

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

**LAURENCE COURNOYER,
Appellant**

v.

D-12-314

**CITY OF HOLYOKE,
Respondent**

Appearance for Appellant:

Michael P. Clancy, Esq.
International Brotherhood of
Police Officers
1299 Page Boulevard
Springfield, MA 01104

Appearance for Respondent:

Sara J. Carroll, Esq.
City of Holyoke Law Department
20 Korean Veteran's Plaza, Rm. 204
Holyoke, MA 01040

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION

The Appellant, Laurence Cournoyer (Cournoyer), duly appealed to the Civil Service Commission (Commission), pursuant to G.L. c. 31 §43, from a decision of the City of Holyoke (City or Appointing Authority), to suspend him for one (1) day from his employment as a Lieutenant in the Police Department (Department), as a result of his conduct on April 21, 2012. A full hearing was held by the Commission on March 13, 2013 in Springfield, Massachusetts.

¹ The Commission acknowledged the assistance of Law Clerk Amanda Belanger in the drafting of this decision.

As no written notice was received from either party, the hearing was declared private. Witnesses were sequestered. The hearing was digitally recorded.

FINDINGS OF FACT

Based on seven (7) exhibits entered into evidence and the testimony of:

For the Appointing Authority:

- James Neiswanger, Chief of Police, Holyoke Police Department
- Michael McCoy, Lieutenant, Professional Standards Division, Holyoke Police Department

For the Appellant:

- Laurence Cournoyer, Lieutenant, Holyoke Police Department

And taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Laurence Cournoyer employed with the City of Holyoke Police Department and assigned as a Commanding Officer Lieutenant. Cournoyer has served the Holyoke Police Department for twenty-five (25) years. (*Testimony of Laurence Cournoyer*)
2. Lieutenant Michael McCoy was asked to do a preliminary investigation of four incidents concerning Cournoyer. McCoy found two of these incidents without merit. He was then ordered by Chief of Police James Neiswanger to complete a Disciplinary Action Notice

“DAN” and begin a full investigation of the two remaining incidents. (*Testimony of Michael McCoy*)

3. Cournoyer received a written reprimand for violating Rules 3.2 Unbecoming Conduct, 3.13 Proper Leave-Reporting, 3.22 Outside Employment of Department’s Rules and Regulations and the Department Standing Operating Procedure, Rule 2.15.0 Outside Employment on April 13, 2012. (*Exhibit 4*)
4. Under Rule 3.2, Unbecoming Conduct, of the Department Rules and Regulations, it states, “Officers shall conduct themselves at all times, both on and off duty in such a manner as to reflect most favorable upon the Department. Conduct unbecoming an officer shall include that which brings the Department into disrepute or reflects discredit upon the officer as a member of the Department, or that which impairs the operation or efficiency of the Department or officer.” (*Exhibit 6*)
5. Under Rule 3.13, Proper Leave – Reporting, of the Department Rules and Regulations, “No member of the Department shall absent himself without proper leave.” (*Exhibit 6*)
6. Under Rule 3.22, Outside Employment, of the Department Rules and Regulations, “Outside employment shall not conflict with the duties and responsibilities of a member or the interests of the Department, nor interfere with or take precedence over the proper performance of any police duties at any time or under any circumstances. Determination of the compatibility of outside employment with interests of the Department shall be made by the Chief of Police. (*Exhibit 6*)
7. Under Rule 2.15.0, of the Department Standing Operation Procedure, “Any outside part-time employment of the full-time commissioned members shall be in work situations which in no way interfere with the rendering of completely impartial work police service

and employment loyalty to the City and the Police Department, or which would in any way prevent the satisfactory fulfillment of duties as a commissioned member.” (*Exhibit 6*)

8. Cournoyer received a one (1) day suspension without pay for violating Rules 3.2 Unbecoming Conduct, 3.13 Proper Leave-Reporting, 3.22 Outside Employment of the Department’s Rules and Regulations and the Department Standing Operating Procedure, Rule 2.15.0 Outside Employment on April 21, 2012. (*Exhibit 6*)
9. On April 21, 2012, Cournoyer was scheduled for duty as a Commanding Officer of the 2nd Watch of Operations from 3 p.m. to 11 p.m. Two other supervisors were originally scheduled to work the 4 p.m. to 12 a.m. shift, however, one of them, Sergeant Chirwign, called out sick. As a result, two supervisors were on duty; Cournoyer was assigned to the 3 p.m. to 11 p.m. shift as Commanding Officer at the station and Sergeant McKay was assigned from 4 p.m. to 12 a.m. as street supervisor. (*Testimony of Michael McCoy*)
10. The Department has a rule which requires that at least two supervisors be on duty at all times, so that one may be positioned in the station and another on the street. (*Testimony of James Neiswanger*)
11. On April 21, 2012, Cournoyer was also scheduled to work a detail assignment at the Mambo Café from 10 p.m. to 2 a.m. The Mambo Café is a bar and night club in the City. The owner of the bar pays officers to be stationed at the bar for security. Officers receive a detail rate. (*Testimony of Laurence Cournoyer and Michael McCoy*)
12. Outside employment should not take priority over an officer’s regular duty assignment. (*Testimony of James Neiswanger*)

13. The Mambo Café used to pay Officers in cash for four hours of work at a rate of \$38 dollars per hour. There is no record of how much Cournoyer was paid by the Mambo Café on April 21, 2012. *(Testimony of Michael McCoy)*
14. Cournoyer's shift at the Department and his assignment at the Mambo Café conflicted for a period of one hour. Cournoyer scheduled himself for both of these assignments as he is responsible for making his own schedule and fixing any conflicts. *(Testimony of Michael McCoy and Neiswanger)*
15. On April 21, 2012 at approximately 10:30 p.m., McCoy saw Cournoyer's personal vehicle parked outside of the Mambo Café. When McCoy returned to the station, he checked the Daily Personnel Assignments. Cournoyer left his regular shift which ended at 11 p.m. at least 30 minutes early in order to work the Mambo Café detail. *(Testimony of Michael McCoy)*
16. Cournoyer did not have permission to leave his assignment at the Department early because at least two supervisors are supposed to be on duty. His early departure left only one supervisor on duty. *(Testimony of Michael McCoy and Neiswanger)*
17. Cournoyer did not document that he left early on his Daily Personnel Assignment log on April 21, 2012. Nor did he indicate that he was using compensatory time when he left his shift before it was over. *(Testimony of Michael McCoy and Exhibit 3)*
18. Cournoyer was disciplined once prior to April 12, 2012 for scheduling himself to work conflicting shifts. Specifically, on April 13 and April 14, 2012, Cournoyer was scheduled to work at the Mambo Café from 10 p.m. to 2 a.m. and at the Department from 12 a.m. to 8 a.m. Cournoyer reported for duty at 12 a.m. for roll call and then proceeded

back to the Mambo Café to finish his shift there. He was disciplined with a written reprimand for his actions. (*Testimony of Michael McCoy and Exhibit 5*)

19. Cournoyer filed the instant appeal on November 16, 2012.

DISCUSSION

Applicable Law

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.”

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. of Boston, 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, 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. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See 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.

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, 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." 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 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).

Analysis

The Appellant, Laurence Cournoyer, was charged with three violations of the Department's Rules and Regulations and one violation of the Department's Standing Operating Procedure for his conduct on April 21, 2012. (*Exhibit 6*) By a preponderance of the evidence, I find that the Department had just cause to give Cournoyer a one (1) day suspension for scheduling himself for a conflicting shift for an outside detail and ultimately leaving his assignment at the station before his shift ended in violation of the cited rules and procedure. Cournoyer was previously given a written reprimand for the same conduct on April 13 and 14, 2012. (*Exhibit 5*)


Rule 3.22 of Outside Conduct of the Rules and Regulations clearly states that "outside employment shall not conflict with duties and responsibilities of a member or the interests of the Department." In this present case, Cournoyer's outside detail at the Mambo Café overlapped with his shift at the Department and he left Department shift early, as Lieutenant McCoy observed his car stationed outside the Mambo Café at 10:30 p.m., a half hour before his shift at the Department ended. Furthermore, the rules state that outside employment should not "interfere or take precedence over the proper performance of any police duties at any time or under any circumstances". Cournoyer's detail at the Mambo Café clearly interfered with his job obligations at the Department. Two supervisors are to be present on duty at all times. Cournoyer left the station to report to his detail at least 30 minutes early, leaving only one supervisor on the shift as the third supervisor was out sick and the incoming supervisor for the next shift had not arrived yet. Although Cournoyer argues that officers commonly leave their

shift early as the incoming officers arrive prior to the start of the shift for roll call, Cournoyer left at least 30 minutes prior to the end of his shift and before the incoming officer was present to take over.

Cournoyer directly violated Rule 3.13, Proper Leave, as he did not absent himself from the Department properly, and Rule 3.22, Outside Employment (*Exhibit 1*). He also violated the Department's Standing Operating Procedure, Rule 2.15.0 (*Exhibit 2*) when his outside detail directly interfered with the fulfillment of his duties at the Department. Cournoyer neglected his duties and responsibilities at the station by leaving early in order to report to the Mambo Café detail and therefore demonstrated conduct unbecoming of an officer, in violation of Rule 3.2 of the Rules and Regulations. Due to these violations, I find by a preponderance of the evidence that the Department had just cause for suspending Cournoyer for one (1) day without pay and that this one-day suspension constituted progressive discipline in view of the previous written reprimand issued to him for the same conduct one week earlier. Given the proximity in time of Cournoyer's previous discipline, there can be no question that Cournoyer was not aware of his obligations.

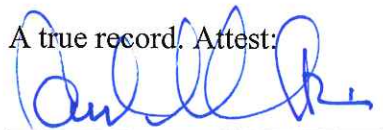
CONCLUSION

For the reasons stated herein, the Department has established just cause and the appeal is hereby *dismissed*.


Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, and Stein, McDowell, Commissioners;) on July 25, 2013.

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)(1), 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 to:

Michael P. Clancy, Esq. (for Appellant)

Sara J. Carroll, Esq. (for Appointing Authority)