

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PATRICIA ALICEA,
Appellant
v.

Docket No.: D-13-61

CITY OF HOLYOKE,
Respondent

Appearance for Appellant:

Kevin B. Coyle, Esq.
1299 Page Boulevard
Springfield, MA 01104

Appearance for Respondent:

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

Commissioner:

Cynthia Ittleman¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Patricia Alicea (hereinafter "Officer Alicea" or "Appellant"), filed an appeal on March 8, 2013 with the Civil Service Commission ("Commission"), regarding the decision of the City of Holyoke (hereinafter "City" or "Respondent"), to suspend her without pay for two (2) days from the Holyoke Police Department ("Department"). Officer Alicea filed a timely appeal. A pre-hearing conference was held on March 27, 2013 and a full hearing was held on June 12, 2013, both at the Springfield State Building.² The hearing was digitally recorded and all of the witnesses were sequestered,

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 and thereafter (formal rules) apply to adjudications before the Commission, with G.L. c. 31 or any Commission rules taking precedence in the event of a conflict.

except for the Appellant. Post-hearing briefs were filed by both parties on July 22, 2013. For the reasons stated herein, the appeal is denied.

Findings of Fact:

The Respondent entered eight (8) exhibits and the Appellant entered two (2) exhibits into evidence at the hearing. Based on these exhibits and the testimony of the following witnesses:

For the Respondent:

- James Neiswanger, Chief of Police, Holyoke Police Department
- Denise Duguay, Captain, Holyoke Police Department

For the Appellant:

- Patricia Alicea, Appellant

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

1. Officer Alicea is a tenured civil service employee in the position of patrol officer with the Department and is currently assigned to Operations in the Uniformed Division. Officer Alicea served as a dispatcher for ten (10) years and she has served with the Department as a Police Officer since March, 2007. (*Stipulated Facts, Testimony of Alicea*)
2. Prior to February 17, 2013, Officer Alicea served as a Detective in the Department's Domestic Violence and Sex Offender Unit of the Criminal Investigations Bureau. As a member of the Domestic Violence and Sex Offender Unit, Officer Alicea investigated domestic violence complaints and updated sex offender registration information.
(*Testimony of Duguay*)
3. Officer Loumag Alicea is the brother of Officer Alicea. They served on the Holyoke Police Department together for six (6) years. (*Testimony of Duguay, Neiswanger, Alicea*)

4. Mr. Alicea was a patrolman with the Department and was placed on administrative leave pending the outcome of criminal charges brought against him on September 28, 2012; he was arrested that same day. Mr. Alicea was charged with Domestic Assault and Battery and Assault with a Dangerous Weapon relating to allegations of domestic abuse of his wife.³ (*Testimony of Duguay*)
5. Capt. Duguay was assigned to handle the criminal investigation of Mr. Alicea. Typically Officer Alicea would be assigned to investigate domestic assault charges, as a detective with the Domestic Violence and Sex Offender Unit. However, due to the inherent conflict of interest that would be involved if she investigated her brother, Officer Alicea was not assigned to the case. (*Testimony of Duguay*)
6. Officer Alicea was never ordered or authorized to participate in the criminal investigation of Mr. Alicea. (*Testimony of Duguay, Neiswanger, Respondent's Exhibit 4 and 5*)
7. On September 28, 2012, Capt. Duguay accompanied Mr. Alicea's wife to her home so she could retrieve her belongings. Officer Alicea was standing at the threshold of the house when they arrived. Officer Alicea wanted to go into the house stating that the judge had modified the restraining order to allow Mr. Alicea to retrieve his belongings. Capt. Duguay advised Officer Alicea that although a family member may be present while Mr. Alicea's wife retrieved her belongings, it was improper for Officer Alicea to participate, especially since her other brother could be there in that capacity. (*Testimony of Duguay*)
8. Officer Alicea lived across the street from the home of Mr. Alicea and his wife. She left the home of Mr. Alicea and his wife when Capt. Duguay arrived at the home. (*Testimony of Alicea*)

³ Mr. Alicea has since been terminated from his position as a Police Officer with the Holyoke Police Department. He appealed his termination to the Civil Service Commission. His appeal was subsequently dismissed and his termination upheld.

9. On September 28, 2012, after talking to Captain Duguay, Officer Alicea received a phone call from her immediate supervisor, Captain Arthur Monfette, stating that he knew what was going on with Mr. Alicea but Officer Alicea needed to keep her distance from Mr. Alicea's case. (*Testimony of Alicea*)
10. On October 1, 2012, a dangerousness hearing was held concerning Mr. Alicea in Holyoke District Court with regard to the criminal charges against him. Officer A of the Department testified that he was contacted by Mr. Alicea. Mr. Alicea made verbal admissions to Officer A about the charges against him (Mr. Alicea). (*Testimony of Duguay, Appellant's Exhibit 1*)
11. Mr. Alicea and Officer Alicea believed that Officer A had previously been involved in a domestic violence matter. Mr. Alicea asked Officer Alicea if she would inquire of Officer B if he had personal knowledge of this and, if called as a witness, whether he would testify to such knowledge. This information could have been helpful to the defense of Mr. Alicea. (*Testimony of Alicea, Appellant's Exhibit 1*)
12. On October 29, 2012, Officer B called Officer Alicea. This phone conversation came about when Officer B received a message from dispatch "to call Patty Alicea." There was a misunderstanding in this regard as Officer Alicea did not attempt to call Officer B. Rather, another woman, named "Maddy," attempted to call Officer B. Believing that Officer Alicea tried to contact him, Officer B called her on her personal cell phone. (*Testimony of Alicea, Appellant's Exhibit 1*)
13. During this conversation, Officer Alicea asked Officer B if he knew if Officer A had been involved in a domestic violence matter. Officer B stated that he was somewhat familiar with the matter but not the related marital problems or issues. She further asked him if he

would testify against Officer A at the criminal trial involving Mr. Alicea. Officer B responded with indignation and anger at being asked to testify against a fellow officer and stated that he would not do so. Officer Alicea said she was at the dentist's office, dropped the matter, and hung up. (*Appellant's Exhibit 1*)

14. Officer B informed Officer A of the conversation with Officer Alicea and what she had asked him. On November 20, 2012, Officer A informed Capt. Duguay about Officer Alicea's alleged conduct and Capt. Duguay wrote up a disciplinary action notice against Officer Alicea on December 4, 2012. (*Appellant's Exhibits 1 and 2*)

15. The disciplinary action notice stated that Officer Alicea had allegedly asked Officer B to lie on the witness stand in an attempt to discredit Officer A's testimony against Mr. Alicea. In so doing, it stated, Officer B would have committed perjury and Officer Alicea would have committed subornation of perjury. (*Appellant's Exhibit 2*)

16. On December 20, 2012, Internal Affairs investigator Lt. Michael McCoy interviewed Officer B concerning the disciplinary action notice against Officer Alicea. Officer B told Lt. McCoy that Officer Alicea was not asking him (Officer B) to lie but asked if he knew anything about Officer A allegedly having committed domestic abuse and if he (Officer B) would testify about it. (*Appellant's Exhibit 1*)

17. On January 15, 2013, Lt. McCoy interviewed Officer Alicea concerning the disciplinary action notice against her. (*Respondent's Exhibit 5*)

18. On February 11, 2013, Chief Neiswanger issued Personnel Order 013-13 ("Order") to the Appellant. The Order stated that it had been alleged that she violated HPD Rules 3.2 and 4.4, as well as G.L. c. 268, § 2. The Order further states that Lt. McCoy provided the results of his investigation to a Captain's group, and that the Captain's group found that

the Appellant violated HPD Rules 3.2 and 4.4, but not G.L. c. 268, § 2, and recommended that the Appellant be suspended for three (3) days and transferred out of her domestic violence assignment. (*Respondent's Exhibit 4*)

19. Rule 3.2 – Unbecoming Conduct states: “Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorable 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.” (*Respondent's Exhibit 2*)

20. Rule 4.4 – Interference with Investigations states:

Officers shall not interfere with cases being handled by other officers of the department or by any other governmental agency unless:

- (a) Ordered to intervene by a superior officer, or
- (b) The intervening officer believes beyond a reasonable doubt that a manifest injustice would result from failure to take immediate action.
- (c) Officers shall not undertake any investigation or other official action not part of their regular duties without obtaining permission from their superior officer unless the exigencies of the situation require immediate police action.

(*Respondent's Exhibit 2*)

21. G.L. c. 268, § 2 states: “Whoever is guilty of subornation of perjury, by procuring another person to commit perjury, shall be punished as for perjury.” (*Respondent's Exhibit 4*)

22. Should there be a conflict of interest, an Officer is expected to disclose it. The Officer must act professionally by removing him or herself from the occasion to avoid even the appearance of impropriety. If a conflict is apparent, the rules and regulations are in place to prevent that officer from tainting the investigation. Interference in an investigation

does not need to be successful for there to be a violation of Rule. 4.4. (*Testimony of Neiswanger*)

23. The Order further indicates that on February 5, 2013, Chief Neiswanger met with the Appellant, her attorney and union representative to discuss it. In the Order, Chief Neiswanger upheld the findings of the Captains' mast but issued a two (2) day suspension, transferred her back to regular patrol, and ordered her to take remedial ethics training. (*Respondent's Exhibit 4*)
24. Officer Alicea appealed the Order to the Mayor of Holyoke. On February 21, 2013, a hearing was held in the Mayor's office, attended by Officer Alicea, her attorney, Chief Neiswanger, and Lt. McCoy. By a decision dated February 28, 2013, the Mayor upheld the Order issued by Chief Neiswanger. (*Respondent's Exhibit 7*)
25. At some point during the proceedings against Mr. Alicea, Mr. Alicea's wife recanted her testimony and moved to Florida. As a result, Officer A became the key witness against Mr. Alicea. However, all criminal charges against Mr. Alicea were dismissed on February 26, 2013. (*Testimony of Duguay*)
26. Officer Alicea filed an appeal with the Commission on March 8, 2013.

DISCUSSION

Applicable Civil Service Law

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.”

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 (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, 923, *rev.den.*, 426 Mass. 1102, (1997). *See also* City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, *rev.den.*, 440 Mass. 1108, (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477, (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

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., 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, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, (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, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, (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, (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" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). *See* Watertown v. Arria, 16 Mass.App.Ct. 331, 334, *rev.den.*, 390 Mass. 1102, (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities." Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

Respondent's Argument

The Respondent argues that it has substantiated its allegations that Officer Alicea's conduct constitutes interference and is deserving of disciplinary action. It was Officer Alicea's brother who was the subject of a criminal investigation conducted by the Department. The investigation and prosecution of Mr. Alicea remained open during the events at issue here. Officer Alicea had a duty to remove herself from all aspects of the investigation to avoid even

the appearance of impropriety due to this clear conflict of interest. She was expressly advised on two occasions by Superior Officers that she should not be involved in the case.

The Respondent further avers that Rule 4.4 of the Department's Rules and Regulations clearly prohibits an officer from interfering with cases being handled by another officer. This interference does not need to be physical interference, nor does it need to be successful. Officer Alicea's conduct in asking Officer B to testify is clear evidence of interference of the Department's criminal investigation. By asking Officer B to testify against Officer A, she essentially solicited a witness to refute or undermine her own Department's criminal investigation. This conduct is inappropriate and worthy of disciplinary action. Had Officer B agreed to testify about Officer A, it would have nullified the Department's investigation and seriously damaged the credibility of the Department in future investigations. Based on these facts, the City was justified in suspending Officer Alicea for two (2) days.

Appellant's Argument

The Appellant argues that there is no evidence that Officer Alicea interfered with the investigation. She did not encourage any witnesses to avoid investigators, withhold information, be untruthful, conceal, or destroy evidence. The investigation proceeded completely unaffected by anything Officer Alicea did, including her conversation with Officer B. Chief Neiswanger stated that an investigation is "never" closed, but conceded that he had received no further reports or information from the investigation of Mr. Alicea since the October 29, 2012 conversation between Officer Alicea and Officer B. Thus, the investigation was over by the time the conversation took place and could not have affected, or interfered with, by Officer Alicea's actions. Furthermore, Officer Alicea's simple inquiry of Officer B was not undertaken in her police capacity, but as a family member.

The Appellant further states that there was no violation of rule 3.2 as Officer Alicea did nothing to bring the Department into disrepute, which reflected discredit upon her, or which impaired the operation or efficiency of the Department. Chief Neiswanger emphasizes that the effect of Officer Alicea's inquiry may have been to discredit Mr. Lopez. Following that logic, no Officer should ever report misconduct of a fellow Officer because it may discredit that Officer. If Officer A had been discredited by prior misdeeds, it would not be the result of Officer Alicea revealing them but because of Officer A's own poor past decisions. For these reasons, the Appellant avers that the City did not have just cause to suspend Officer Alicea for two (2) days.

Analysis

By a preponderance of evidence, the City has shown that it had just cause to suspend Officer Alicea for two (2) days for conduct unbecoming an Officer in violation of HPD Rule 3.2 and interfering in the investigation of her brother in violation of HPD Rule 4.4. It is understandable that an individual whose brother is under investigation would want to be involved. However, it is a different matter entirely when both the individual and her brother are Police Officers, especially in view of the higher standards of conduct to which Police Officers are held. The Appellant was advised by both her immediate supervisor and Capt. Duguay, both of whom are her superior officers, to stay away from the investigation of Mr. Alicea and yet she appeared at the marital home of her brother and his wife when Capt. Duguay escorted Ms. Alicea to the marital home to gather her belongings, a time which poses significant safety concerns in domestic violence cases. Next, the Appellant sought the aid of Officer B to undermine the credibility of Officer A in regard to his testimony at the court's initial dangerousness hearing preceding the criminal prosecution of Mr. Alicea. Although Officer Alicea did not initiate the phone conversation with Officer B, asking him to testify against Officer A was both conduct

unbecoming an officer and an attempt to interfere with, and undermine the case, even though she was not on duty at the time. While Officer Alicea argues that she was acting as a family member and was not trying to interfere with the case, her actions show otherwise. In asking Officer B to testify she was essentially asking him to testify against the very Department where they both worked. The Appellant's actions in these instances reflect poor judgment and constitute conduct unbecoming an Officer, bringing discredit upon herself and the Department, effecting the Department's operations.

What is most troubling here is that this involved a matter of domestic violence. As an Officer assigned to such matters, Officer Alicea should be especially concerned for, and aware of the Department's job to protect members of the public from domestic abuse and ensure its appropriate and effective investigation and processing. On this occasion, Officer Alicea did neither. For these reasons, the City had just cause to suspend Officer Alicea.

CONCLUSION

Based on the facts and the law and rules herein, the Appellant's appeal under Docket No. D-13-61 is hereby *denied*.

Civil Service Commission

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on May 1, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Kevin Coyle, Esq. (For Appellant)

Sara Carroll, Esq. (for Respondent)