

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia :
 :
 v. : No. 2531 C.D. 2009
 : Argued: October 18, 2011
 Civil Service Commission and :
 Michael Gibbs :
 :
 Appeal of: Michael Gibbs :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 22, 2011

Michael Gibbs (Gibbs) appeals from the order of the Court of Common Pleas of Philadelphia County (trial court) which reversed an order of the Civil Service Commission (Commission) of the City of Philadelphia (City) reinstating him to his position with the City’s Water Department without back pay. After review, we affirm.

Gibbs was employed by the City for approximately eighteen years as an Industrial Waste Control Technician II (Tech II) with the Water Department. Gibbs’ responsibilities included conducting water sampling and inspections and consulting with private companies concerning their compliance with Environmental Protection Agency (EPA) guidelines. In the course of his duties,

Gibbs was required to complete chain-of-custody forms showing the dates and times that he took water samples, as well as inspection forms which were used by the EPA when auditing the Water Department. Gibbs spent the majority of his time as a Tech II in the field, unsupervised. In the course of his employment with the City, Gibbs has never been accused of falsifying chain-of-custody forms, inspection forms or time sheets, and has always received a satisfactory job performance rating.

While employed by the City, Gibbs also worked part-time as a behavioral specialist and mobile therapist for the Northeast Treatment Center (NET) and WES Horizons (WES), private agencies with contracts with the State to provide services for families and children. Gibbs worked for these agencies primarily after his hours at the Water Department ended.

In July 2007, Gibbs' Supervisor, Robert Gonsiewski, was contacted by Special Agent Vicki Bicking of the Office of Attorney General, Criminal Investigations Bureau, Medicaid Fraud Control Section, regarding an investigation into Gibbs' billing practices with the State. Bicking showed Gonsiewski billing records which revealed overlapping times between Gibbs' Water Department job and his social worker job. The investigation eventually led to charges being filed against Gibbs for violating the Public Welfare Code¹ and the Crimes Code.²

¹ Act of June 13, 1967, P.L. 31, *as amended*, 62 P.S. §§101-1503. Specifically, Gibbs was charged with Medicaid Fraud under Section 1407(a)(1), (4), and (9), 62 P.S. §1407(a)(1), (4), and (9).

² 18 Pa. C.S. §§101-9101. The grand jury recommended charges be brought against Gibbs for Tampering with Public Records or Information under 18 Pa. C.S. §4911(a)(1); Theft by Deception under 18 Pa. C.S. §3922(a)(1); Forgery under 18 Pa. C.S. §4101(a)(2),(3); and Receiving Stolen Property under 18 Pa. C.S. §3925(a).

Following receipt of this information, the Water Department sent Gibbs a Notice of Suspension Without Pay and held a pre-disciplinary hearing and review of the proposed intention to dismiss him on November 7, 2007. Gibbs was formally dismissed by Notice of Dismissal dated November 30, 2007, effective December 1, 2007, for the following reasons:

In October of 2007, criminal charges were filed against you by the Office of the Attorney General of the Commonwealth of Pennsylvania. Those charges are based on allegations that, over an extended period of time, you made entries to records which purported to record hours during which you performed services for the Commonwealth. During a Water Department pre-disciplinary hearing conducted on November 7, 2007, you admitted that many of the entries you made to the records in question were not accurate.

The fact that, by your own admission, you lightly made inaccurate entries to important work-related records, demonstrates your unfitness for continued employment as an Industrial Waste Control Technician II.

Notice of Dismissal at 2; Reproduced Record (R.R.) at 12a. Gibbs appealed to the Commission, which conducted a hearing on May 27, 2008, at which Gonsiewski and Francis Meiers, the Employee and Labor Relations Officer, testified for the Water Department. Gibbs appeared and testified on his own behalf.

Gibbs testified that in his part-time position as a behavioral specialist and mobile therapist, he often needed to work past the hours allowed by NET and WES. Gibbs testified that he dealt with “families that ... have behavioral, sociological, psychology [sic], and emotional problems” and that he would not only make home visits, but often had to “track [the kids] down on street corners.” Civil Service Appeal Hearing, May 27, 2008, Notes of Testimony (N.T.) at 64.

Because he could not bill for the work he performed on behalf of these agencies past 8:30 or 9:00 p.m., Gibbs recorded dates and times that were not always accurate.³ On cross-examination, Gibbs denied using sick time from his Tech II job with the City to work at his part-time social worker job, and while he admitted that some of his conflicting time sheets state that he did mobile therapy work during the day (i.e. during his Water Department hours), he clarified that he did not work as a therapist during those hours, “but I’m admitting that I billed during those hours.” *Id.* at 72. Gibbs also admitted that as part of a plea agreement, he pled guilty to one count of forgery.

Robert Gonsiewski, Gibbs’ supervisor at the Water Department, testified that his department was responsible for enforcing “Federal and local pre-treatment regulations as they apply to industrial users that may discharge into the City’s sewer system . . . by sampling and inspecting these industries, levying fines for violations of the Clean Water Act and various pre-treatment regulations.” *Id.* at 12. Gonsiewski testified that Tech IIs worked primarily in the field taking samples and making observations in order to enforce these pre-treatment regulations. Gonsiewski explained that the Tech II is responsible for two forms which they must complete as part of their duties. The first is a chain-of-custody form that is

³ For example, Gibbs testified that, “[t]hey [WES] told us that we could not bill after 8:30 at night because they would not be reimbursed by the governing agency,” and that “[w]ith [NET], I believe it was nine o’clock.” N.T. at 65 and 66. He further explained:

[S]ince we couldn’t be paid past a certain time and since I actually worked past a certain time – let’s just say there is a block of time where I worked, let’s say, five – hypothetically, five o’clock until nine o’clock – you wouldn’t be paid after 8:30. So I just simply slid the time forward to a block where I can be paid and so the agencies could be paid and, hence, you have the overlap with the City time.

N.T. at 69.

filled out when taking a sample from an industry, and which records date, time, type of sample, how long it took to take the sample as well as any visual observations made. Gonsiewski testified that this document is an official record that is used in the event the Water Department finds a violation and will be levying fines against the industry as a result. Gonsiewski further testified that Tech IIs were also required to fill out inspection forms which the EPA uses when they audit the Water Department. Gonsiewski also testified as to the importance of honesty with respect to the Tech II position, stating:

[A]ll Technicians are required to work independently, basically, they have to be held accountable for the integrity of being at certain locations, times, and other job-related duties, which can entail, you know, taking samples at certain times. Because these samples, they're used for billing purposes and, eventually, they can be used for fining purposes.

Id. at 14. Gonsiewski acknowledged on cross-examination that while he reviewed Gibbs' City time sheets for inaccuracies, he did not audit any of his chain-of-custody or inspection forms for mistakes or inaccuracies.

Francis Meiers testified that as part of his duties, he administers discipline in the Department by reviewing the recommendations for discipline and advising the Water Commissioner whether or not the recommendation is in the Water Department's best interest. Meiers testified with regard to the accuracy of entries on Gibbs' time sheets:

The fact that one of them was false was very important to us. Because the essence of [Gibbs'] job is to record data properly, and this stuff is reported to the Federal government and criminal charges can come out of it, and billing is driven by it. So, the fact that he was making false entries at all was a big deal.

Id. at 34. Meiers testified that Gibbs explained to him that while there was a conflict between his time sheet entries for the State and the City, he was not defrauding the Water Department or the State and that while he did perform the services for the State, they were just not at the hours that he indicated on his State time sheets. Finally, Meiers testified that “[w]hat drove the dismissal was [Gibbs’] propensity or proclivity for making these kind of entries to official records.” *Id.* at 45.⁴

The Commission did not render specific factual findings. It instead recounted the testimony of both Gonsiewski and Meiers. It accepted Meiers’ testimony that Gibbs’ dishonesty in his part-time position rendered him unfit for his Tech II job, which required accurate record-keeping. The Commission further recounted that Gibbs’ testimony “that the alleged falsified State time sheets were due to the practices of the mental health agency he worked for on a part-time

⁴ Meiers further testified that:

[Gibbs’] job is to go out and gather this information and record it for us, and then we take action based on the information he gave us. Now, if it turns out that information can be proven not to be accurate, or that a lot of doubt can be cast on it, we’re in a bad situation. And that’s why he was dismissed. He just is not dependable to perform this function when he tells us he makes improper entries to official records. He told us repeatedly during that hearing.

....

He freely admitted that he doesn’t think a big deal out of making false entries to these records, and his usefulness to us is dependent upon us being able to say, this is what our investigator reported, we believe this to be the truth, therefore we’re bringing these charges against you.

....

It was his own admissions that demonstrated his unfitness for further employment in this capacity.

N.T. at 51-52, and 54.

basis.” Commission’s Decision at 2. The Commission also noted Gibbs’ testimony that he pled guilty to the charges; that he no longer works for the “agency” (presumably NET or WES); and that “the more important issue” is that Gibbs’ part-time position “in no way affected” his Water Department work. *Id.* It concluded:

Following a thorough review of the evidence, the testimony of all the parties, and the relevant and applicable case law, we find that the Department has not met its burden of proof. In this matter there is not sufficient, probative, substantial evidence to conclude that there was just cause for [Gibbs’] dismissal. The Commissioners do not agree that [Gibbs’] conduct in his part-time job affected or will affect his job performance for the Water Department. Further, the Commissioners dismiss the notion that [Gibbs’] guilty plea will negatively affect the Water Department if a complaint or question arises about [Gibbs’] records. Therefore, the Commission finds that the Department did not have just cause to take action against [Gibbs].

Id. Accordingly, the Commission sustained Gibbs’ appeal and reinstated him to his Tech II position without back pay. The City appealed to the trial court, which reversed, determining that the Commission committed an error of law in concluding that just cause did not exist for Gibbs’ dismissal. Gibbs’ appeal to this court followed.⁵

The sole issue raised in this appeal is whether the Commission erred in concluding that the Water Department did not have just cause to dismiss Gibbs from his position as a Tech II for off-duty conduct. Gibbs asserts that there is no

⁵ Whether an employee’s behavior constitutes just cause for dismissal is a question of law subject to plenary review by this court. *City of Philadelphia v. Civil Serv. Comm’n (Johnson)*, 967 A.2d 1034 (Pa. Cmwlth. 2009). Thus, based on the issue presented, the scope of our review is limited to whether the commission erred as a matter of law. *Id.*

nexus between his off-duty conduct and his ability to perform his Tech II job and that the evidence established that he was an excellent employee for over eighteen years, who always received the highest performance evaluations and was never accused or suspected of falsifying chain of custody forms, inspection forms, or time sheets during his tenure. Gibbs further argues that whether a public employer has just cause to terminate an employee depends upon whether the employee's conduct: 1) harms the employer's business; 2) adversely affects the employee's ability to perform his job; or 3) leads other employees to refuse to work with the offending employee. Gibbs contends that the Water Department's evidence consisted solely of speculation and that it did not offer any evidence that his off-duty conduct harmed the Water Department or that this conduct would adversely affect his ability to perform his job. Gibbs argues that the Commission credited his explanation for his off duty conduct. He notes that the Commission concluded that this conduct did not and would not affect his performance as a Tech II and that his guilty plea would not have a negative impact should a question arise about his records. Lastly, Gibbs argues that his off-duty conduct, by mere evidence of his guilty plea, without more, does not demonstrate a lack of judgment and does not show that his trustworthiness or integrity as a Tech II has been compromised.

The City counters that off-duty conduct can be "just cause" for dismissal where it shows that the employee lacks qualities required for his position, even where the employee asserts that his on-duty conduct is above reproach, citing *Tech v. Wattsburg Area School District*, 373 A.2d 1165 (Pa. Cmwlth. 1977), holding that a school bus driver's two off-duty accidents constituted just cause for dismissal despite her arguments that she had a clean on-duty record. The City argues that there is a nexus between Gibbs' off-duty misconduct and his ability to

perform his Tech II job because the misconduct involved falsification of time sheets and his guilty plea to a forgery charge and because his Tech II duties required that he provide accurate and reliable information about the inspections he performed at local industries. Citing *Commonwealth, Office of Attorney General v. Colbert*, 598 A.2d 344 (Pa. Cmwlth. 1991) and *Aiello v. Commonwealth, Department of Environmental Resources*, 551 A.2d 664 (Pa. Cmwlth. 1988), the City argues that Gibbs' disregard for the law and his demonstrated untrustworthiness directly impacted on his ability to perform his job and called his integrity into question, and that this misconduct was just cause for his dismissal. Finally, the City argues that Gibbs' admission that he regularly entered inaccurate times on his state time sheets demonstrated a lack of judgment that eroded the Water Department's confidence in his character and his ability to perform the duties of his Tech II position. We agree.

Philadelphia's Home Rule Charter provides that dismissal of any employee "shall be for just cause only." 351 Pa. Code § 7.7-303. While it does not define the term "just cause," we have held that the criteria for determining just cause must be job-related and must in some manner rationally and logically touch upon the employee's competency and ability to perform his position. *Mihok v. Dep't of Pub. Welfare*, 607 A.2d 846 (Pa. Cmwlth. 1992). The appointing authority, in this case, the Water Department, has the burden of establishing just cause for the employee's dismissal. *Id.* It is up to the head of the department to determine whether just cause exists, and the Commission must defer to that discretion as long as it is exercised in good faith and not for some reason unrelated to the fitness of the employee to perform his job, such as religion, race, or politics. *City of Philadelphia v. Civil Serv. Comm'n (Boles)*, 965 A.2d 389 (Pa. Cmwlth.

2009); *City of Philadelphia, Department of Human Servs. v. City of Philadelphia Civil Serv. Comm'n (Carter)*, 895 A.2d 87 (Pa. Cmwlth.), *appeal denied*, 589 Pa. 732, 909 A.2d 306 (2006). Finally, even a single instance of misconduct or an error of judgment can constitute just cause, even for dismissal, if it adversely reflects on the fitness of a person for his duties. *Williams v. Civil Serv. Comm'n*, 457 Pa. 470, 327 A.2d 70 (1974); *Davis v. Civil Serv. Comm'n of the City of Philadelphia*, 820 A.2d 874 (Pa. Cmwlth. 2003).

In the matter *sub judice*, it was not the mere appearance of impropriety nor improper speculation which led the Water Department to dismiss Gibbs. Rather, he was discharged because he admitted that he regularly entered inaccurate times on his state time sheets and subsequently pled guilty to the forgery charge. The Water Department's witness, Meiers, testified that it was precisely this "propensity" for falsification of important official documents that led to Gibbs' dismissal. In addition, we disagree with Gibbs' assertions, and the Commission's determination, that his off-duty misconduct had no bearing on his ability to perform his Tech II duties.⁶ As aptly stated by the trial court:

⁶ Gibbs argued that the criminal off-duty conduct of the employees in both *Woods v. State Civil Service Commission*, 590 Pa. 337, 912 A.2d 803 (2006) and *Philadelphia Civil Service Commission v. Owens*, 556 A.2d 967 (Pa. Cmwlth. 1989), in and of itself, did not support a determination that there was just cause for their dismissal. While our Supreme Court concluded that Wood's arrest alone, "albeit on *crimen falsi* charges, failed to demonstrate that his trustworthiness or integrity had been compromised," the court went on to hold that because the employer had not proven a nexus between his off-duty misconduct and his ability to perform his job, it had failed to prove just cause for his dismissal. *Woods*, 590 Pa. at 346, 912 A.2d at 809. *Owens*, a matter involving an irate tow truck operator who was convicted of aggravated and simple assault for off-duty conduct, involved whether the strict standard of conduct applicable to off-duty firefighters and policemen applied to Owens, who was a civilian working for the police department. In that case, we concluded that because the city had not presented evidence that this strict standard of conduct had been extended to its civilian support personnel, we would not infer it. Furthermore, we held that the city failed to present any evidence that Owens' misconduct **(Footnote continued on next page...)**

It is vital that in Gibbs' job at PWA he maintains the public confidence in the operation of municipal services. In falsifying time records Gibbs offended public standards of decency and eroded confidence in his character. The timesheet violations call into question his ability to accurately report hours to PWA, where he has an unsupervised position, as well as his ability to record and report findings essential to his position as a technician. Pennsylvania law allows outside conduct to establish just cause for termination where it bears a connection to the employee's ability to do his job. Such is the case here, where PWA now questions Gibbs' job performance and truthfulness in his reporting.

Trial Court's Opinion at 3.⁷

(continued...)

would affect his ability to do his job in the future or that it had lessened the public's respect for municipal employees. In contrast, the Water Department has proven that Gibbs' conviction for forgery and his admission that he routinely provided inaccurate information on official work records, establishes the requisite nexus between the misconduct and his ability to perform his job.

⁷ Moreover, the Commission erred in finding that Gibbs' actions were essentially excused because they were the result of the practices of the mental health agencies, which would not allow him to bill past a certain hour, and that he was admittedly "unorganized" in his billing practices. In general, one who pleads guilty to a crime is bound by that conviction and cannot collaterally attack or deny his criminal acts in other legal proceedings, including administrative proceedings. *Carter; Burger King v. Workmen's Comp. Appeal Bd. (Boyd)*, 579 A.2d 1013 (Pa. Cmwlth. 1990). In *Carter*, we reversed the Commission's decision which determined that Carter's actions, which led to two guilty pleas for driving under the influence and carrying a firearm without a license, were excused in light of his admission that he had taken a prescription drug that evening. While we did not hold that the Commission erred in admitting Carter's testimony about the reasons for his actions, we did state that the Commission could not rely on mitigating evidence when deciding the issue of just cause. Similarly, in the instant case, the Commission was bound by Gibbs' conviction for forgery and was not permitted to accept his explanation that he falsified state documents due to the rules or practices of the agencies he worked for to find that there was not just cause for his dismissal. The testimony of Gonsiewski and Meiers, which was not rejected by the Commission, supports the legal conclusion that the City had just cause to dismiss Gibbs.

Accordingly, we affirm the order of the trial court.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 22nd day of December, 2011, the order of the Court of Common Pleas of Philadelphia County in the above-captioned case is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge