Decision mailed: 7/19/10
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DEBORAH ANDERSON,
Appellant

v.

D-01-631

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorneys:

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Commissioner:

Paul Stein, Esq.[1]

DECISION

The Appellant, Deborah Anderson (hereinafter "Appellant"), pursuant to G.L. c. 31, § 43, is appealing the decision of the Boston Police Department (hereinafter the "Department" or "Appointing Authority") to terminate her employment as a Boston police officer.

The appeal was timely filed. A hearing was held at the offices of the Civil Service Commission (hereinafter "Commission") on January 19, 2010.[2] Because no written

[1] The Commission gratefully acknowledges the assistance of Maimoona L. Sahi, Esq. in the drafting of this decision.

[2] This appeal was filed with the Commission on April 24, 2001, and was consolidated with other complaints challenging the validity of the hair test issued by the BPD. Those complaints are being heard in

notice was received from either party to make the proceeding public, the hearing was declared private. The witnesses were not sequestered. The hearing was digitally recorded. Both parties subsequently submitted proposed decisions.

FINDINGS OF FACT:

Sixteen (16) exhibits were entered into evidence at the hearing. The record was left open in order for the Respondent to submit an additional document at the request of the Commissioner. That document was received by the Commission on February 25, 2010, and was entered into the record as Exhibit 17. Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Edward Callahan ("Callahan"), Boston Police Department

For the Appellant:

- Deborah Anderson, Appellant
- Cheryl Jacobs ("Jacobs"), Appellant's Sister

I make the following findings of fact:

1. The Appellant, Deborah Anderson, a tenured civil service employee of the Department, has been employed as a Police Officer since November 24, 1986. (Stipulation of Facts)
2. On November 5, 1996, the Appellant submitted to toxicology testing which revealed positive levels of cocaine and marijuana. (Exhibit 7)

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the United States District Court of Massachusetts. Once it was determined that the Appellant in the instant matter was not challenging the validity of the hair test, the matter was scheduled for a Full Hearing.

3. The positive drug test was a violation of Department Rule 111 (Substance Abuse Policy). (Exhibit 7)
4. The Appellant was offered an opportunity to avoid termination by entering into a Settlement Agreement with the Department. (Exhibit 7)
5. On November 18, 1996, the Appellant signed a Settlement Agreement with the Department. Pursuant to the agreement, the Appellant received a forty-five (45) day suspension without pay, and entered a rehabilitation facility at Bournewood Hospital. (Stipulation of Facts, Testimony of Appellant)
6. Under the terms of the agreement, the Appellant agreed to submit to random drug testing for a period of thirty-six (36) months after returning to full time duty. The Appellant also agreed to disciplinary action if she failed to meet all established standards of conduct and job performance, including testing positive for illegal drugs at any time. (Exhibit 7)
7. The Appellant returned to full time duty in January 1997. (Testimony of Appellant)
8. The Appellant passed a series of 10 random urine tests from January 22, 1997 to January 1, 2000. (Exhibit 13, Testimony of Appellant)
9. The Appellant also tested clean on annual hair tests conducted in January 1999 and December 1999. (Exhibits 14, 15)
10. In January 1998, the Appellant sustained a head injury after falling from a second story window. The injury caused the Appellant to suffer from both long term and short term memory loss. (Testimony of Appellant)
11. While working a paid detail at the Pine Street Inn on October 22, 2000, the Appellant slipped and fell. The Appellant suffered a fractured tailbone, and was prescribed

Motrin and Percocet. The Appellant was initially instructed to take one Percocet up to every six hours for pain, and on a follow-up visit on November 14, 2000, the instructions were modified to one or two Percocet tablets at bedtime as needed for pain. As a result of taking the Percocet, the Appellant suffered drowsiness and dizziness. (Exhibit 16, Testimony of Appellant)

12. Shortly after this injury, the Appellant also contracted a flu-like illness. This condition went untreated initially and developed into pneumonia. (Exhibit 16, Testimony of Appellant)

13. In November 2000, the Appellant agreed to look after her sister's two cats, while her sister visited her father in North Carolina. (Testimony of Appellant, Testimony of Jacobs)

14. The Appellant's sister, Cheryl Jacobs, is a smoker. On or about November 21, 2000, while at her sister's apartment performing pet care, the Appellant noticed an open box of about 15 Newport cigarettes. The Appellant began to smoke the cigarettes at the rate of 3 or 4 a day. She noticed no ill or unusual effects. The Appellant had smoked all of the cigarettes by the time her sister returned from her trip. (Testimony of Appellant)

15. At the time, the Appellant was still suffering from flu-like symptoms and a severe cough from her untreated pneumonia. In addition, the Appellant was still taking the Percocet that had been prescribed to her for the pain. The Appellant testified that the combination of illness and medication deadened her senses of smell and taste. (Testimony of Appellant, Exhibit 16)

16. When Jacobs returned in December 2000, she asked the Appellant about the box of cigarettes. When the Appellant replied that she had smoked them all, Jacobs said that each cigarette contained a small amount of cocaine. Jacobs, an individual with an abuse history, preferred this method of ingesting cocaine, especially since it concealed her relapse from her family and friends. (Testimony of Jacobs)
17. The Appellant states that she did not inform anyone about the cocaine-laced cigarettes. (Testimony of Appellant)
18. On December 27, 2000, toxicology testing revealed positive levels of cocaine in the Appellant. (Exhibit 10)
19. On January 9, 2001, the Department placed the Appellant on administrative leave without pay pending further action. (Exhibit 3)
20. When she spoke with the Department's Medical Review Officer, Dr. Benjamin Hoffman, on January 9 and 10, 2001, the Appellant informed him that she had used no drugs except for the Percocet. (Exhibit 17)
21. As a result of the December 27, 2000 positive cocaine test result, the Appellant voluntarily submitted to a second Hair Analysis Drug Test (Safety-Net-Test) on January 12, 2001. This test also confirmed the positive levels of cocaine. (Exhibit 10)
22. On June 15, 2001, in a matter of arbitration, Arbitrator Tammy Byrnie ruled that where a Department employee has an initial positive toxicology test result and enters into a settlement agreement with the Department - identical to the Settlement Agreement signed by the Appellant - that Department employee is deemed to have suffered a second offense when the employee tests positive for illicit drugs following

the 36- month random testing period provided for in the settlement agreement and subjects himself to termination under Department Rule 111. *See* Boston Police Patrolmen's Association and the City of Boston, Case No. 16-1413 (June 15, 2001). In this case, Arbitrator Byrnie further ruled that a four-year gap between two positive tests is insufficient to mitigate against a Department employee's discharge. (Exhibit 11)

23. Edward Callahan was the Director of Human Resources for the Department from 1998-2001. He testified that in all instances where an officer has tested positive on two separate occasions, the Department has terminated the officer. (Testimony of Callahan)

24. On January 30, 2001, the Department notified the Appellant that due to her January 12, 2001 positive test result it would be instituting disciplinary proceedings against her. (Exhibits 2, 4, 5)

25. The Department charged the Appellant with eight (8) violations of the Department's Rules and Procedures. The specifications for those violations are as follows:

SPECIFICATION I
On December 27, 2000, Officer Deborah Anderson submitted to toxicology testing which revealed positive levels of cocaine. Such conduct is in violation of Rule 102, § 3 (Conduct of Department Personnel).

SPECIFICATION II
That on December 27, 2000, Officer Deborah Anderson submitted to toxicology testing which revealed positive levels of cocaine. Such conduct is in violation of Rule 102, §35 (Conformance to Laws).

SPECIFICATION III
That on December 27, 2000, Officer Deborah Anderson submitted to toxicology testing which revealed positive levels of cocaine. Such behavior constitutes conduct which violates Rule 111 (Substance Abuse Policy).

SPECIFICATION IV
That on November 18, 1996, Officer Deborah Anderson entered into a Settlement Agreement with the Boston Police Department, whereby she agreed to submit to random

drug testing for a period of thirty six (36) months and agreed that disciplinary action would be taken against him (sic) should he (sic) again test positive for illegal drugs at any time. Officer Anderson did test positive for cocaine following drug testing on December 27, 2000. Such conduct is in violation of the Settlement Agreement executed on November 18, 1996.

SPECIFICATION V
That on January 12, 2001, Officer Deborah Anderson submitted to toxicology testing which revealed positive levels of cocaine. Such conduct is in violation of Rule 102, § 3 (Conduct of Department Personnel).

SPECIFICATION VI
That on January 12, 2001, Officer Deborah Anderson submitted to toxicology testing which revealed positive levels of cocaine. Such conduct is in violation of Rule 102, §35 (Conformance to Laws).

SPECIFICATION VII
That on January 12, 2001, Officer Deborah Anderson submitted to toxicology testing which revealed positive levels of cocaine. Such behavior constitutes conduct which violates Rule 111 (Substance Abuse Policy).

SPECIFICATION VIII
That on November 18, 1996, Officer Deborah Anderson entered into a Settlement Agreement with the Boston Police Department, whereby she agreed to submit to random drug testing for a period of thirty six (36) months and agreed that disciplinary action would be taken against him (sic) should he (sic) again test positive for illegal drugs at any time. Officer Anderson did test positive for cocaine following drug testing on January 12, 2001. Such conduct is in violation of the Settlement Agreement executed on November 18, 1996.
(Exhibit 2)

26. At a March 15, 2001 trial board hearing, Superintendent Florastine Creed issued a ruling sustaining the charges against the Appellant. (Stipulation of Facts, Exhibit 1)

27. On April 10, 2001 the Appellant was terminated from her position as a Boston Police Officer. (Exhibit 6)

28. The Appellant filed a timely appeal of that termination with the Commission on April 23, 2001. (Stipulation of Facts)

CONCLUSION

The role of the Civil Service 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 Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997). *See* Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civ. Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civ. Serv. v. Mun. Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civ. Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The Commission is also mindful of the standard of conduct expected of police officers. "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 474 (1995). "[P]olice officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens." Attorney General v. McHatton, 428 Mass. 790, 793 (1999). As stated in Police Comm'r of Boston v. Civil Serv. Comm'n, 22 Mass. App. Ct. 364, 371 (1986):

> Police officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for, rather than public distrust of, law enforcement personnel. They are required to do more than refrain from indictable 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.

In this case, the Department Specifications I through IV charged Appellant with testing positive for cocaine on a December 27, 2000 toxicology test and the Department Specifications V through VIII charged her with testing positive for cocaine on a January 12, 2001 toxicology test. The Department sustained all eight of the Specifications against the Appellant at an internal disciplinary hearing on March 15, 2001 for two counts of violating Department Rule 102, § 3 (Conduct of Department Personnel), two counts of violating Department Rule 102, § 35 (Conformance to Laws), two counts of violating Department Rule 111 (Substance Abuse Policy) and two counts of violating the

November 18, 1996 Settlement Agreement the Appellant entered into with the Department.

At the hearing, the Department submitted evidence in the form of the November 18, 1996 Settlement Agreement and the Psychemedics Corporation Test Result Support Documents, which showed by a preponderance of the evidence that the Appellant had violated Department rules and the Settlement Agreement. The documents established that Appellant tested positive for cocaine use when she submitted to her annual hair analysis drug test on December 27, 2000, and again when she submitted to the Safety Net test on January 12, 2001. Indeed, Appellant does not deny that she consumed cocaine prior to her positive toxicology tests. Rather, she contends unpersuasively that she should not be held liable for violations of the Department rules and the Settlement Agreement because her consumption was inadvertent.

It is the function of the agency hearing the matter to determine what degree of credibility should be attached to a witness's testimony. School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978). Doherty v. Retirement Bd of Medicine, 425 Mass. 130, 141 (1997). The hearing officer must provide an analysis as to how credibility is proportioned amongst witnesses. Herridge v. Board of Registration in Medicine, 420 Mass. 154, 165 (1995).

The Appellant's testimony – that she did not experience a "high" because she was taking other medications – is unconvincing. It is not reasonable to believe that given her prior drug abuse history, the Appellant was unable to recognize the smell, taste, and effects of cocaine: especially if the cocaine was ingested repeatedly over the course of a two (2) week period - regardless of any concurrent medication use. The Appellant was

specifically instructed in her follow-up visit to the doctor on November 14, 2000 that she should only be taking Percocet at night as needed for pain, so any concurrent medication use should have been minimal. Furthermore, the Commission is on administrative notice that there is no indication in any published documents that Percocet interferes with sensory perceptions.

More significantly, although she was subject to drug testing, the Appellant never alerted anyone that she had inadvertently been exposed to illicit drugs. The Appellant did not alert her employer although she had allegedly smoked the cocaine laced cigarettes repeatedly from November 21 to December 5, 2000. In her own words, the Appellant acknowledged that by smoking the "laced" cigarettes, she had consumed drugs. She was on notice from her 1996 Settlement Agreement with the Department that any positive drug test results would lead to the termination of her employment. She therefore had every reason to document and report any exposure that could yield a positive drug test result and place her future employment in jeopardy. This is what a reasonable person would have done immediately upon learning of the conditions of the cigarettes. The Appellant is not credible. Her tale is one of fabrication, in order to excuse the drug use and avoid termination.

Finally, to the extent that the Appellant may argue that her December 27, 2000 positive toxicology test should be treated as her first offense under Department Rule 111, this argument is without merit. As held in the Matter of Arbitration between Boston Police Patrolmen's Association and the City of Boston, Case No. 16-1413 (June 15, 2001), a Department employee's positive toxicology test is treated as his or her second offense under Rule 111 where such employee had previously tested positive for illicit

drugs and entered into a settlement agreement with the Department calling for a period of random drug testing. It is of no consequence that the random drug testing period had expired at the time of the employee's second positive toxicology test. Thus, the fact that the Appellant's random drug testing period from her November 18, 2006 Settlement Agreement had expired prior to December 27, 2000 is not relevant to the determination that she was to be treated as having a second offense under Department Rule 111 and therefore was subject to termination. The Department has consistently applied this analysis to subsequent drug offenses, as arbitration case number 16-1413 demonstrates. The Appellant was treated consistently as were other officers who have repeatedly tested positive for illegal drug use.

I find that the Department had reasonable justification for finding that Appellant's positive toxicology tests on December 27, 2000 and January 12, 2001 violated Rule 102, § 3 (Conduct of Department Personnel), Rule 102, § 35 (Conformance to Laws), and Rule 111 (Substance Abuse Policy) of the Rules and Procedures of the Boston Police Department as well as the November 18, 1996 Settlement Agreement entered into between Appellant and the Department.

The Department has met its burden and proven by a preponderance of the evidence that there was just cause to terminate the Appellant. Moreover, I find that there is no evidence of inappropriate motivations or objectives that would warrant the Commission modifying the discipline imposed upon her.

For all of the above reasons, the Appellant's appeal filed under Docket No. D-01-631 is hereby *dismissed.*

Civil Service Commission

Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman: Henderson, Marquis, McDowell and Stein, Commissioners) on July 15, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to:

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