

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

RUBEN D. COLON,
Appellant

Docket No.: D-14-66

v.

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

Joseph P. Kittredge
Rafanelli & Kittredge, PC
1 Keefe Rd.
Acton, MA 01720

Appearance for Respondent:

Jaclyn Zawada, Sean W. Farrell
Office of the Chief Legal Counsel
Massachusetts State Police
470 Worcester Road
Framingham, MA 01702

Commissioner:

Cynthia A. Ittleman¹

DECISION

Pursuant to G.L. c. 31, § 43 and G.L. c. 22C, §13, the Appellant, Ruben Colon (“Mr. Colon” or “Appellant”), filed a timely appeal with the Civil Service Commission (Commission) on March 18, 2014, contesting the decision of the Department of State Police (“State Police” or “Appointing Authority”) to suspend him for four (4) days and to order a forfeiture of time amounting to six (6) days, comprised of three (3) days each from his accrued personal and vacation time. A pre-hearing conference was held at the offices of the Commission on April 8, 2014. A full hearing was held at the Commission on June 10, 2014. Neither party requested a public hearing, so the hearing was deemed private. All witnesses were sequestered, except the

¹ The Commission acknowledges the assistance of Law Clerk David Roberson in the drafting of this decision.

Appellant. The hearing was digitally recorded and the parties were given copies of the digital recording of the hearing.² The parties submitted post-hearing briefs. For the reasons stated below, the appeal is allowed.

FINDING OF FACTS

Based on Exhibits 1 through 18³, as well as the stipulations of the parties, the testimony of:

Called by the Appointing Authority:

- Major Arthur W. Sugrue, Massachusetts State Police
- Lieutenant David Rea, Massachusetts State Police

Called by Mr. Colon:

- Detective Robert Smith, Massachusetts State Police
- Trooper Ruben Colon, Massachusetts State Police, Appellant

and taking administrative notice of all matters filed in the case, including, without limitation, the affidavit of Trooper David F. Parsons, and pertinent statutes, regulations and policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Mr. Colon was hired by the State Police in 1994 as a State Trooper. (Stipulated Facts)
2. On June 28, 2010, Mr. Colon was alerted to a motor vehicle pursuit occurring on the Massachusetts Turnpike. Mr. Colon joined the pursuit of the vehicle being chased. Mr. Colon's patrol vehicle overtook the vehicle being pursued and the vehicle being pursued struck Mr. Colon's patrol vehicle three (3) times, causing Mr. Colon to suffer an injury to his left shoulder. (Ex. 3, Testimony of Mr. Colon)

² 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/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

³ This includes the post-hearing affidavit the Appellant was allowed to file.

3. After the suspect was apprehended, Mr. Colon was transported to Metro-West Hospital in Framingham, MA, and was later placed on Injured Leave Pending Status because of his injuries. (Ex. 3) Before Mr. Colon was transported to the hospital, he relinquished his duty equipment, including his department-issued laptop. (Testimony of Colon, Rea)
4. On July 20, 2010, Mr. Colon appeared at Health Resources in Woburn, MA, to be examined by a physician and was officially placed on No Duty Status. A follow-up appointment was scheduled for August 31, 2010. (Ex. 3)
5. Between July 20, 2010 and August 31, 2010, Mr. Colon was in contact with his personal doctor in an attempt to schedule surgery on his left shoulder. The doctor originally scheduled the surgery for December of 2010, but a change in the doctor's schedule allowed Mr. Colon to have surgery on August 31, 2010. Mr. Colon agreed to have the surgery on August 31, 2010, forgetting that he also had an appointment with Health Resources on that day. (Testimony of Colon)
6. On the morning of August 31, 2010, prior to his surgery, Mr. Colon called Sgt. Knight, the desk officer that day, and informed him he would not make it to the Health Resources appointment that day because he was having surgery on his shoulder. (Testimony of Colon)
7. Detective Smith drove the Appellant to his 9:00 AM surgery on August 31. The surgery was a full day of surgery and recovery. Detective Smith waited until Mr. Colon was out of surgery and recovery to take him home; the surgery lasted 6 ½ hours. (Testimony of Smith, Colon) Before releasing Mr. Colon, his surgeon injected time-released pain medication in his shoulder and prescribed more pain medication to manage the pain following the surgery. The pain medication contained a high dose of narcotics. (Testimony of Colon, Ex. 9)

8. Once Mr. Colon arrived home from surgery on August 31, he received a phone call from Major Sugrue inquiring why Mr. Colon missed his Health Resources doctor appointment that day. Mr. Colon informed Sugrue that he had surgery that day and that he had forgotten about the Health Resources appointment when he scheduled the surgery. Sugrue informed Mr. Colon that his appointment would be rescheduled. (Testimony of Colon, Sugrue)
9. At the Mass. State Police, an administrative assistant coordinates appointments for Troopers at Health Resources as needed. (Testimony of Sugrue, Rea)
10. On September 3, 2010, the administrative assistant emailed Lieutenant Rea to tell him that Mr. Colon's appointment was rescheduled for September 13, 2010 at 10:00 AM. Rea did not receive the September 3 email message until September 6, 2010, which is when he returned from the extended Labor Day weekend. Rea lacked access to his department issued laptop while on the extended weekend. (Testimony of Rea) On September 6, Rea forwarded the email to Mr. Colon's work email address to inform him of the date of his rescheduled appointment, which was September 13, 2010. However Rea's initial email message to Mr. Colon did not specifically state the time. Rea then sent a follow-up email message to Mr. Colon that stated that the time was included in the forwarded message and that the appointment was scheduled for 10:00 AM on September 13, 2010. Also on September 6, after he sent this email message, Rea called Mr. Colon to inform him of the time of the appointment, although he did not state the date. (Testimony of Rea, Exs. 10, 11)
11. On September 14, 2010, Rea sent an email message to Mr. Colon and called him to ask why he missed another appointment with Health Resources. Rea was informed that Mr. Colon had missed the appointment by the Troop "H" administrative assistant at 1700 (5:00 PM) on September 13, 2010. During the phone call, Mr. Colon told Rea that he was unaware of the

appointment's date and time. Rea told Mr. Colon that he and Sugrue had informed him that he had an appointment scheduled on September 13, 2010 at 10:00 AM. Mr. Colon also told Rea in their phone call that he did not have access to his laptop and never saw the email messages with the time and date of the rescheduled appointment. Rea then told Mr. Colon that the secretary had again rescheduled the appointment for September 16, 2010, and that he needed to make sure he attended. Mr. Colon attended the appointment scheduled on September 16, 2010. (Ex. 12, Testimony of Colon, Rea)

12. On September 14, 2010, Rea filed a personnel complaint regarding Mr. Colon's failure to report to the two Health Resources appointments and Mr. Colon was subsequently charged with violating Article 5 of the Department of State Police's Rules and Regulation for failing to report for duty, insubordination, and unsatisfactory performance. (Ex.3)

13. On January 31, 2014, a hearing was held before a State Police Trial Board to determine the truth of these charges as well as other charges related to events that occurred between August 2005 and November 2011. The purpose of part the hearing was to determine Mr. Colon's guilt or innocence relating to charges stemming from an Internal Affairs investigation. (Exs. 4,5) While Mr. Colon was found not guilty of the charges stemming from the Internal Affairs investigation, Mr. Colon was found guilty of failing to report for duty and for insubordination, but not for unsatisfactory performance. (Ex. 5)

14. On March 14, 2014, Mr. Colon was informed of the Trial Board's decision to find him guilty of insubordination and failing to report to duty when he failed to attend the scheduled Health Resources appointments on August 31, 2010 and September 13, 2010. The Board recommended a forfeiture of ten (10) days accrued personal/vacation/holiday time. Mr. Colon did not have the requisite amount of accrued time so Colonel Alben ordered that Mr.

Colon serve a suspension without pay for a period of four (4) days and forfeit three (3) personal days and three (3) vacation days. (Ex. 5, 6) The decision also relied on prior discipline to indicate a pattern of behavior. The prior matter was in 2008, when Mr. Colon was charged with insubordination because he failed to follow a direct verbal order to not extend his time on a detail beyond 1700 hours for which he was disciplined. Mr. Colon accepted a Waiver of Right to Trial Board for the 2008 charge, which resulted in a transfer and a forfeiture of three (3) days accrued time off. The Appellant argued that that incident involved only a clerical error (Exs. 7, 18)

15. Mr. Colon filed a timely appeal on March 18, 2014. (Stipulated Facts)

DISCUSSION

Applicable Civil Service Law

G.L. c. 22c, § 13, provides:

“Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel. Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45, inclusive of chapter 31. A uniformed officer of the state police who has been dismissed from the force after trial before such a trial board, or who resigns while charges to be tried by a trial board are pending against him, shall not be reinstated by the colonel.”

G.L. c. 31, § 41, provides:

“Except for just cause... a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent... lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority.”

An employee aggrieved by the decision of an Appointing Authority may appeal to the Commission under G.L. c. 31, § 43, which 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).

Section 43 also vests the commission with authority to affirm, vacate, or modify a penalty imposed by the appointing authority. The Commission is delegated with “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. *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).

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.

Arguments of the Parties

The Appointing Authority's decision to suspend Mr. Colon for four (4) days and require a forfeiture of time equaling six (6) accrued leave days relies on the argument that Mr. Colon was ordered by Sugrue and Rea repeatedly by phone and email to attend the August 31 and September 13, 2010 Health Resources appointments.

Mr. Colon argues that he was unable to attend the August 31, 2010 appointment because he was having surgery on his shoulder. He states that he called the desk officer that day, prior to the surgery, and informed him that he would not be able to attend the appointment because he was having surgery that day. Mr. Colon also argues that when Major Sugrue called him on August 31, 2010 to inquire why he did not attend the appointment that day and informed him that they would reschedule the appointment for a later date, Sugrue did not inform him of the September 13, 2010 appointment. Mr. Colon also argues that he did not have access to his email after he sustained the injury on June 28, 2010 so that he did not receive the email messages that were sent to him. Mr. Colon also argues that he does not recall speaking to Lieutenant Rea on September 6, 2010 about the appointment.

Analysis

Reviewing all the exhibits and testimony, the Appointing Authority did not have reasonable justification to suspend Mr. Colon for four (4) days and require him to forfeit six (6) accrued leave days for missing two Health Resources appointments. First, Mr. Colon followed protocol when alerting his superiors that he would not be able to attend the August 31, 2010 appointment. Specifically, when he realized the scheduled surgery conflicted with the date of his Health Resources appointment, he was informed by Detective Smith to call and alert the desk officer. Mr. Colon testified that he informed the desk officer, Sgt. Knight, on the morning of

August 31, 2010, that he would not be able to attend the Health Resources appointment because of a conflicting appointment for surgery. The Appointing Authority offers no evidence that disputes that Mr. Colon called and informed the desk officer of the conflict and that he would not be able to report to the appointment. There can be no question that surgery is a valid reason to reschedule an appointment at Health Resources. The Appointing Authority also offers no evidence that disputes that this is the process required when a Trooper will not be able to report for duty as required. Therefore, Mr. Colon did not fail to report for duty on August 31, 2010 and was not insubordinate since he notified his superiors in this regard.

Secondly, Mr. Colon cannot be said to have failed to report to the September 13, 2010 appointment because he was not aware of the appointment and, therefore, he was not being insubordinate when he did not report to the Health Resources appointment on September 13, 2010. Mr. Colon did not report to the rescheduled appointment on September 13, 2010 as a result of miscommunication between Mr. Colon and the Appointing Authority. On August 31, 2010, Sugrue inquired about the missed appointment and informed Mr. Colon that a new appointment with Health Resources would be scheduled. The parties dispute whether the date and time were given during this conversation. Examining the record, I find that the facts support the Appellant's statement that he was not informed of the appointment on August 31, 2010, by Sugrue. Sugrue states that he alerted Mr. Colon of this appointment during their conversation in August but the record shows that the administrative assistant who generally handled coordinating appointments with the Health Resources was made aware of the appointments at the earliest on September 3, 2010.

The September 3rd email message sent by the administrative assistant to Rea shows that it was intended to inform Mr. Colon of the date and time of his rescheduled appointment. This

email message, sent to Rea, informs Rea of the missed appointment on August 31, the fact Mr. Colon had had surgery, that Mr. Colon and Sugrue had a conversation about Mr. Colon missing an appointment, and that her email message to Rea was meant to provide Rea with the information needed to inform Mr. Colon that he had an appointment on September 13, 2010, at 10:00 AM, that he needed to attend. The September 3rd email supports Mr. Colon's position that he was not told of the appointment during his conversation with Sugrue but he was told only that the appointment would be rescheduled. The email message shows that the administrative assistant is the person who schedules Health Resources appointments and that she informs the supervising officer of the scheduled appointment, with instructions to tell the Trooper about the scheduled appointment. The email message reads as if the appointment was new information and that the administrative assistant was ordered to coordinate with Health Resources and secure a new date and time for Mr. Colon to be examined.

Sugrue's testimony regarding his conversation with Mr. Colon is given little weight. Sugrue does not recall the time in which he called the Appellant, whether he told the administrative assistant that he called the Appellant, he does not recall the length of the conversation between he and the Appellant, nor does he recall exact statements made during the conversation beyond his assertion that he told Mr. Colon his rescheduled appointment date and time.

The administrative assistant's email message was sent to Rea on September 3 and forwarded to Mr. Colon on September 6, 2010. Rea's message that accompanied administrative assistant's notification of appointment, informed Mr. Colon of his rescheduled appointment. In forwarding the email to Mr. Colon, Rea said that he was not sure of the time, but he would investigate it time and get back to Mr. Colon with that information. Rea then reexamined the

email message sent to him by the administrative assistant and realized that the time was included in administrative assistant's original message. Rea emailed Mr. Colon again to inform him that the time was included in the original message, hoping to clear up any confusion in his original message.

However, Rea testified that he was unable to access his email until September 6, 2010, because he was on vacation and that officers generally access their emails through their department issued laptops or at computer terminals within the department. Mr. Colon testified that on the day of his accident he relinquished all his service equipment, including his laptop. Mr. Colon did not receive any email correspondence from Rea and he could not reply to the September 6, 2010 or September 14, 2010, email messages sent by Rea during this time period precisely because he was still out of work and he did not have his laptop. Rea's only exchanges with Mr. Colon were through telephone calls during this time. Rea testified that he only informed Mr. Colon of the time of the September 13 appointment by phone and that he only communicated the date of the appointment in his email correspondences, to which Mr. Colon did not have access.

Mr. Colon cannot be held liable for failing to report to an appointment or for insubordination when he was not adequately alerted to such duty. The Appointing Authority's argument relies on the fact that Mr. Colon was told through both telephone conversation and email messages about the September 13, 2010 appointment. The August 31 conversation between Mr. Colon and Sugrue cannot be relied on because of Sugrue's limited recollection and because Mr. Colon's mental state was likely affected by the prescribed narcotics for pain management and Rea only informed Mr. Colon of the date of the September 13 appointment by email. I find that the telephone communications between Mr. Colon and Rea did not inform Mr.

Colon of the specifics of his duty to appear at the September 13, 2010 appointment. Since Mr. Colon lacked access to email sent to him after his accident, he did not see the email messages regarding the rescheduled appointment. Therefore, the Appointing Authority has not established, by a preponderance of the evidence, that it had just cause to discipline the Appellant for failing to report for duty and insubordination in this regard.

Conclusion

For all of the above reasons, Mr. Ruben Mr. Colon's appeal under Docket No. D-14-66 is hereby *allowed* and the decision by the Department of State Police to suspend Mr. Colon for four (4) days and require him to forfeit six (6) accrued leave days is hereby reversed.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on July 24, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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-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:

Joseph P. Kittredge, Esq. (for Appellant)
Jaelyn Zawada, Esq. (for Appointing Authority)
Sean W. Farrell, Esq. (for Appointing Authority)