

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Afrid Irani,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1038 C.D. 2014
	:	Submitted: February 13, 2015
	:	
State Civil Service Commission	:	
(Department of Health),	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: April 20, 2015**

Afrid Irani (Petitioner) petitions for review of an order issued by the State Civil Service Commission (Commission) on June 12, 2014 pursuant to the Civil Service Act (Act)<sup>1</sup> that sustained the termination of his employment by the Department of Health (Department). Because, on the evidence before the Commission, neither the email nor the internet usage for which Petitioner was discharged was sufficient to constitute just cause for removal from employment, we reverse.

Petitioner was employed by the Commonwealth from September 2005 to February 2012 in the Executive Offices, first as a Fiscal Assistant and,

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<sup>1</sup> Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1- 741.1005.

subsequently, as an Accountant 1, Accountant 2, and Administrative Officer 2. (Certified Record Item (R. Item) 4, Commission Adjudication Findings of Fact (F.F.) ¶¶3-7; R. Item 1, Petitioner Ex. 1.) In February 2012, Petitioner began working for the Department as an Accountant 2 in the Department's Bureau of WIC, which is responsible for administering the federal Women, Infants and Children (WIC) supplemental nutrition program in Pennsylvania. (R. Item 4, Commission Adjudication F.F. ¶7; R. Item 1, Hearing Transcript (H.T.) at 26-28, 164, Supplemental Reproduced Record (Supp. R.R.) at 9b, 43b; R. Item 1, Department Ex. 1, Supp. R.R. at 67b.)

Prior to his employment with the Department, Petitioner repeatedly received Employee Performance Review (EPR) ratings of "satisfactory" and "commendable," both as to his overall performance and his communications. (R. Item 4, Commission Adjudication F.F. ¶¶3-6; R. Item 1, Petitioner Ex. 1; R. Item 1, H.T. at 151, 155-56, Supp. R.R. at 40b-41b.) In his work for the Department, Petitioner received an EPR rating in November 2012 of "needs improvement" for his overall performance and "unsatisfactory" as to his communications. (R. Item 4, Commission Adjudication F.F. ¶7; R. Item 1, Department Ex. 1, Supp. R.R. at 67b-74b; R. Item 1, H.T. at 137-38, Supp. R.R. at 36b-37b.) In March 2012, Petitioner received a written reprimand for sending "an inappropriate email to another Commonwealth employee" and for storing personal files on his computer. (R. Item 4, Commission Adjudication F.F. ¶9; R. Item 1, Department Ex. 11, Supp. R.R. at 164b-165b.) In July and August, 2012 and March 2013, Petitioner received a second written reprimand and alternative disciplines in lieu of suspension for "inappropriate" email communications with his supervisor and other

Commonwealth employees. (R. Item 4, Commission Adjudication F.F. ¶¶10-12; R. Item 1, Department Exs. 3, 12, 13, Supp. R.R. at 81b-82b, 166b-168b.)

On June 6, 2013, the Department hand-delivered a letter to Petitioner notifying him that he was being removed from employment effective June 7, 2013, stating as the grounds for removal that

on May 20, 2013, you sent an unprofessional and inappropriate email to staff in the Division of Contracts. In the e-mail, you were combative when addressing an issue with a contract's validity date. Additionally, you have abused Commonwealth information technology resources. Specifically, over the period of April 8, 2013 through May 3, 201[3], you used information technology resources for an excessive amount of personal use.

(R. Item 4, Commission Adjudication F.F. ¶1; R. Item 1, Commission Ex. A, Supp. R.R. at 65b-66b; R. Item 1, H.T. at 30-32, 140-41, Supp. R.R. at 10b, 37b.)

Petitioner appealed his removal and a hearing was held before a Commissioner on December 10, 2013. At the hearing, the Director of the Bureau of WIC, William Cramer, and a Department Human Resource Analyst, Jerry Sheehan, testified for the Department and Petitioner testified on his own behalf and called one former co-worker as a witness. In addition, the Department and Petitioner introduced a number of documents, including Petitioner's performance evaluations, the May 2013 email chain at issue, Department reports of Petitioner's internet usage in April and May 2013, Commonwealth policies on the use of information technology resources, and Petitioner's disciplinary history. Neither Petitioner's supervisor, Robert Williams, nor the individual to whom the email was directed testified at the hearing and no witness familiar with Petitioner's work, other than Petitioner himself, testified at the hearing.

The evidence at the hearing showed that the email for which Petitioner was discharged was sent by him to Lori Diehl, the Director of the Department's Division of Contracts in response to her email request that questions concerning purchase orders be sent to the Division of Contracts and not to the Department of General Services (DGS), and consisted of the following:

Lori,

I don't have a problem if you say your office is always correct, but I personally prefer to get my answers straight from the source. Even better, I would prefer a policy or something that I can refer to instead of digging up years old email to see what's the verdict in any situation. I hope you understand what I mean. Thank you.

(R. Item 4, Commission Adjudication F.F. ¶¶27-29; R. Item 1, Department Ex. 2, Supp. R.R. at 75b-76b.) In response, Diehl sent Petitioner the following email:

I understand your reasoning and I am not saying that my office is always correct, however, all questions for DGS need to come from my office. It looks bad for the Department when multiple questions go to them (sometimes for the same question) when they could have been avoided. Please direct future questions for DGS to Tyler and myself. Thanks.

(R. Item 4, Commission Adjudication F.F. ¶31; R. Item 1, Department Ex. 2, Supp. R.R. at 75b.) Petitioner promptly responded to Diehl: "I understand. Will do. Thank you." (R. Item 4, Commission Adjudication F.F. ¶32; R. Item 1, Department Ex. 2, Supp. R.R. at 75b.) The Department's evidence shows that Petitioner sent this response to Diehl within four minutes of his prior email to her. (R. Item 1, Department Ex. 2, Supp. R.R. at 75b.)

The evidence concerning Petitioner's internet use consisted of Net Analysis reports capturing the name of every internet website accessed by Petitioner on his work computer between April 8, 2013 through May 3, 2013 and

the time of day that he accessed the website. (R. Item 1, Department Exs. 9, 10, Supp. R.R. at 108b-163b.) The Net Analysis reports, however, do not show the length of time any of these websites was open or used by Petitioner. (R. Item 4, Commission Adjudication F.F. ¶44; R. Item 1, H.T. at 181, Supp. R.R. at 47b; R. Item 1, Department Exs. 9, 10, Supp. R.R. at 108b-163b.) The Net Analysis reports show that Petitioner accessed websites 11-40 times a day during his work hours in that four-week period. (R. Item 4, Commission Adjudication F.F. ¶¶46-50; R. Item 1, Department Exs. 9, 10, Supp. R.R. at 108b-163b.) Department Human Resource Analyst Sheehan testified that the “vast majority” of the websites were not work-related, but did not identify the type of internet sites that Petitioner would access for his work and, with respect to most of the websites listed, did not identify which were non-work-related. (R. Item 4, Commission Adjudication F.F. ¶43; R. Item 1, H.T. at 121-22, 126, Supp. R.R. at 32b-34b.) There was no evidence or claim that any of the websites visited by Petitioner was offensive in content or prohibited by Commonwealth policy or that he engaged in any internet activity of a type that was specifically prohibited.

Commonwealth Management Directive 205.34 permits reasonable, limited, occasional and incidental personal internet use during working hours, except where the website or activity is of a nature or type that is specifically prohibited. (R. Item 4, Commission Adjudication F.F. ¶37; R. Item 1, H.T. at 111-12, Supp. R.R. at 30b; R. Item 1, Department Ex. 6, Supp. R.R. at 88b, 93b.) Commonwealth Management Directive 205.34 provides:

Where personal use of [information technology] resources does not interfere with the efficiency of operations and is not otherwise in conflict with the interests of the commonwealth, reasonable use for personal purposes will be permitted in

accordance with standards established for business use. Such personal use shall be limited, occasional and incidental.

(R. Item 1, Department Ex. 6, Supp. R.R. at 88b, 93b.) Petitioner signed an acknowledgement on February 28, 2012 that he had read and agreed to abide by this policy. (R. Item 4, Commission Adjudication F.F. ¶39; R. Item 1, Department Ex. 8, Supp. R.R. at 107b.) On February 21, 2012, the Department issued HR Bulletin No. 2012-01, which further limited personal internet use to “assigned lunch or break periods.” (R. Item 4, Commission Adjudication F.F. ¶38; R. Item 1, Department Ex. 7, Supp. R.R. at 101b-102b.) No evidence was introduced at the hearing that Petitioner was advised or aware of this latter restriction on internet usage.

On June 12, 2014, the Commission issued its Adjudication dismissing Petitioner’s appeal and sustaining the Department’s termination of his employment. The Commission held that Petitioner’s May 20, 2013 email to Diehl was combative, antagonistic and accusatory and was therefore just cause for discharge in light of the prior discipline that Petitioner had received for inappropriate email communications. (R. Item 4, Commission Adjudication at 25-26, 29-30.) The Commission also concluded that Petitioner’s internet usage was just cause for the termination of his employment because, although “it would have been helpful if the [Department] had presented evidence showing how much time [Petitioner] spent accessing the websites,” the fact that Petitioner did not confine his personal internet use to lunch and break periods constituted a knowing abuse of technology resources. (*Id.* at 27-30.) Petitioner timely appealed the Commission’s Adjudication to this Court.<sup>2</sup>

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<sup>2</sup> This Court’s review of the Commission’s Adjudication is limited to determining whether an error of law was committed, whether constitutional rights were violated, and whether the Commission’s findings of fact are supported by substantial evidence. *Pennsylvania Game*

Section 807 of the Act provides that “[n]o regular employe in the classified service shall be removed except for just cause.” 71 P.S. § 741.807. The burden is on the Commonwealth employer to show just cause for the removal. *Pennsylvania Board of Probation and Parole v. State Civil Service Commission (Manson)*, 4 A.3d 1106, 1112 (Pa. Cmwlth. 2010); *Thompson v. State Civil Service Commission (Beaver County Area Agency on Aging)*, 863 A.2d 180, 184 (Pa. Cmwlth. 2004); *Ellerbee-Pryer v. State Civil Service Commission (Department of Corrections)*, 803 A.2d 249, 253-54 n.2 (Pa. Cmwlth. 2002). To constitute “just cause,” the reasons for the employee’s discharge must be merit-based, such as an employee’s failure to execute his or her duties or behavior that hampers or frustrates the execution of those duties, and the criteria used as a basis for removal must touch upon the employee’s competency and ability in a rational and logical way. *Pennsylvania Game Commission v. State Civil Service Commission (Toth)*, 747 A.2d 887, 892 (Pa. 2000); *Thompson*, 863 A.2d at 184. Questions of credibility are determined by the Commission, and this Court will not re-weigh the evidence or substitute its judgment even if it might have reached a different factual conclusion. *Thompson*, 863 A.2d at 184; *Ellerbee-Pryer*, 803 A.2d at 254. Whether the employee’s actions found by the Commission constitute just cause for removal, however, is a question of law subject to this Court’s plenary review. *Manson*, 4 A.3d at 1112; *Ellerbee-Pryer*, 803 A.2d at 254 n.2.

Neither of the two grounds for Petitioner’s discharge was shown by the Department to rise to the level of just cause for removal from employment under Section 807 of the Act. Communications that make personal attacks or use

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*Commission v. State Civil Service Commission (Toth)*, 747 A.2d 887, 891 (Pa. 2000); *Pennsylvania Board of Probation and Parole v. State Civil Service Commission (Manson)*, 4 A.3d 1106, 1112 n.11 (Pa. Cmwlth. 2010).

abusive, harassing or threatening language can constitute just cause for discipline, including discharge. *City of Philadelphia v. Civil Service Commission of the City of Philadelphia (Luna)*, 717 A.2d 1067, 1069-70 (Pa. Cmwlth. 1998), *abrogated on other issue by Naylor v. Township of Hellam*, 773 A.2d 770 (Pa. 2001); *Department of General Services v. Civil Service Commission (Maddox)*, 707 A.2d 1210, 1212-13 (Pa. Cmwlth. 1998); *Mufson v. Department of Public Welfare*, 456 A.2d 736, 737-38 (Pa. Cmwlth. 1983). The email for which Petitioner was removed from employment does not contain any such language or personal attacks. Rather, it is merely a somewhat argumentative response to a reasonable request.

While Petitioner's email had a less than fully cooperative tone that his supervisors could reasonably request that he improve upon, it is not insulting, accusatory, abusive, harassing or threatening. It is thus a far cry from the type of behavior that this Court has held to constitute just cause for discharge. *Compare Luna*, 717 A.2d at 1069-70 (abusive and foul language directed at supervisor); *Maddox*, 707 A.2d at 1211-13 (attack on supervisor's character accusing her of being malicious and untruthful); *Mufson*, 456 A.2d at 737-38 (disrupting co-worker's business call, directing profane and abusive language at co-worker and refusing to comply with supervisor's instructions to stop harassing co-worker); *Alley v. State Civil Service Commission*, (Pa. Cmwlth. Nos. 493, 494 C.D. 2013, filed December 12, 2013), slip op. at 5-6, 8-9, 2013 WL 6568754 at \*3-\*5 (profanity and threats directed at co-workers and supervisor); *McGovern v. Civil Service Commission*, (Pa. Cmwlth. No. 155 C.D. 2008, filed June 17, 2009), slip op. at 15-18, 2009 WL 9096475 at \*8-\*9 (yelling, screaming, harassing and directing ethnic insults at co-workers). The Department cites no case law holding that a communication of the argumentative, but non-abusive nature here is



sufficient to constitute just cause for removal from employment. Moreover, the Department's evidence showed, and the Commission's findings establish, that Petitioner ceased any defiant behavior within minutes of the offending email by politely acknowledging to the recipient that he would comply with her request. (R. Item 4, Commission Adjudication F.F. ¶32; R. Item 1, Department Ex. 2, Supp. R.R. at 75b.) There was no evidence that the email for which Petitioner was discharged had any adverse effect on the recipient or on the Department.

The fact that Petitioner had received previous disciplinary actions does not change this. The record does not show what the "inappropriate" email communications were that were the basis of the 2012 reprimands and alternative discipline in lieu of suspension. The conduct for which Petitioner received his March 2013 alternative discipline in lieu of suspension was substantially different in character from the email chain at issue here. There, Petitioner had sent a sequence of insulting emails to employees of another Commonwealth department repeatedly accusing them and their department of incompetence, containing, *inter alia*, an assertion that "the Comptroller's office wasn't able to perform its duties as expected" and a reference to "a mess created due to an inefficiency by the Comptroller's Office." (R. Item 1, Department Ex. 14, Supp. R.R. at 174b-178b.) In addition, in that prior incident, Petitioner did nothing to back away from the accusations he was making or display any cooperative attitude, and the emails were shown to have had an adverse effect on the working relationship with the recipient department. (*Id.*, Supp. R.R. at 174b-181b.) While the March 2013 emails did rise to the level of just cause for discipline and just cause for removal would have existed if that conduct had recurred, the May 20, 2013 email did not constitute

such a recurrence and the prior misconduct and discipline do not make it into something it is not.

The Department likewise failed to show that Petitioner's internet usage constituted just cause for his removal. Personal use of the internet during work hours can constitute just cause for discharge where there is a showing of an excessive amount of time spent on personal use, interference with the employee's work or a knowing violation a work policy on times of use. *See Thompson*, 863 A.2d at 183-84 (personal internet use was just cause for removal where duration of employee's personal internet use was shown and amounted to 20% of his work day and almost 30% of his work time and evidence showed that employee was aware of policy allowing personal use only during lunch break and outside of work hours). None of those factors are present here. There was no evidence as to the amount of time that Petitioner spent on non-work internet sites, only the number of times and times of day that he accessed particular sites. The Commission made no finding that Petitioner's work was affected by his internet usage. Nor was there any evidence to support a finding of impact on Petitioner's work. No witness with knowledge of Petitioner's work testified that he was not timely completing his work assignments or that the quality of his work was deficient. While Petitioner's November 2012 EPR gave him a rating of "needs improvement" for "work results" and "work habits," the only reasons given for those ratings were customer service and late arrival at work, not lack of diligence during the work day or timeliness or quality of work product. (R. Item 1, Department Ex. 1, Supp. R.R. at 68b-70b.)

The Department's evidence did establish that the frequency or timing of Petitioner's internet use violated the Department's policy against personal internet use outside of lunch and break periods, HR Bulletin No. 2012-01. The

Commission's finding that Petitioner had notice of this policy, however, is unsupported by the record. The acknowledgement that Petitioner signed concerning information technology resources stated that he had read and agreed to abide by Management Directive 205.34, and did not refer to HR Bulletin No. 2012-01. (R. Item 1, Department Ex. 8, Supp. R.R. at 107b.) Management Directive 205.34, unlike HR Bulletin No. 2012-01, does not limit personal internet usage to lunch and break periods. (R. Item 1, Department Ex. 6, Supp. R.R. at 85b-100b.) No evidence was introduced that Petitioner was made aware of any policy restricting internet use other than Management Directive 205.34. Moreover, Petitioner had not received any prior discipline concerning internet usage. The written reprimand that Petitioner received concerning information technology use was for storage of personal files on his computer, not internet usage, and that reprimand referenced only Management Directive 205.34, not HR Bulletin No. 2012-01 or any other information technology use restrictions. (R. Item 1, Department Ex. 11, Supp. R.R. at 164b-165b.) Given the absence of evidence of the amount of time Petitioner spent in personal internet use, effect on his work, notice to Petitioner of the requirement that he confine his use to specific periods, or prior complaint or warning concerning his internet usage, the mere fact that Petitioner visited a substantial number of non-prohibited internet sites throughout the workday is not sufficient to constitute just cause for his discharge.<sup>3</sup>

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<sup>3</sup> We note that in *Montgomery County Behavioral Health/Development Disabilities v. State Civil Service Commission (Oyetayo)* (Pa. Cmwlth., No. 851 C.D. 2014, filed February 11, 2015), slip op. at 14-17, an unrelated matter, the employer asserted that the Commission's decision that the employee's conduct in that case did not constitute just cause for removal was inconsistent and contradictory with the Commission's decision on Petitioner's internet use in this case. We compared the facts and circumstances in *Montgomery County* with the circumstances in the present matter as they were described to us, and declined to set aside the Commission's decision in *Montgomery County* based on its decision here. Neither the Commission's decision in this

Because the Department failed to meet its burden of showing conduct by Petitioner that constitutes just cause for removal, the order of the Commission sustaining the Department's action is reversed.

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**JAMES GARDNER COLINS, Senior Judge**

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case nor the evidence of record here were before us in *Montgomery County*. It is the record in this case, not characterizations of this case in an unrelated matter, that must govern our decision here. Moreover, our holding in *Montgomery County*, that the Commission did not err in ruling that the employee's personal internet use did not constitute just cause for removal where there was no evidence of adverse effect on work performance, is completely consistent with our conclusion that the Department did not show just cause here.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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Petitioner	:	
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v.	:	No. 1038 C.D. 2014
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State Civil Service Commission	:	
(Department of Health),	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 20<sup>th</sup> day of April, 2015, the order of the State Civil Service Commission in the above-captioned matter is REVERSED and it is ORDERED the Petitioner be reinstated to his position as Accountant 2 with the Department of Health as of the effective date of his removal.

**JAMES GARDNER COLINS, Senior Judge**