

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MICHAEL CONNOLLY,
Appellant

v.

D-08-61

DEPARTMENT OF STATE POLICE,

Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43 and G.L. c. 22C, § 13 as amended by Chapter 43 of the Acts of 2002, the Appellant, Michael Connolly (hereinafter "Connolly" or "Appellant"), is appealing the decision of the Department of State Police (hereinafter "State Police") to suspend him for twenty-one (21) days for violation(s) of department policy occurring on or about June 14, 2006. The appeal was timely filed with the Civil Service Commission (hereinafter "Commission") on March 14, 2008. A pre-hearing

conference was conducted on May 1, 2008 and a full hearing was held on June 24, 2008 at the offices of the Commission. At the request of the Appellant, the hearing was declared to be a public hearing. All witnesses who testified, other than the Appellant, were sequestered. Two (2) tapes were made of the hearing.

FINDINGS OF FACT:

Thirteen (13) Exhibits were accepted into evidence during the hearing and Exhibit 11 was impounded at the request of the parties. Additionally, the Commission kept the record open and ordered the State Police to produce records relating to the discipline of other officers. The records, reflecting disciplinary action initiated and/or taken against other members of the State Police, were submitted to the Commission on July 25, 2008; marked as Exhibit 14 and also impounded.

Based upon the documents entered into evidence and the testimony of:

For the Massachusetts State Police:

- Trooper Michael Connolly, the Appellant
- Lt. John J. Stuart, Troop H-3 Station Commander (Rebuttal Witness)

For the Appellant:

- Trooper Edward Hunter, Officer, State Police Association of Massachusetts
- Detective-Lieutenant Paul White, Investigating Officer

I make the following findings of fact:

1. The Appellant, Michael Connolly, is a Trooper employed by the Massachusetts State Police, a position and rank he has held for approximately 16 years. (Testimony of the Appellant)
2. There was no evidence presented of any prior discipline against the Appellant.

3. On June 14, 2006, from 3:00 P.M. to 11:00 P.M., the Appellant was assigned to Troop H-3 (Foxboro). (Testimony of the Appellant and Detective-Lieutenant Paul White; Exhibit 2)
4. On June 14, 2006, from 3:00 p.m. to 11:00 p.m., the Appellant was assigned to a patrol area within Troop H-3 (Foxboro) known as the “Route 95 South Patrol” or “South Patrol.” (Testimony of the Appellant, & Detective-Lieutenant Paul White; Exhibit 2)
5. On June 14, 2006, at approximately 9:00 P.M., the Appellant, while on patrol, observed a dump truck that was parked within his assigned patrol on Route 495 North in Wrentham. (Testimony of the Appellant; Exhibits 1, 2 and 9)
6. The Appellant testified before the Commission that he did not see a license plate on the truck nor did he see anyone with the vehicle when he drove past the dump truck. He testified that he did observe that the truck had red reflector lights on the rear and that the truck was in the breakdown lane. (Testimony of Appellant)
7. The Appellant did not stop his cruiser, report his observation to the Station Desk Officer, or request a stolen vehicle and/or RMV check of the vehicle. (Testimony of the Appellant; Exhibits 1, 2 and 4)
8. State Police General Order TRF-11, Section 4.2.1 states: “Officers, while on patrol, may have occasion to observe a disabled vehicle that has been temporarily abandoned. The Station Desk Officer should be notified and a request made to RMV registration desk and an NCIC / LEAPS stolen vehicle check.” (Exhibit 7)
9. State Police General Order TRF-05, “Patrol Function” states in part that “uniformed officers engage in a wide variety of activities in order to: protect life and property;

and respond to emergencies and other calls for service; investigate crimes; provide a safe environment for motorists and pedestrians...”. (Exhibit 7)

10. State Police General Order TRF-05, “Patrol Responsibilities” states in part that officers shall: “Check vehicles parked in their patrol area, on the highway, and in rest areas...particularly at night and during periods of extreme or inclement weather; ascertain if the motorist / occupants are in need of assistance; be alert to and report hazards within their patrol area, such as: road debris, inoperative traffic lights, fallen trees, or icy roads...”. (Exhibit 7)
11. While the Appellant stated that it was his usual practice to stop for such vehicles he did not on this occasion. He believes that he may have been doing some other police activity at the time, but could not recall anything specific during his testimony before the Commission. (Testimony of Appellant)
12. The Appellant did not stop and affix an orange sticker to the dump truck that is used to identify vehicles checked by the Department. (Testimony of Appellant; Exhibit 8)
13. State Police General Order TRF-11, Section 4.2.2 states: “If the vehicle is properly registered and does not appear to be stolen, a courtesy check sticker may be completed and affixed to the vehicle.” (Exhibit 7)
14. The Appellant did not have the abandoned vehicle towed. (Testimony of Appellant)
15. State Police General Order TRF-09, stated, as of the time of this incident ,that:
“Officers are authorized to remove, or cause to be removed, any vehicle found upon a road / state highway when...the vehicle is so disabled as to constitute an obstruction to traffic and/or is an obvious hazard.” (Exhibit 7)

16. The Appellant stated that he did not tow the vehicle because he did not believe that it was an obvious hazard as it was well within the breakdown lane and was visible to him from ¼ mile away. Further, the Appellant testified that there is a Massachusetts Highway regulation that permits vehicles to stay on the highway for up to 24 hours to enable an operator to take care of the vehicle. (Testimony of Appellant)
17. Lt. John Stuart has been the Station Commander in Foxboro for the past 10 ½ years. He testified before the Commission that a trooper may use his discretion and not order an abandoned vehicle to be towed only after the trooper has checked the vehicle in question. (Testimony of Lt. Stuart)
18. The Appellant testified before the Commission that although he did not “stop”, he still believes that he visually “checked” the vehicle as he drove by in his cruiser. (Testimony of Appellant)
19. Approximately one (1) hour after the Appellant drove past the abandoned dump truck, the State Police received two (2) emergency telephone calls concerning the abandoned vehicle on Route 495 North from an off-duty Fire Chief from a neighboring Town. (Testimony of Appellant & Detective-Lieutenant Paul White; Exhibits 1, 2, 3, 4, 5A, 5B and 6)
20. The second emergency telephone call was sent to the Troop H-3 (Foxboro) Barracks and another member of the Department conveyed the gist of the information/concern expressed by the off-duty Fire Chief to the Appellant, who had returned to the Barracks before the end of his shift. (Testimony of the Appellant & Detective-Lieutenant Paul White; Exhibits 1 2, 3, 4, 5A, 5B and 6)

21. The Appellant, being informed that there was “a disabled [vehicle]... northbound [on Route 495], Route 1A,” determined that it was the same abandoned dump truck he saw early that evening and informed the officer who took the call that he “already saw it [the dump truck]” and “[i]t was all set.” (Testimony of Appellant; Exhibits 1, 2 and 4)
22. The Appellant did not, at any time during the remainder of his shift, return to Route 495 North in Wrentham to inspect the abandoned dump truck or take any other action in connection with the abandoned vehicle. (Testimony of the Appellant; Exhibits 1, 2 and 4)
23. Before finishing his shift, the Appellant did not discuss the existence or status of the abandoned vehicle with any member of the incoming (11:00 p.m. – 7:00 a.m.) shift. (Testimony of the Appellant, Exhibit 1, 2 and 4)
24. On June 15, 2006, nearly eight (8) hours after the Appellant had first observed the abandoned dump truck, another state trooper, traveling in a State Police cruiser to his home via Route 495 North in Wrentham, crashed into the abandoned truck in the breakdown lane and, tragically, died within minutes of the accident. (Exhibit 2)
25. The State Medical Examiner determined that the trooper died as a result of a heart attack. Blunt head trauma was listed as a significant condition contributing, but not the underlying cause for the death. (Exhibit 11)
26. The fatal crash was widely publicized by the print and electronic media for several days, including a report that an off-duty Fire Chief from a neighboring town, while travelling the same highway, had reported the abandoned dump truck to State Police several hours before the crash. (Exhibit 2)

27. After an internal investigation and a hearing before a State Police Trial Board, the State Police suspended the Appellant for twenty-one (21) days for violating TRF-05 stating that, “this occurred when he [the Appellant] failed to check a 1995 GMC 3500 HD dump body truck parked in his assigned patrol area, on Rte. 495 in Wrentham. This action is in direction violation of [Rule] 5.1” The State Police also found that the Appellant’s actions were in violation of a more encompassing rule regarding unsatisfactory performance (Rule 5.8.2) for which he was issued a concurrent twenty-one (21) day suspension. (Exhibit 3)
28. Trooper Edward Hunter has served as the Troop H union representative for the last 15 years. The Foxboro barracks was within Troop H and he represented the men and women assigned to that barracks. In his role as union representative, he tracks and is aware of discipline that is imposed against his troop members and those in other troops. He testified that he was not aware of any other cases where a trooper was subject to discipline for failing to check a motor vehicle. (Testimony of Trooper Hunter)
29. At the direction of the Commission, the Department produced records relating to other members disciplined for Rule 5.1 (Violation of Rules) and Rule 5.8 (Unsatisfactory) infractions, specifically those involving TRF-05 and/or other Department Traffic Policies. (Exhibit 14)
30. Although it is not possible to determine from the records if the infractions were of the exact same nature to those alleged against the Appellant, the State Police has disciplined at least thirty (30) individuals, including the Appellant, for violating Traffic Policies & Procedures since 2000. Discipline has ranged from a letter of

counseling to termination. It appears that the greatest suspension previously imposed for a violation of TRF-05 was a 5-day suspension. (Exhibit 14: impounded)

CONCLUSION:

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (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." City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (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, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (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, 133 N.E.2d 489 (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'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Town of Falmouth v. Civil

Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Patrolling the state's highways can be one of the more dangerous jobs in the Commonwealth and State Troopers deserve our respect and gratitude for performing this important function. This case involves the tragic fatal accident of a State Trooper, who, while on his way home from work in a cruiser, suffered a heart attack, and then hit a dump truck parked in the breakdown lane on Route 495 North in Wrentham and died.

Several hours before the above-referenced accident, the Appellant was patrolling this section of highway and saw the abandoned dump truck, with no plates attached, parked in the breakdown lane. He did not stop and "[c]heck the vehicle parked in...[his] patrol area" or "[a]scertain if the motorist/occupants [were] in need of assistance" as required by State Police rules. He did not stop and "check" the vehicle within the plain meaning of TRF-05 and he acknowledges that he was not able, with any degree of certainty, to determine whether the vehicle showed any signs of an accident, vandalism, or theft.

The Appellant did not see a license plate attached to the abandoned dump truck. He did not determine if the vehicle was occupied or if anyone in or with the vehicle was injured or in need of assistance.

The Appellant contends that he complied with the requirements of TRF-05 by making an observation of the vehicle (and an appropriate assessment of its risk) as he drove past the dump truck at night and at a high rate of speed. This is not credible.

The State Police has shown that the policy in question (TRF-05) exists for a reason; to provide sound guidance to officers patrolling the Commonwealth's roads. It was the

Appellant's responsibility to be alert to the potential hazard created by the dump truck that was abandoned on Route 495 North in Wrentham. It was his obligation to vigilantly patrol the assigned area, to stop and check the vehicle, and to take appropriate action to ensure the public safety. The evidence shows that he did none of these things.

Essentially, after a de novo hearing before the Commission, I have reached the same findings as the State Police did in this matter.

Under the Department's Disciplinary Guidelines (Exhibit 7), the State Police Trial Board, having found Trooper Connolly Guilty of the Rule 5.1 and Rule 5.8 (Class B violations), could recommend a sanction of not less than five (5) and not more than thirty (30) days suspension.

During the hearing, it was suggested that the discipline recommended by the Trial Board was somehow unfair to Trooper Connolly or too harsh. The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.'" Town of Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 659 N.E.2d 1190 (1996) Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the

relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation” E.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

At the direction of the Commission, the Department produced records relating to other members disciplined for Rule 5.1 (Violation of Rules) and Rule 5.8 (Unsatisfactory) infractions, specifically those involving TRF-05 and/or other Department Traffic Policies.

Although I am unable to determine from the records submitted just how similar the alleged offenses were, the records do show that the State Police has disciplined at least thirty (30) individuals, including the Appellant, for violating Traffic Policies & Procedures since 2000. Discipline has ranged from a letter of counseling to termination. Although the union representative for Troop H testified that he was not aware of any other cases where a trooper was subject to discipline for failing to check a motor vehicle in the past 15 years, it appears that there was a 5-day suspension previously imposed for a violation of TRF-05.

As referenced above, the Commission, if it reaches the same findings as the Appointing Authority, as it has in this case, can not modify the penalty imposed without an adequate explanation.

After a careful review of all the testimony, I have concluded that the penalty imposed by the State Police (a 21-day suspension) should be modified and I offer the following explanation:

- Prior to this incident, it appears that the greatest penalty ever imposed for a similar offense was at most 5 days;
- I make the reasonable inference that the harshness of the penalty imposed in this case was influenced by the media attention that focused on the untimely death of the state trooper.

For all of the above reasons, the Appellant's appeal under Docket No. D-08-61 is *allowed in part*. The Commission, pursuant to G.L. c. 31, § 43, hereby *modifies* the penalty imposed by reducing the 21-day suspension to a 5-day suspension.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 8, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:

Joseph P. Kittredge, Esq. (for Appellant)
Michael Halpin, Esq. (for Appointing Authority)