

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

JOSHUA ARCHER,
Appellant

v.

D1-22-025

TOWN OF NORTON,
Respondent

Appearance for Appellant:

Scott W. Dunlap, Esq.
89 Access Road, Suite 19
Norwood, MA 02062

Appearance for Respondent:

Joseph S. Fair, Esq.
KP Law, P.C.
101 Arch Street
Boston, MA 02110

Commissioner:

Paul M. Stein¹

SUMMARY OF DECISION

The Civil Service Commission upheld the termination of a municipal police officer, finding that substantial credible evidence supported the conclusion that he had engaged in conduct violative of the rules and regulations of the Norton Police Department when he fled the scene of a motor vehicle accident and was later arrested for operating while intoxicated, which was not his first off-duty alcohol-related incident. The Commission also drew an adverse inference from the Appellant's failure to testify at the Appointing Authority hearing and at the Commission hearing.

¹ The Commission acknowledges the assistance of Law Clerk Daniel Taylor in the drafting of this decision.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Joshua Archer (Appellant), timely appealed to the Civil Service Commission (Commission) contesting the decision of the Town of Norton (Norton or Respondent) to terminate him from his employment as a police officer with the Norton Police Department (NPD).² The Commission held a remote pre-hearing conference (via Webex) on March 22, 2022 and held a full hearing at the UMass Dartmouth School of Law on July 22, 2022, which was digitally recorded.³ On December 9, 2022, the Commission received Proposed Decisions from each party. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Ten (10) exhibits were offered into evidence at and following the hearing, all by the Respondent. Both parties submitted post-hearing briefs. Based on these exhibits and the testimony of the following witnesses:

Called by the Respondent:

- Michael Yunits, Norton Town Manager
- Chief Brian Clark, Norton Police Department
- Sergeant James Cameron, Norton Police Department
- Officer Melanie Costa, Norton Police Department
- Officer Janna Perez, Norton Police Department

and taking administrative notice of all pleadings filed in the case, pertinent rules, statutes, regulations, case law and policies, and drawing reasonable inferences from the credible evidence,

I make the following findings of fact:

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 (Formal Rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ A copy of the audio recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/it wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

Appellant's Background

1. The Appellant, Joshua Archer, began his employment with the Norton Police Department (NPD) as a part-time special police officer in 2013. He completed the police academy in August 2017 and was appointed as a full-time permanent police officer. (Stipulated Facts; Resp.Ex.8)
2. On April 30, 2018, during his one-year probationary period, Plymouth police officers responded to a complaint about a male who was acting erratically outside a tavern. The officers identified him as the Appellant, whom they found highly intoxicated. As a result of this incident, the NPD found the Appellant had engaged in conduct unbecoming a police officer and had violated NPD rules concerning the use of alcohol. He received a one-day suspension, and his probationary period was extended for an additional six months. (Testimony of Clark; Resp. Ex. 8)

November 13, 2021 Incident and Arrest

3. On November 13, 2021, at approximately 1:00 a.m., the Appellant was off-duty, and driving his vehicle in Norton, when he attempted to make a turn onto Taunton Avenue. As he was turning, the Appellant's vehicle struck another vehicle stopped at a red light. (Testimony of Perez; Resp. Ex. 5; Resp. Ex. 9)
4. The other operator, a woman in her 60s, struck her head on the steering wheel. The Appellant exited his vehicle and approached the other operator, who remained in the driver's seat. Her teenage daughter, riding as her passenger, called 911 call and reported the accident. (Testimony of Clark; Testimony of Perez; Resp. Exs. 4 and 5)
5. Both the operator of the other vehicle and her daughter reported to responding officers, and later to internal affairs investigators, that the Appellant's speech was difficult to understand,

and he appeared to be intoxicated. (Testimony of Perez; Resp. Ex. 4)

6. A witness to the interaction between the Appellant and the other operator also reported that the Appellant seemed intoxicated, nervous, and slurred his words. (Resp. Ex. 4)
7. Approximately two minutes after the crash, the Appellant returned to his vehicle and began driving away from the scene.⁴ (Testimony of Clark; Testimony of Perez; Resp. Ex. 4)
8. The passenger took a photo of the Appellant's license plate. She gave the information to the 911 dispatcher, who was able to identify the vehicle as belonging to the Appellant. (Testimony of Cameron; Resp. Ex. 5)
9. The operator was later taken to the hospital via ambulance for treatment. (Testimony of Perez; Resp. Ex. 4)
10. When he learned of the accident, Sgt. Cameron, the shift supervisor, called the Appellant's cell phone. The Appellant admitted that he had been in an accident. He said that he left the scene because the other operator had been yelling at him. (Testimony of Cameron; Resp. Ex. 4)
11. Sgt. Cameron asked the Appellant to give his location. Sgt. Cameron advised him to remain where he was on Taunton Avenue. (Testimony of Cameron; Resp. Ex. 5)
12. Sgt. Cameron and Officer Costa arrived simultaneously at the scene, finding the Appellant further down the road than reported, approximately a mile from the scene of the accident. (Testimony of Cameron; Testimony of Costa; Resp. Ex. 4)
13. Both Sgt. Cameron and Officer Costa observed the Appellant's engine running, and the driver's side window rolled down. Both detected a strong odor of alcohol coming from the Appellant's vehicle. (Testimony of Cameron; Testimony of Costa; Resp. Ex. 4)

⁴ The younger woman described the Appellant "sprinting" back to his vehicle, and the male bystander reported that once in his vehicle, the Appellant "floored it," and "really, really sped away." (Resp. Ex. 4)

14. Sgt. Cameron ordered the Appellant to turn off the engine and step out of the vehicle. He had to repeat himself twice before the Appellant complied. As the Appellant stepped out of the vehicle, both Sgt. Cameron and Officer Costa observed that he was unsteady on his feet. (Testimony of Cameron; Testimony of Costa; Resp. Ex. 4)
15. Sgt. Cameron asked the Appellant if he had been drinking alcohol, and the Appellant admitted that he had been drinking earlier in the day. When Sgt. Cameron then asked where the Appellant was coming from, he pointed vaguely to the west and northwest. (Testimony of Cameron; Testimony of Costa; Resp. Ex. 4)
16. During this exchange, both policemen observed the Appellant's red, bloodshot, and glossy eyes. The odor of alcohol on his breath was now greater than when the Appellant remained in the vehicle. (Testimony of Cameron; Testimony of Costa; Resp. Ex. 4)
17. The Appellant refused a field sobriety test requested by Sgt. Cameron. (Testimony of Cameron; Testimony of Costa; Resp. Ex. 4)
18. After observing the Appellant's demeanor, his eyes, and his odor, Sgt. Cameron and Costa concluded that he was intoxicated. Sgt. Cameron then placed him under arrest for operating a motor vehicle while under the influence of alcohol. (Testimony of Cameron; Resp. Ex. 4)
19. Sgt. Cameron took photographs of the Appellant's vehicle, documenting the damage to the front portion caused by the collision. (Testimony of Cameron; Resp. Ex. 5)
20. Sgt. Cameron transported the Appellant to the Norton Police Station for booking. During the booking process, the Appellant again refused to undergo a breath alcohol test. (Testimony of Costa; Testimony of Perez; Resp. Ex. 5)
21. Refusal of the breath alcohol test resulted in an automatic suspension of the Appellant's driver's license, for a minimum of 180 days. (G. L. c. 90, § 24(1)(f)(1); Resp. Ex. 6)

22. Officer Perez assisted Officer Costa during the booking process. He observed that the Appellant was unsteady on his feet, and that his eyes were red, bloodshot, and glossy. (Testimony of Perez; Resp. Ex. 4)
23. A Clerk Magistrate arrived the police station and set the Appellant's bail at personal recognizance. The police released the Appellant with a summons to appear in Attleboro District Court at 9:00 a.m. on Monday, November 15, 2021 for his arraignment. (Testimony of Perez; Resp. Ex. 4; Stipulated Facts)
24. The Appellant did not appear for the arraignment. His counsel advised the Court that he had checked into an alcohol rehabilitation facility. (Stipulated Facts)
25. The presiding judge found the Appellant in default and ordered that an arrest warrant issue if the Appellant did not appear before the end of the day. The Appellant appeared later in the day to remove the default. (Stipulated Facts)

Town of Norton Disciplinary Process

26. On November 15, 2021, Chief Brian Clark ordered Lt. James Franco to open an internal affairs investigation. (Testimony of Clark; Resp. Ex. 4)
27. In the course of his investigation, Lt. Franco interviewed the injured operator of the vehicle hit by the Appellant, the operator's daughter, a pedestrian eyewitness and the five Norton officers who responded on scene or handled the incident at the police station. Based on this information, Lt. Franco found that the Appellant had violated NPD Rule 4.1 - Conduct Unbecoming an Officer, Rule 10.15 - Criminal Conduct, and Rule 13.7 - Possession/Use of Alcohol. (Resp. Ex. 4)
28. On December 6, 2021, Chief Clark adopted the findings of Lt. Franco's investigation. He issued charges to the Appellant, and forwarded a request to the Town Manager for an

appointing authority hearing. (Testimony of Yunits; Testimony of Clark; Resp. Ex. 3)

29. On January 18, 2022, Town Manager Michael Yunits notified the Appellant that he would be holding a hearing at 10:00 a.m. on January 24, 2022, to determine whether there was just cause to terminate the Appellant based on his November 13, 2021 conduct. (Resp. Ex. 2)

30. The Appellant was represented at the January 24, 2022 hearing. He invoked his right against self-incrimination, under both the Fifth Amendment to the U.S. Constitution and Article 12 of the Massachusetts Constitution. (Resp. Ex. 1)⁵

31. The Appellant was advised that the Town Manager was permitted to draw an adverse inference based on his refusal to testify. (Testimony of Yunits; Resp. Ex. 1)

32. The Town Manager heard from Sgt. Cameron, and reviewed Lt. Franco's internal affairs report, and the reports of the officers involved in the arrest and booking of the Appellant. (Testimony of Cameron & Yunits; Resp. Ex. 1)

33. In a February 9, 2022 decision, the Town Manager found that there was just cause to terminate the Appellant's employment as an NPD police officer. The decision found that the Appellant was intoxicated at the time of the accident, his actions were unlawful, constituted a "substantial violation of the public trust and of his role as a police officer," tarnishing the reputation of the NPD and eroding the public's confidence in its officers. (Resp. Ex. 1)

34. The Town Manger's decision noted aggravating factors supporting the Appellant's

⁵Article XII of the Massachusetts Declaration of Rights extends the Fifth Amendment privilege not to answer any questions posed in a government proceeding where answers might prove incriminating in future criminal proceedings, by stating that no person "shall . . . be compelled to accuse, or furnish evidence against himself." The privilege encompasses "all judicial or other official governmental investigations, proceedings, or hearings, including those carried on by administrative agencies, boards, or officials." G.A. McDonough, *Administrative Law and Practice*, § 4:8 (2d ed. 2022).

termination: 1) the 180-day suspension of the Appellant's driver's license which made him unable to complete the essential functions of his position; 2) his failure to appear at 9:00 a.m. for his arraignment; and 3) his previous suspension and the extension of his probationary period due to his 2018 off-duty alcohol-fueled incident. The Town Manager also drew an adverse inference against the Appellant based on his failure to testify on his own behalf. (Resp. Ex. 1)

35. As of the date of the Commission hearing, the Appellant's criminal case had not been resolved. (Testimony of Yunits; Resp. Ex. 10)

APPLICABLE LEGAL STANDARD

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries the burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. *Id.* See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000).

In performing that function, the commission does not view a snapshot of what was before the appointing authority. Were that determinative, this case would resolve in favor of the city. . . . Although counsel appeared for Stratton at the discharge hearing, Stratton did not testify in his defense. At the police chief's request, Stratton underwent a polygraph examination. The examiner gave an opinion that Stratton had failed the test. With un rebutted evidence against Stratton, the police chief had a basis for discharging him for conduct unbecoming a police officer.

In performing its § 43 review, however, the commission hears evidence and finds facts anew. Examining an earlier but substantially similar version of the same statute, the court in Sullivan v. Municipal Ct. of the Roxbury Dist., 322 Mass. 566, 572, 78 N.E.2d 618 (1948), said: "We interpret this as providing for a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer."

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

The Commission must take account of all credible evidence in the entire administrative record, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law, including whatever would fairly detract from the weight of any particular supporting evidence. See Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971) citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).; Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” Leominster v. Stratton, 58 Mass. App. Ct. at 729. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997).

“The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006).” Clark v. Boston Housing Authority, 24 MCSR 193 (2011), *aff’d*, Suffolk Superior Court, C.A. No. SUCV2011-2554E (Feb. 13, 2015). In a civil case, the Massachusetts courts have held that even a party asserting his or her rights against self-incrimination under the U.S. or Massachusetts Constitutions “may be the subject of a negative inference by a fact finder where the opposing party ... has established a case adverse to the person invoking the privilege. Quintal v. Commissioner of the Dep’t of Employment & Training, 418 Mass. 855, 861 (1994), quoting Custody of Two Minors, 396 Mass. 610, 616 (1986).” Falmouth, *supra*, at 826-27 (citations omitted). While the adverse inference may not be required, in Falmouth, the Supreme Judicial Court found that the

Commission erred when it failed to factor into its decision to reduce the Appellant's suspension from 180 days to 60 days that the Appellant failed to testify at the Town's hearing, invoking the privilege against self-incrimination. Id.

The Commission has also consistently held police to a high standard of conduct even in the absence of indictable conduct or a criminal conviction. For example, in Zorzi v. Town of Norwood, 29 MCSR 189 (2016), the Commission noted:

“An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion.” McIsaac v. Civil Service Comm'n, 38 Mass. App. Ct. 473, 475 (1995) (negligent off-duty handling of firearm). “When it comes to police officers, the law teaches that there is a special ‘trust reposed in [a police officer] by reason of his employment 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.’ Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, *rev. den.*, 398 Mass. 1103 (1986).”

Section 43 of G.L. c. 31 also vests the Commission with the authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated “considerable discretion” in this regard, albeit “not without bounds” so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass. App. Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass. App. Ct. 985, 987 (1982) (remanded for findings to support modification). However, the Supreme Judicial Court has added that, in the absence of “political considerations, favoritism, or bias,” the same penalty is warranted “unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way.” Falmouth v. Civil Service Comm'n, 447 Mass. at 824.

ANALYSIS

Following a thorough review of the evidence presented at the Commission hearing, I conclude that the Town had just cause to terminate the Appellant, based on his conduct in the early morning of November 13, 2021.

First, the evidence in the record proffered by the Town concerning the Appellant's misconduct was not substantially contested. During the Commission hearing, the Appellant offered no exhibits into evidence, and called no witnesses. The Town, by contrast, offered the arrest report and internal affairs report associated with the incident, as well as calling four witnesses with firsthand knowledge of the accident who offered substantially consistent accounts of the events of November 13, 2021. A strong preponderance of the evidence supports the finding that on the night in question the Appellant was intoxicated, caused a motor vehicle accident, and then fled the scene. The Town is rightfully concerned by the grave lapse in judgment in drinking and driving, which endangered the Appellant's own life and the lives of other motorists and was further compounded by his failure to render any medical assistance to the operator whose vehicle he struck. Likewise, the Appellant's failure to appear in court, as ordered by a clerk-magistrate, tends to call into question his judgment as a public safety officer and also damage the credibility of the NPD, regardless of the Appellant's reasons for failing to appear.

Second, while it is true that the Town was unable to present the results of a field sobriety test or a breath alcohol test, I find that the preponderance of the existing evidence is sufficient for a finding that the Appellant was intoxicated. Further, the 180-day license suspension that followed from the Appellant's refusal to take a breath alcohol test made him unable to perform the essential functions of his job for at least the duration of that suspension, and possible longer depending on the disposition of the associated criminal case.

Third, I consider the Town's previous discipline of the Appellant, in which he was suspended during his (then extended) probationary period for another off-duty incident involving alcohol. Again, this 2018 incident tends to support the Town's argument that the Appellant has a problematic relationship with alcohol and lacks the good judgment necessary to comport himself according to the high standards expected of public safety officers. As such, this prior incident is further support for the ultimate finding of just cause for termination of the Appellant's employment.

Fourth, I draw an adverse inference from the Appellant's failure to testify at the appointing authority hearing, and before the Commission itself. The Commission may properly draw such an inference even against a party properly invoking their rights against self-incrimination, so long as the opposing party has established a case adverse to the party invoking the privilege. Town of Falmouth, 447 Mass. at 826-27. The adverse inference is also "particularly appropriate" where it is the "dubious behavior of a police officer, who is expected to comport himself in an exemplary manner, that put himself in the position of being unwilling or unable to tell his version of events." D'Andrea v. City of Everett, 34 MCSR 369 (2021).

Fifth, the Appellant has asserted that his termination was improper, so long as the criminal case against him is pending. This is incorrect. In the Commonwealth of Massachusetts, and in the United States at large, criminal liability must be proven beyond a reasonable doubt, a far more stringent standard than the preponderance of evidence standard required in civil proceedings. As such, even where the weight of evidence is insufficient for a criminal conviction, it may be sufficient to support just cause for discipline based on a preponderance of the evidence. The Town was not obliged to postpone its disciplinary action until the conclusion of the related criminal case, which was ongoing as of the date of the Commission hearing.

Finally, the Appellant contends his treatment was disparate from that of an NPD officer arrested for domestic assault and battery in 2014. The evidence presented on this issue was insufficient to properly analogize the two cases. Unlike the incident which precipitated this appeal, the criminal investigation of the 2014 incident was conducted by a department other than the NPD, and witnesses were unwilling to cooperate with the NPD's internal investigation. Consequently, the quality and quantity of evidence available to the appointing authority in each case was substantially dissimilar.

Accordingly, I find that, based on the substantial credible evidence present in the record, the Appellant's behavior constituted conduct unbecoming an officer, violative of NPD rules and regulations. This misconduct indicates poor judgment on the part of the Appellant and was damaging to the reputation of the NPD specifically, and to the public trust generally. Given that my findings do not differ substantially from those of the Town, and in the absence of political considerations, favoritism, or bias, I decline to modify the administered discipline.

CONCLUSION

For all of the above reasons, the discipline appeal of the Appellant, Joshua Archer, under Docket No. D1-22-025 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney and Tivnan, Commissioners [Stein – Absent]) on February 9, 2023.

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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his/her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Scott W. Dunlap, Esq. (for Appellant)

Joseph S. Fair, Esq. (for Respondent)