

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

LOUMAG ALICEA,  
Appellant,

Case No.: D-12-52

v.

CITY OF HOLYOKE,  
Respondent.

Appearance for Appellant

Michael Clancy, Esq.  
International Brotherhood of  
Police Officers  
1299 Page Boulevard  
Springfield, MA 01104

Appearance for Respondent

Sara J. Carroll, Esq.  
City of Holyoke Law Department  
20 Korean Veteran's Plaza, R. 204  
Holyoke, MA 01040

Commissioner:

Cynthia A. Ittleman<sup>1</sup>

**DECISION**

Pursuant to the provisions of G.L. c. 31 § 43, the Appellant, Loumag Alicea (hereinafter referred to as "Mr. Alicea" or "Appellant") seeks review of the City of Holyoke's (hereinafter "Appointing Authority" or "City") decision to suspend him for three (3) days, following his conduct on the evening of October 29, 2011. The appeal was timely filed. A full hearing on this matter was held on September 12, 2012 at 10:00 AM in Springfield, Massachusetts. The witnesses were sequestered. The hearing was

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Jared Varo in preparing this decision.

digitally recorded and copies were forwarded to the parties. The parties submitted post-hearing briefs.

**FINDINGS OF FACT:**

Thirteen (13) exhibits were entered into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

*For the Appointing Authority:*

- James Neiswanger, Chief of Police, Holyoke Police Department
- Michael McCoy, Lieutenant, Professional Standards Division
- Lawrence Cournoyer, Lieutenant, Holyoke Police Department
- Kevin Whalen, Detective, Holyoke Police Department

*For the Appellant:*

- Loumag Alicea, Officer, Holyoke Police Department
- Andrew Dinapoli, Officer, Holyoke Police Department

and taking administrative notice of all matters filed in the case; as well as pertinent statutes, regulations and policies; drawing reasonable inferences from the credible evidence; a preponderance of the credible evidence establishes as follows:

1. The Appellant, Loumag Alicea, has been employed as a full-time Patrol Officer with the City of Holyoke for 14 years. (Testimony of Mr. Alicea)
2. Mr. Alicea has a discipline record with the Holyoke Police Department (“HPD”). Specifically, Mr. Alicea had a verbal altercation with a superior in 2009. Mr. Alicea was found to have violated several provisions of the HPD Rules and Regulations, including Obedience to Orders, Compliance to Orders, Conduct Unbecoming, Conduct Towards a Member, Truthfulness in Official Dealings,

Criticism of the Department, and Misrepresentation of Facts in Official Capacity.

He received a written reprimand and was ordered to attend anger management classes. (Testimony of Chief Neiswanger, Ex. AA 4)

3. On the evening of October 29, 2011, the City of Holyoke was experiencing a severe snowstorm that caused significant damage to western Massachusetts. The storm caused a number of trees to fall across the City, bringing down power lines and causing transformers to explode. By early evening, several roadways were impassable and conditions grew progressively worse into the early hours of October 30, 2011. (Testimony of Lt. Cournoyer; Mr. Alicea)
4. On October 29, 2011, Mr. Alicea was scheduled to work as House Officer on his regular shift of 4:00 p.m. to midnight. As House Officer, an officer is required to stay indoors to watch prisoners and set bail. (Testimony of Cournoyer; Mr. Alicea)
5. Lieutenant Lawrence Cournoyer is a superior officer employed by the HPD. On the evening of October 29, 2011, Lt. Cournoyer was assigned as Commanding Officer to all patrolmen, including Mr. Alicea. (Testimony of Cournoyer).
6. On that night, HPD received numerous 911 emergency calls from citizens asking for assistance. To cover the additional need for manpower, Lt. Cournoyer requested that the midnight to 8 a.m. shift be called in early to assist. Additionally, Lt. Cournoyer held over officers from the 4 p.m. to midnight shift. (Testimony of Cournoyer)
7. Lt. Cournoyer directed the officers to respond to different locations throughout the City for the purpose of closing roadways, assisting the Holyoke Gas &

- Electric Company, and protecting citizens from downed power lines. However, HPD remained short on manpower, despite having called the midnight to 8 a.m. shift in early. (Testimony of Cournoyer; Testimony of Dinapoli)
8. At approximately 9:00 p.m., Lt. Cournoyer was notified that two detectives stationed at a Holyoke Gas & Electric detail on Route 202 and Appremont Highway needed relief. Route 202 had been closed due to downed utility poles. (Testimony of Cournoyer)
  9. Lt. Cournoyer approached the Appellant at approximately 9:00 p.m. and asked if, at the end of his shift, he wished to man the detail at the intersection of Route 202 and Appremont Highway and relieve the detectives present there. Lt. Cournoyer told Mr. Alicea that there would be a cruiser available for him to use for the duration of the detail. Mr. Alicea told Lt. Cournoyer that he would accept the detail. (Testimony of Lt. Cournoyer, Mr. Alicea)
  10. Between 10:30 and 11:00 p.m., Lt. Cournoyer notified the Appellant that the midnight to 8 a.m. shift had come in and exhausted the supply of cruisers. Lt. Cournoyer explained to the Appellant that he would have to drive to the site of the detail in his personal vehicle. (Testimony Mr. Alicea, Lt. Cournoyer)
  11. Between 10:30 and 11:00 p.m., the House Officer for the midnight to 8 a.m. shift arrived at the Station and relieved Mr. Alicea. Mr. Alicea was instructed by Lt. Cournoyer to leave before his 4 p.m. to midnight shift ended in order to proceed to the detail. (Testimony of Cournoyer)
  12. Lt. Cournoyer told Mr. Alicea to take the Massachusetts Turnpike to Westfield in order to approach the detail site from the opposite direction. Mr. Alicea indicated

that he would accept the detail at the intersection of Route 202 and Appremont Highway understanding that he would have to drive his personal vehicle to the detail site and that Lt. Cournoyer would get a cruiser to him as soon as he could.

(Testimony of Lt. Cournoyer, Mr. Alicea)

13. Before leaving the station, Mr. Alicea encountered an officer who had just returned from the site of the detail at Route 202 and Appremont Highway. The officer said that Southampton Road was passable. (Testimony of Mr. Alicea)
14. The Appellant left the Holyoke Police Station at approximately 11:00 p.m. and proceeded to the detail in his personal vehicle by means of Southampton Road. As this was a private vehicle, it did not carry a standard complement of emergency equipment. (Testimony of the Mr. Alicea)
15. While on Southampton Road, Mr. Alicea encountered a tree across the road and was forced to turn his vehicle around. He called the Holyoke Police Station and stated that he was turning back. (Testimony of Mr. Alicea)
16. Lt. Cournoyer called Mr. Alicea on the phone and told him once again to proceed back down Southampton Road and take the Massachusetts Turnpike to the detail site. Mr. Alicea stated that he respectfully declined to follow Lt. Cournoyer's order and proceeded to return home. Lt. Cournoyer once again ordered Mr. Alicea to obey his order to go to the detail or face disciplinary action. Mr. Alicea replied: "Do what you have to do." (Testimony of Mr. Alicea, Lt. Cournoyer)
17. Mr. Alicea's conduct was at least partially motivated by his concern that conditions were dangerous and if an accident occurred while using his personal

vehicle he would not be eligible for “killed-in-line-of-duty benefits” under G.L. c. 32 § 100A. (Testimony of Mr. Alicea, Ex. App. 3)

18. The Holyoke Police Department does not have a written policy on how and when an officer may return a detail assignment. (Testimony of Mr. Alicea; Testimony of Chief Neiswanger).

19. Chief Neiswanger found that the Appellant’s conduct in declining to follow Lt. Cournoyer’s order violated Rule 1.2, Obedience to Orders of the HPD Rules and Regulations, which provides: “Members of the Department shall promptly obey any lawful order emanating from any superior officer. Should any such order conflict with a previous order from any other superior officer, with any General or Special order, or any provision of the Rules, the member to whom such order is given shall respectfully call attention to such conflict, his order shall stand and the responsibility shall be his, and the person obeying the same shall not be held in any way responsible for disobedience of any orders theretofore issued. If any unlawful order is given to any member of the Department, such member shall promptly report such fact in writing to the Chief of Police.” (Ex. AA 1, 2).

20. Chief Neiswanger found that the Appellant’s conduct violated Rule 3.2, Unbecoming Conduct, of the HPD Rules and Regulations, which provides: “Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorable (sic) upon the Department. Conduct unbecoming an officer shall include that which brings the Department into disrepute or reflects discredit upon the officer as a member of the Department, or

that which impairs the operation or efficiency of the Department or officer.” (Ex. AA 1, 2).

21. Chief Neiswanger found that by returning his detail under such circumstances, the Appellant violated rule 3.24, Conduct in Adversity, of the HPD Rules and Regulations, which provides: “Members of the Department are expected to be firm and calm in their actions at all times and at times of peril shall act together to protect each other from danger and for the restoration of peace and order. A member of the force who shrinks from danger or responsibility when duty requires that he meet it shall be deemed unworthy of a place in the department.” (Ex. AA 1, 2).

## **DISCUSSION**

### *Applicable Civil Service Statutes and Rules*

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev. den.*, 426 Mass. 1102, 687 N.E.2d 642

(1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, *rev. den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)\

The Appointing Authority's burden of proof by a preponderance of the evidence 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, 133 N.E.2d 489 (1956). "The commission's task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass.App.Ct. 331, 334, 451 N.E.2d 443, *rev. den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is



to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority."

Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev. den.*, 426 Mass. 1102, 687 N.E.2d 642 (1997). *See also* Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, *rev. den.*, 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, *rev. den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, *rev. den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

#### *The Respondent's Argument*

The City argues that the suspension was justified because Mr. Alicea violated rules, disobeyed an order, returned home in his own interest, and abandoned other officers. The City emphasized that the storm was unusual and severe, that other officers faced significant danger and that Mr. Alicea's action impacted the entire department, as well as the city as a whole. The City argued that it was necessary for such acts to have consequences.

#### *The Appellant's Argument*

Mr. Alicea argues that the detail was voluntary and that there was no official policy as to whether an officer could rescind his offer to engage in such a detail. He also argues that the unofficial policy allowed an officer to return a detail at any time. Mr. Alicea argues that it was reasonable to turn back because he was ill equipped and that the City's poor management and failure to provide a vehicle resulted in undue personal risk.

Finally, the Appellant argued that his punishment was inconsistent with punishments meted out to others.

### *Analysis*

The City has shown, by a preponderance of the evidence, that it had just cause to suspend Mr. Alicea for three days. The reasons for the Appellant's suspension were his violations of HPD rules 1.4, 3.2 and 3.24. Essentially, these violations boil down to a more basic question: Was it improper for Mr. Alicea to unilaterally rescind his acceptance of a detail during severe storm conditions, where he did not have use of a police vehicle? I find that he could not rescind under these circumstances and thus his discipline was proper. Furthermore, I find that each of the above rule violations was proved by a preponderance of the evidence and that they justify a three-day suspension.

HPD, like all police departments in this Commonwealth, is a paramilitary organization. The chain of command is vital to its operations and it is vital that the orders of commanding officers be followed. It follows that officers must sometimes be disciplined to enforce this order. In the case at bar, the City acted reasonably by suspending Mr. Alicea for his failure to respect the authority of his superior officer's orders, especially in light of the circumstances.

When Mr. Alicea accepted his detail, the City of Holyoke was caught in a severe storm that required more police officers, and police vehicles, than were readily available. Mr. Alicea voluntarily accepted his detail. While he initially believed that a cruiser would be available, this was ultimately not the case. However, Mr. Alicea reaffirmed his willingness to go to the detail in his own vehicle. When he eventually rescinded his

acceptance, it was too late. Police forces must be able to rely on their officers, especially in trying situations such as severe storms.

There is no written policy for when an officer may return a detail. Mr. Alicea claims that an officer may return a detail at any time, while Chief Neiswanger testified that a detail may be returned only when advanced notice is given, there is a family emergency or illness, and either the Officer finds a replacement, or the Commanding Officer is able to find a replacement. There is insufficient evidence before me to rule what the actual practice was at the time of the incident. However, I do not find Mr. credible Alicea's claim that an officer may return a detail at *any* time, especially not in the circumstances present in this situation. I do not believe that, under any policy, it is unfair or unreasonable to expect an officer to follow through with a voluntary detail in a public safety crisis, in the facts found here. As such, it was reasonable for the Commanding Officer to refuse Mr. Alicea's request to return the detail.

Finally, I find that Mr. Alicea did not have sufficient reason to rescind his detail. Police officers are charged with protecting the public. Mr. Alicea accepted the potential for danger by accepting appointment as an officer and reaffirmed it when he *voluntarily* accepted the detail. Even though the availability of a cruiser for use in the detail changed, this was no reason to shrink from his duty. Ordering Mr. Alicea to complete his detail was reasonable.

Mr. Alicea also claimed that the order to continue the detail was unlawful. Chief Neiswanger credibly testified that an unlawful order would be one which would violate a Constitutional right, or would otherwise be contrary to law. Precise definition is unnecessary however, as it is clear that an order that entails personal risk to an officer is

not de facto unlawful. Many duties of police officers entail personal risk. The order at issue was not unlawful given the circumstances, and was issued to address an immediate public safety need. Mr. Alicea voluntarily undertook a dangerous detail and it was lawful to order him to discharge that duty.

Finally, Mr. Alicea claimed that his punishment in this case was inconsistent with the discipline (or lack thereof) that other officers receive for returning details. However, Mr. Alicea did not merely return a detail; he disobeyed an order to continue a detail, during an emergency, which he had voluntarily taken. There is no evidence before this Commission that indicates that other Officers were not punished after attempting to return details, having that request refused, and then simply refusing to perform the detail. Likewise, there is no indication that others escaped punishment after receiving a direct order to continue a detail that was already undertaken. It is clear that the circumstances of this discipline were unique and, thus, Mr. Alicea has not received disparate treatment.

As such, the City had just cause to suspend Mr. Alicea for three days and the suspension does not warrant modification. *See Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 824, 857 N.E.2d 1053, 1059 (2006).

### CONCLUSION

For all of the above reasons, the Appellant's appeal under Docket No. D-12-52 is hereby *dismissed*.

Civil Service Commission

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Cynthia A. Ittleman  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners) on July 11, 2013.

A true record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the 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 a Civil Service Commission's final decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

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Notice:

Michael Clancy, Esq. (for Appellant)  
Sara J. Carroll, Esq. (for Appointing Authority)