

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

JASON BROUILLARD,
Appellant

vs.

D-03-130

HOLYOKE POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

Richard K. Sullivan, Esq.
300 East Main Street
Milford, MA 01757

Respondent's Attorney:

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Commissioner:

Daniel M. Henderson, Esq.

DECISION

Pursuant to the provisions of General Laws Chapter 31, Section 43, the Appellant, Jason Brouillard (hereinafter "Brouillard"), is appealing the decision of the Appointing Authority, City of Holyoke (hereinafter "City"), terminating him as a permanent reserve police officer in the Holyoke Police Department. Brouillard filed a timely appeal. A hearing was held at the offices of the Civil Service Commission on April 13, 2005. One (1) tape was made of the hearing.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Exhibits 1-4) and the Testimony of Brouillard, Brouillard's mother, Ann Marie Brouillard (hereinafter "Mrs. Brouillard"), and Chief of Police Anthony Scott (hereinafter "Chief Scott"), I find the following:

1. On August 25, 2002, Brouillard was appointed as a permanent Reserve Police Officer in the City's Police Department. At all times material hereto, the appointing authority for permanent reserve police officers of the City was Mayor Michael J. Sullivan (hereinafter "Mayor Sullivan"). Mayor Sullivan is the Appointing Authority for the entire City of Holyoke.(Testimony)
2. On January 29, 2003, Chief Scott sent Brouillard a letter purporting to terminate his employment. Prior to Chief Scott's January 29, 2003 letter to Brouillard, he had been given no indication that his employment as a permanent reserve police officer would be terminated. In Chief Scott's letter of January 29, 2003, he stated:

This department was notified by Ms. Michele Oparowski of a breaking and entering and subsequent losses to her apartment at 8 Arbor Way, apartment A, Holyoke. This matter was turned over to the Office of Professional Standards and an internal investigation under my orders . . . You were requested to submit a report answering specific questions relating to your presence at the address indicated herein. You specifically denied being present at the location indicated herein on the dates (sic) in question.

Independent witnesses contradict your assertions. (Exhibit 3 and Testimony)

3. By appeal dated February 6, 2003, Brouillard timely appealed his termination of employment to the Civil Service Commission (hereinafter "Commission"). On February 7, the Commission acknowledged receipt of Brouillard's appeal. (Exhibit 1, Docket and Testimony)
4. At the time of the alleged breaking and entering incident Brouillard and Michele Oparowski ("hereinafter "Oparowski") had been dating as boyfriend and girlfriend. It appears that they had also broken up about this time, but not over this alleged incident. (Testimony)
5. At the hearing before the Commission, Chief Scott was unable to recall the name of the complainant, the date or time of the alleged breaking and entering, the names of any witness who could place Brouillard at the scene, any items taken as a result of the alleged breaking and entering or most other details of the alleged incident. (Testimony)
6. Chief Scott testified that he did recall the alleged incident involved an open patio door and an animal (a dog or cat) which may have walked out the open patio door. Chief Scott testified there was no evidence that Brouillard opened the patio door or took any animal or anything else from the premises. (Testimony)

7. Chief Scott testified that Brouillard had denied any involvement in the alleged incident. Brouillard testified and also denied any involvement in the alleged incident. (Testimony)
8. Brouillard testified that prior to his termination, he had never received any form of discipline while a permanent reserve police officer of the City (Testimony).
9. Brouillard testified and his testimony is believed; that he had not been at Oparowski's apartment on that date and time, as he had attended Christmas Eve church services with his family, including his Parents.(Testimony)
10. Brouillard further testified that at the conclusion of church services, he returned to his residence (which is also his parents' residence) for a Christmas Eve meal. Brouillard testified that he remained at home until approximately 10:00 p.m., at which time he left his residence with his brother. .(Testimony)
11. Chief Scott testified that the complainant, Michele Oparowski, subsequently recanted her allegation that Brouillard may have been involved in the alleged incident. Chief Scott recalled that Oparowski had both telephoned him and written a letter to him, stating that she was incorrect in regard to her prior allegations against Brouillard. However, Chief Scott testified emphatically that he

received the telephone call and the letter after he had sent his January 29, 2003 letter. Chief Scott clearly felt that it was too late for him to reverse the termination of Brouillard as stated in his January 29, 2003 letter. (Testimony)

12. The January 29, 2003 letter states that the allegation of a breaking and entering against Brouillard had been received by the Police Department and referred to the Department's Criminal investigation Bureau for investigation. The letter further states that the matter was turned over to the Office of Professional Standards. The letter concludes that Chief Scott found "the investigation to be sustained, and I have subsequently asked the Mayor to terminate your employment with the City of Holyoke." The letter goes on to state, "You are terminated in accordance with Mass. General Laws Chapter 31, Section 34, Probationary Period." (Exhibit 3 and Testimony)

13. It is clear from Chief Scott's letter and his Testimony here, that he did believe; that an allegation of a criminal matter which is received, referred within the Department's bureaucracy, investigated and concluded, even with nebulous results or based on a recanted allegation, is sufficient to invoke the termination of a probationary employee, pursuant to M.G.L. chapter 31, sec. 34. (Exhibits, Testimony, Demeanor).

14. No criminal charges were ever filed against Brouillard concerning the alleged

incident, even after the Department reviewed and consulted with the District Attorney's Office on the matter. (Testimony)

15. Chief Scott testified that he was unsure of the number of shifts which Brouillard had worked while a permanent reserve police officer. When asked whether the number of shifts which Brouillard worked could have been twenty-six, Chief Scott answered in the affirmative. (Testimony)

16. Brouillard testified that he worked approximately thirty shifts, more or less, as a permanent reserve police officer of the City. (Testimony)

17. Brouillard testified that a Sergeant Daniel McCavick inquired of him (Brouillard) if he had been at Oparowski's apartment between approximately 4:30 p.m. and 5:30 p.m. on December 24, 2002, the date and time of the alleged incident. (Testimony)

18. Brouillard testified that he had not been at Oparowski's apartment on that date and time, as he had attended Christmas Eve church services with his family, including his Parents. (Testimony)

19. Brouillard further testified that at the conclusion of church services, he returned to his residence (which is also his parents' residence) for a Christmas

Eve meal. Brouillard testified that he remained at home until approximately 10:00 p.m., at which time he left his residence with his brother. .(Testimony)

20. General Laws Chapter 31, Section 34, provides in pertinent part as follows:

Following his original appointment as a permanent employee to a less than full-time civil service position, including a reserve . . . a person shall serve a probationary period of six months immediately following such an appointment, which shall include the actual performance of the duties of such position for not less than thirty working days or the equivalent thereof during such period, before he shall be considered a less than full-time tenured employee ... If the conduct or capacity of the person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon termination of such period. (Administrative Notice)

21. Mayor Sullivan, not Chief Scott, is the appointing authority of permanent reserve police officers of the City's Police Department. Since Mayor Sullivan did not provide Brouillard with the required written notice of termination of employment under General Laws Chapter 31, Section 34, in default thereof, Brouillard became a tenured employee upon the termination of his probationary period, by operation of law.(Exhibits, Testimony and Administrative Notice)

22. Moreover, there is no reliable evidence that Brouillard had any involvement in the alleged breaking and entering at the apartment of Oparowski on December 24, 2002. There is credible and reliable evidence that he did not have any involvement in the alleged incident. Indeed there is strong and reliable evidence that no such breaking and entering ever occurred but was a mistaken conclusion, on the part of Oparowski, to which she latter admitted, at least several times. The City cannot rely on a mere allegation, later disproved, as evidence that Brouillard's conduct or capacity, or the character or quality of his work, was unsatisfactory within the meaning of General Laws Chapter 31, Section 34. (Exhibits, Testimony, Administrative Notice)

23. The alleged breaking and entering incident, on which Chief Scott initiated an investigation and then used as the sole reason to terminate Brouillard's employment, is a legal and factual nullity. "Nullity" is defined as, "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as

though it had not taken place, or which has no legal force of effect.” Salter v. Hilgen, 40 Wis. 363; Jenness v. Lapeer County Circuit Judge, 42 Mich. 469, 4 N.W. 220. Black’s Law Dictionary, Revised Fourth Edition, St. Paul, Minn.; West Publishing Co., 1968. Pg. 1216 (Exhibits, Testimony and Administrative Notice)

24. Mrs. Brouillard testified that her son worked extremely hard to become a police officer of the City of Holyoke, the City in which he is a life long resident. Her testimony is believable and is given great weight. She is a straightforward unassuming witness. She loves her son but would not lie for him. Her demeanor was such that she could physically project her son’s love of and supreme dedication to his career as a police officer. Scandal seems to be a complete stranger to the Brouillard household. She corroborated her son’s testimony in detail. (Testimony)

25. Mrs. Brouillard further testified that, on the date of December 24, 2002, she, her husband and her son (Brouillard) all attended a service at the Mater Dolorosa Church in Holyoke. The church service lasted from approximately 4:00 p.m. to 5:15 p.m. Thereinafter, her family, including Brouillard, returned home for a Christmas Eve meal. At approximately 10:00 p.m. on December 24, 2002, Brouillard left his home with his brother (Testimony).

26. Brouillard testified that, since his termination of employment by the City, he had applied to various other Police Departments. To date, no other Police Department has hired Brouillard, a circumstance which he attributes to his termination of employment as a permanent reserve police officer of the City.

.(Testimony)

27. Chief Scott admitted in his Testimony that he was not aware of any mechanism or any forum in which Brouillard could rectify this mistaken allegation that resulted in his termination from employment. Chief Scott also admitted that it would be very difficult if not impossible, for a person terminated from a public safety job for cause, during his probationary period, to obtain subsequent public safety employment. Indeed, Brouillard has not yet been able to secure subsequent, public safety employment, despite three subsequent applications for same.

(Testimony)

28. The mere allegation of a breaking and entering against Brouillard, despite its later recantation by the alleged victim and being otherwise disproved, has caused Brouillard to be terminated from his employment a police officer, ^{FROM} (for) the Holyoke Police Department. That termination has cause prejudice or harm to Brouillard's employment status, with the Holyoke Police Department and with other Departments. That prejudice or harm is continuing on into the foreseeable future.

(Exhibits and Testimony)

29. Chief Scott testified that he did not see the events and the outcome here to be an act of unfairness or prejudice against Brouillard, but a simple application of the law. Chief Scott then gave an example of obvious prejudice that had occurred to him, years ago, at the start of his law enforcement career. He was then disqualified from eligibility for the New Orleans Police Department. His disqualification was that he did not meet the minimum height requirement, of 6 feet, for the Department. However Chief Scott, a black man, was 6 foot 2 inches in height at that time. Although Chief Scott's earlier disqualification from the New Orleans Police Department was an obvious act of prejudice, the New Orleans Police Department, if later called to account, might have claimed a faulty tape measure as the real culprit. In this present case we do not have prejudice but we do have; a faulty allegation, a faulty investigation, a faulty conclusion, a faulty statutory application and a faulty termination letter, later unrecalled despite recantation. (Exhibits, Testimony and Demeanor)

30. I find Chief Scott to be a credible but a mistaken witness. He was mistaken in his belief that his January 29, 2003 letter did not have to be recalled or could not be recalled after the subsequent receipt of the recantation. He was also mistaken in his application of M.G.L. Chap. 31, sec. 34 to the totality of the known relevant facts and circumstances of the alleged incident. He believed that since the investigation had been initiated based on an allegation or complaint and

concluded in the termination letter, that the requirements of M.G.L. Chapter 31, section 34 had been met. The Chief did not consider that the subsequent letter and telephone call from the alleged victim, recanting the original allegation, warranted the revocation of the termination letter. Chief Scott is courteous, appropriate and professional in appearance and Demeanor. He is thoughtful and well considered in his answers. He did not try to embellish his answers despite any obvious opportunity and advantage. Chief Scott is a no-nonsense but fair man. He could best be described as "a man's man". It would be expected that all of the officers under his command would work diligently to meet or exceed the high level of professionalism that Chief Scott exhibits, indeed personifies. (Exhibits, Testimony and Demeanor)

31. Jason Brouillard is a credible and appropriate witness in appearance and Demeanor. He is circumspect, un presupposing, almost shy in appearance and Demeanor. He seems to have a close respectful relationship with his parents. He answered questions, in a straight forward, thoughtful and unembellished manner. His genuine sincerity, pride and long term commitment to being a police officer seems a substantial part of his personality. He had no prior discipline or other blemish on his record. His obvious high character traits seem to almost preclude any possibility of criminal and/or inappropriate behavior on his part. He values and is protective of his reputation and other personal character qualifications because he knows that any negative incident might impact on his chosen career as

a police officer. His Testimony is believed and given great weight.. (Exhibits, Testimony and Demeanor)

CONCLUSION:

By appeal dated February 6, 2003, Brouillard timely appealed his termination of employment to the Civil Service Commission (hereinafter "Commission"). On February 7, the Commission acknowledged receipt of Brouillard's appeal.

General Laws Chapter 31, Section 34, provides in pertinent part as follows:

Following his original appointment as a permanent employee to a less than full-time civil service position, including a reserve (position) . . . a person shall serve a probationary period of six months immediately following such an appointment, which shall include the actual performance of the duties of such position for not less than thirty working days or the equivalent thereof during such period, before he shall be considered a less than full-time tenured employee.

If the conduct or capacity of the person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing

authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon termination of such period.

None of the essential, statutory requirements, as outlined above, have been met here.

Mayor Sullivan, not Chief Scott, is the appointing authority of permanent reserve police officers of the City's Police Department. Since Mayor Sullivan did not provide Brouillard with the required written notice of termination of employment under General Laws Chapter 31, Section 34, Brouillard became a tenured employee upon the termination of his probationary period by virtue of default. Moreover, since there is no credible evidence that Brouillard had any involvement in the alleged breaking and entering into Oparowski's apartment on December 24, 2002, and since there is credible evidence that he did not, the City cannot rely on that alleged incident as evidence that Brouillard's conduct or capacity, or the character or quality of his work, was unsatisfactory within the meaning of General Laws Chapter 31, Section 34.

Accordingly, the attempted termination of Brouillard's employment as a permanent reserve police officer of the City is unlawful and ineffective.

If the termination of Brouillard were allowed to stand on the basis of an unsubstantiated allegation, subsequently recanted, that act of termination would be arbitrary and capricious and contrary to fundamental fairness. It would also be in contradiction to the "basic merit principles" for the selection and advancement of employees, a fundamental purpose of Chapter 31.

The alleged breaking and entering incident, on which Chief Scott initiated an

investigation and then used as the sole reason to terminate Brouillard's employment, is a legal and factual nullity. "Nullity" is defined as, "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has no legal force of effect." Salter v. Hilgen, 40 Wis. 363; Jenness v. Lapeer County Circuit Judge, 42 Mich. 469, 4 N.W. 220. Black's Law Dictionary, Revised Fourth Edition, St. Paul, Minn.; West Publishing Co., 1968. Pg. 1216.

If a situation, as here, a mere allegation that was subsequently processed through the bureaucracy and resulted in a termination, without substantiation, were allowed to stand; the entire civil service system would be undermined and susceptible to subversion. For instance, another candidate lower on the eligibility list, might be encouraged to covertly fabricate an allegation, just to free-up a position for him.

Brouillard, the Appellant here, was unfairly deprived of an employment opportunity through an arbitrary and capricious act by the Appointing Authority. Specifically, by the misinterpretation or misapplication of M.G.L. chapter 31, sec. 34, based on a nullity. A factual and legal nullity can not be the cause here for the termination, as it has no legal force of effect. It is nothing.

The primary purpose of any adjudicatory proceeding is to ascertain the truth. Here, the primary goal is to determine the truth of Brouillard's alleged involvement in an alleged breaking and entering incident. It has been determined that neither the alleged incident nor Brouillard's alleged involvement in it, actually occurred. Sometimes by mistake or confusion, as here, a party avoids answering the primary question of the truth of the allegation, (pivotal fact), and goes on to the secondary question of application of a statute to the unfounded allegation. The primary

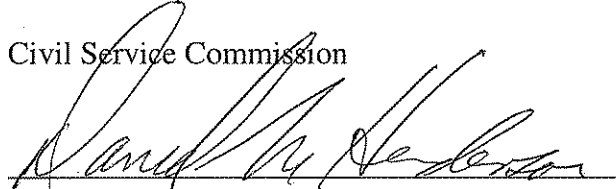
goal for all of us in this human dilemma, especially those in a position of authority, should be to seek the truth. We all should be braced by Baltazar Gracian's axiom; "*Truth is for the minority.*"

I believe that the analogy of the popularity of a sporting event and the general acceptance of the civil service system is appropriate here. I believe that most people enjoy sporting events mainly due to the truth of event. Nothing is hidden. It all occurs in the open, the facts or the truth is in plain view; what you see is what you get. Therefore the best competitor or the better team should win every time. Then, even if your team loses, if the competition is fair and open, you congratulate the winner. However, conversely if the facts or the truth are confused or ignored in specific instances; or the rules are misapplied by the Referees to specific facts, so as to affect the eventual outcome of the event, then the fundamental purpose and popularity of the event is diminished or destroyed and possibly the better team loses, because of it. Many fans were sadly disappointed and offended that poor or suspect officiating may have affected the outcome of the most recent Super bowl and the most recent World Heavyweight Boxing Championship.

Additionally his employment status has suffered future prejudice, as no public safety position would likely be offered to the Appellant, due to his termination in this matter. The Appellant has suffered this loss to his employment status through no fault of his own. Therefore in addition to other statutory grounds, the equitable powers of and pursuant to the powers of relief inherent in Chapter 534 of the acts of 1976, as amended by Chapter 310 of the Acts of 1993, are appropriate here.

For all of the foregoing reasons, Brouillard's appeal, on Docket No. D-03-130 is allowed, and he shall be returned to his position without loss of compensation or other benefits.

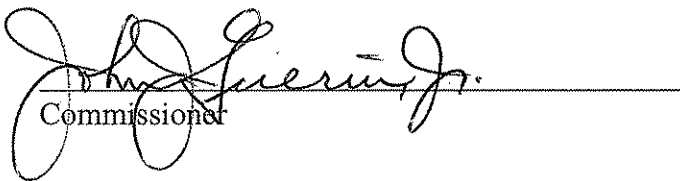
Civil Service Commission



Daniel M. Henderson, Esq.
Commissioner

By vote of the Civil Service Commission (Chairman Goldblatt, Henderson, Guerin, Taylor and Marquis, Commissioners), on February 9, 2006.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten (10) days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with Mass. General Laws Chapter 30A, section 14(1) for the purpose of tolling the time of appeal.

Pursuant to Mass. General Laws Chapter 31, section 44, any party aggrieved by a final decision or order of the Commonwealth may initiate proceedings for judicial review under Mass. General Laws Chapter 30A, section 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 sent to:
Richard K. Sullivan, Esq.
Dan V. Blair, II, Esq.
John Marra, Esq.