thus, we are constrained to find that [ACHA] did not have just cause to terminate him.

(R.R. at 888a-889a) (citation omitted).

Based on its findings, the Commission issued an order sustaining Mullen’s appeal and reversing ACHA’s removal effective October 26, 2012. It also ordered that Mullen be reimbursed for all wages and fringe benefits that he would have received during that time less any wages that he earned or benefits that he received since his removal. ACHA then filed the instant appeal.^{5,6}

III.

ACHA first claims that it proved just cause for Mullen’s removal because he admitted that he worked on Moore’s kitchen on ACHA time in his notes, he switched vehicles to conceal the ACHA logo, and because he falsified the vehicle

⁵ Our standard of review of a Commission adjudication is limited to determining whether Commission findings are supported by substantial evidence; whether errors of law have been committed; and whether constitutional rights have been violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Pennsylvania Game Commission v. State Civil Service Commission (Toth)*, 561 Pa. 19, 26, 747 A.2d 887, 890-91 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bowman v. Department of Environmental Resources*, 549 Pa. 65, 68 n.4, 700 A.2d 427, 428 n.4 (1997).

⁶ By order dated August 15, 2013, we granted ACHA’s motion for a stay of the Commission’s order during the pendency of the instant appeal.

logs. However, as outlined above, the Commission accepted as credible⁷ Mullen's explanation that he was unsure as to his actual work hours and that his note was merely created for a meeting with an outside agency in which he would discuss his fear that he might have done something wrong in working on Moore's kitchen, not that he actually did something wrong. Moreover, the Commission found that ACHA presented no evidence showing that Mullen's leaving ACHA at 3:00 p.m. to work on Moore's kitchen affected ACHA's operations in violation of ACHA's policy prohibiting outside employment that negatively affects the performance of ACHA duties. Finally, while switching vehicles with Owen to conceal his whereabouts and the falsification of the vehicle logs might provide just cause for Mullen's removal, the Commission found as fact that ACHA only terminated Mullen's employment based on his work on Moore's kitchen on ACHA time⁸ and that finding is amply supported by substantial evidence.

⁷ Questions of credibility and the weight to be accorded evidence are determined by the Commission, and this Court will not re-weigh the evidence or substitute its judgment even though it might have reached a different factual conclusion. *Thompson*, 863 A.2d at 184. Thus, this Court must accept the Commission's findings if they are supported by substantial evidence. *Daily v. State Civil Service Commission (Northampton County Area Agency on Aging)*, 30 A.3d 1235, 1239-40 (Pa. Cmwlth. 2011), *appeal denied*, 616 Pa. 647, 48 A.3d 1250 (2012). As fact finder, the Commission is free to reject uncontradicted evidence as not credible. *See Adonizio Brothers, Inc. v. Department of Transportation Board of Review*, 529 A.2d 59, 61 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 627, 541 A.2d 1138 (1988), *citing Williams v. State Civil Service Commission*, 306 A.2d 419 (Pa. Cmwlth. 1973). On appeal, the prevailing party before the Commission is entitled to every inference that can be logically and reasonably drawn from the evidence viewed in a light most favorable to that party. *Western Center, Department of Public Welfare v. Hoon*, 598 A.2d 1042, 1045 (Pa. Cmwlth. 1991).

⁸ The constitutional guarantee of due process of law is equally applicable to administrative proceedings as it is to judicial proceedings. *McClelland v. State Civil Service Commission*, 322 A.2d 133, 135 (Pa. Cmwlth. 1974). The essential elements of due process require that notice be given and that the notice "contain a sufficient listing and explanation of any charges so that the individual can know against what charges he must defend himself if he can." *Jacobs v. Department* **(Footnote continued on next page...)**

ACHA also claims that the Commission capriciously disregarded the testimony of Owen, Reiber, and McPoyle in concluding that ACHA did not have just cause to terminate Mullen's employment. The "capricious disregard of evidence" is a question of law and occurs when an agency expressly refuses to resolve conflicts in the evidence and make essential credibility determinations or where the agency completely ignores overwhelming evidence without comment. *Hinkle v. City of Philadelphia*, 881 A.2d 22, 27 (Pa. Cmwlth. 2005). "The capricious disregard standard then is nothing more than a shorthand way of referring to an amalgam of existing overlapping legal and constitutional standards ... that safeguard against arbitrariness by state and local administrative agencies by requiring a meaningful explanation of why the losing party's overwhelming evidence was not accepted." *Id.* (footnote omitted). We have characterized the capricious disregard of evidence as "a deliberate and baseless disregard of apparently reliable evidence." *Taliaferro v. Darby Township Zoning Hearing Board*, 873 A.2d 807, 814 (Pa. Cmwlth.), *appeal denied*, 585 Pa. 692, 887 A.2d 1243 (2005).

ACHA does not allege that the Commission did not make essential credibility determinations regarding the testimony of Owen, Reiber and McPoyle or that it completely ignored their testimony without comment. Rather, ACHA argues that the Commission erred in rejecting critical portions of their testimony as not

(continued...)

of Public Welfare, 377 A.2d 1289, 1290-91 (Pa. Cmwlth. 1977). Thus, "[i]n addition to proving just cause, the appointing authority also has the burden to prove the substance of the charges underlying the removal." *Long v. Pennsylvania Liquor Control Board*, 535 A.2d 1233, 1235 (Pa. Cmwlth. 1988) (citing *Jacobs*).

credible where it contradicted that of Mullen or supported a finding of just cause. As outlined above, such credibility determinations are for the Commission as fact-finder, and the record demonstrates that the Commission did not act arbitrarily because it amply explained why ACHA failed to establish just cause in this case. Simply, we will not accede to ACHA's request to reweigh the evidence in this case.

ACHA next claims that the Commission invaded its managerial authority to establish the working hours of its employees by finding that Mullen was not on ACHA time when he left at 3:00 p.m. to work on Moore's kitchen. However, the Commission's findings regarding what hours constituted Mullen's workday in no way infringes on ACHA's managerial authority which was free and is free to set the hours of employment for managerial employees. Rather, the Commission found that ACHA failed to credibly establish that Mullen's workday ended at 4:30 p.m. or that Mullen, as a seven-hour employee, worked on Moore's kitchen during a period for which he was simultaneously being compensated by ACHA on the days in question.

Finally, ACHA claims that the Commission violated its due process rights by allowing Commissioner Martin to make credibility determinations in the adjudication because only Commissioner Preston was present at the hearing in which the witnesses testified and the evidence was received. However, ACHA acknowledges that this Court has long held that it is not a violation of due process for Commissioners who did not attend the hearings to join in adjudications provided that they indicate that they have reviewed the testimony and exhibits. *See, e.g., Caldwell v. Clearfield County Children and Youth Services*, 476 A.2d 996, 997 (Pa. Cmwlth. 1984) ("We have held that due process does not require that all the commissioners

rendering a decision be present at the hearing; all that is required is that those not present review and consider the record before an adjudication is issued.”) (citations omitted). Both Commissioner Martin and Commissioner Preston stated that they “reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the Briefs submitted by the parties” in issuing the instant Adjudication. (R.R. at 862a). As a result, ACHA’s due process claim is without merit. *Caldwell*.

Accordingly, the Commission’s order is affirmed.

DAN PELLEGRINI, President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allegheny County Housing Authority,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1243 C.D. 2013
	:	
State Civil Service Commission (Mullen),	:	
	:	
Respondent	:	

ORDER

AND NOW, this 9th day of December, 2013, the order of the State Civil Service Commission dated June 21, 2013, at No. 27652 is affirmed.

DAN PELLEGRINI, President Judge