

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RYAN DAVIS,
Appellant

V.

D-07-143

CITY OF SALEM,
Respondent

Appellant's Attorney:

Gerard S. McAuliffe, Atty.
43 Quincy Avenue
Quincy, MA 02169

Respondent's Attorney:

Daniel B. Kulak, Atty.
40 Lowell Street, Suite 14
Peabody, MA 01960

Commissioner:

Daniel M. Henderson¹

DECISION

The Appellant, Ryan Davis (hereinafter "Davis" or "Appellant"), pursuant to G.L. c. 31, § 43 filed an appeal with the Commission on April 6, 2007 claiming that the City of Salem (hereinafter "City" or "Appointing Authority") did not have just cause to suspend him from the Salem Police Department (hereinafter "Department") for five (5) days.

¹ The Commission acknowledges the assistance of Legal Intern Lauren Nyren in the preparation of this Decision.

The appeal was timely filed. A hearing was held on February 11, 2008 at the offices of the Civil Service Commission (hereinafter “Commission”). No written notice was received from either party requesting the hearing to be public, so the hearing was declared private. The witnesses were not sequestered.

The hearing was recorded onto one (1) tape and both parties subsequently submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Sixteen (16) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the City of Salem:

- Lucia Cole, a resident of the City of Salem
- Captain Brian Gilligan, City of Salem Police Department

For the Appellant:

- Ryan Davis, the Appellant, a patrol officer for the City of Salem Police Department

I make the following findings of fact:

1. The Appellant, Ryan Davis, is a tenured civil service employee of the City of Salem Police Department, currently serving in the position of Patrol Officer within the Department. (Testimony of Appellant)
2. On September 14, 2005, the Appellant was assigned to the evening shift in the dispatch area as a spare officer. As a spare officer, he filled in wherever he was needed on the shift. During this shift, he filled in for the desk officer. The desk officer

3. According to Department policy, a 911 call taker is not required to offer his name to the caller. His focus should be on handling the immediate emergency. Although, if the caller requests his name, he must give it. A non-emergency call taker must identify him/herself by name, advise the caller that the conversation is being recorded, and then handle the call. A 911 call taker is trained to direct all non-emergency calls to the regular police line, so the 911 line will be free for a real emergency. (Testimony of Appellant and Gilligan)
4. On September 14, 2005, Lucia Cole (hereinafter “Cole”), a City resident, called 911 to report a neighbor who she believed was parallel parking his car while under the influence of alcohol. She testified that he caught her attention because she heard loud banging sounds coming from his direction. (Testimony of Cole)
5. The owners of those cars did not report any damage and Cole did not see any damage when she went outside to check. Cole’s husband, who was also at home during the incident, did not go out to check the cars. (Testimony of Cole)
6. 911 dispatchers are expected to use their best judgment to determine if a caller has an actual emergency. The 911 dispatcher who took Cole’s call determined that her situation was not an emergency, so, following Department policy, he instructed her to

7. The 911 lines at the Department are recorded. A print out is also produced after each call that indicates the phone number of the caller, the time of the call, and the length of the conversation. The call taker must make a record of the call, by creating a case number, if and when they dispatch an officer to the scene. The Department has not been able to locate any such records for Cole's call. Captain Gilligan testified that the print out system is not reliable, so he can rarely locate the print out for a call. When Captain Gilligan found the tape for that call, it had a sticky note on top that said "Tape no good." This note was in Captain Comeau's handwriting. The system failed to record all the calls for that month. After this was discovered, the Department instituted a policy of using a backup recording system. (Testimony of Gilligan)
8. Cole never called the Department to complain about the dispatcher. She also never filed a formal complaint. Instead, she sent an email to her mother about it. (Testimony of Cole)
9. Cole was no shrinking violet, as she was mildly combative during her testimony. She challenged the attorney's line of questioning during cross examination and exhibited some resistance to his questions. Her answer to one of his questions was A. - "Why is that important?" (Testimony and demeanor of Cole)
10. Approximately fifteen (15) months after her September 14, 2005 call, the same neighbor was arrested for driving under the influence. Cole wrote to her state representative and the editor of the Salem Evening News about this incident. In these communications, she mentioned her September 14, 2005 call about this neighbor and

11. Although the witness Lucia Cole did not intentionally bend or distort the truth, I find her testimony to be unreliable. She testified to a certain memory of her 911 call that evening, yet failed to recall even sending an e-mail to her state representative. That e-mail in conjunction with another sent to her local newspaper started a chain reaction culminating in the Appellant being disciplined. (Testimony and demeanor of Cole)
12. In December 2006, Police Chief Robert St. Pierre (hereinafter “Chief St. Pierre”) opened an investigation after he received Cole’s correspondence from the state representative. Chief St. Pierre had Captain Gilligan conduct the investigation. (Testimony of Gilligan)
13. The Appellant was questioned about the incident, but had no recollection of the call that had happened eighteen (18) months earlier. Captain Gilligan did not find it strange or unusual that the Appellant had no recollection of the call. No one else in the Department had any recollection of the call either. (Testimony of Appellant and Gilligan)
14. The Appellant answered questions in a straightforward manner. He appeared professional and credible and appeared to genuinely have no recollection of Cole’s 911 call. (Testimony and demeanor of the Appellant)
15. Captain Gilligan, who investigated the call, did not specifically question the other police officers who were in dispatch on the night in question. He vaguely recalls having a very brief discussion with one of the sergeants who supervised dispatch that

16. On February 9, 2007, the Appellant was suspended for five (5) days for his conduct during Cole's September 14, 2005 call. (Exhibit 1)
17. The Appellant appealed his suspension. A hearing was held before Chief St. Pierre on March 20, 2007 at 10:00 A.M. at Salem Police Headquarters. The Appellant's suspension was upheld. (Exhibits 2, 3, 4)

CONCLUSION

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 Civ. Serv. v. Mun. Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civ. Serv. Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (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. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 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 credible and reliable 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'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civ. Serv. 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.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civ. Serv. 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. Civ. Serv. Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). *See also* Leominster v. Stratton, 58 Mass. App. Ct. 726, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 48 Mass.App.Ct. 495 (2000); McIsaac v. Civ. Serv. Comm'n, 38 Mass App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

It is the function of the hearing officer to determine the credibility of the testimony presented before him. *See* Embers of Salisbury, Inc. v. Alcoholic Beverages Control

_____, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997); *See also* Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Captain Gilligan conducted the investigation that lead to the Appellant's suspension. Captain Gilligan began by calling Cole to confirm her side of the story. Then he checked the roster for September 15, 2005 to see if the Appellant was indeed working. He may have spoken to one of the sergeants supervising the desk that night. He did not speak to any of the other supervisors or the house officer on duty in dispatch that night, nor did he ask any of them to submit reports. He checked the log to see if there was a record of the call from Cole's address on September 14 or in the days after. Captain Gilligan found no record of a call from Cole or any reports of car damage in the area around her address. He also talked to the Appellant, who had no recollection of the call. Captain Gilligan did not look for the call print out because he thought it was not important and not likely to be found and he never checked to see how many officers were taking calls in dispatch that night

There is a lack of sufficient evidence that the person Lucia Cole talked to on September 14, 2005 was the Appellant. No one at the Department, including the Appellant, had any recollection of the call and the Department has no record of it. Without these pieces of evidence, the Department cannot establish the reasonable probability that the Appellant was the call taker or that the call even transpired the way Cole alleges it did. It is not fair to discipline the Appellant as the call taker that night. The Department cannot confirm Cole's allegations.

Lucia Cole's situation with her intoxicated neighbor does not seem to have been an emergency. The neighbor did not harm anyone nor damage any property. In fact, Cole's husband thought so little of the event that he did not go outside to check for damage. The 911 call taker was reasonable to conclude that this, by his judgment, was a non-emergency situation. Therefore, it was also reasonable and in conformity with Department policy for this call taker to instruct Cole to call back on the regular police line.

Lucia Cole did not call back. She did not call the regular police line. She did not ask to speak to the 911 call taker's supervisor. She did not file a formal complaint with the Department. Instead, she wrote a letter to her state representative and the Salem Evening News more than fifteen (15) months later. Cole's delay in reporting the alleged incident was unreasonable. The lapse in time was so great that the Appellant, after the lapse of eighteen (18) months could no longer remember if he was the one who took Cole's call. Without a memory of the alleged incident, the Appellant had no means to defend his actions. It was not fair to even proceed with discipline against the Appellant when he justifiably had no memory and thereby did not have the ability to defend himself. There was nothing remarkable in a police sense about the call for the Appellant to remember it after that length of time.

I find that the City has failed to show, by a preponderance of the reliable and credible evidence in the record, that there was just cause to discipline the Appellant. I conclude that the five (5) day suspension was not supported by sound and sufficient reasons. The Appellant's appeal under Docket No. D-07-143 is hereby ***allowed***. The Appellant shall be returned to his position without any loss of pay or other benefits.

Civil Service Commission,

Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on July 23, 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:

Gerard S. McAuliffe, Atty. (for Appellant)

Daniel B. Kulak, Atty. (for Appointing Authority)