

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

RYAN T. DAVIS,

Appellant

v.

D1-18-110

SALEM POLICE DEPARTMENT,

Respondent

Appearance for Appellant:

Peter T. Marano, Esq.  
Law Offices of Peter T. Marano, LLC  
31 Lexington Street  
Boston, MA 02128

Appearance for Respondent:

Victoria B. Caldwell, Esq.  
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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Ryan T. Davis, acting pursuant to G.L.c.31,§43, appealed to the Civil Service Commission (Commission), challenging his discharge by the Respondent, the Salem Police Department (SPD), as a tenured SPD Police Officer.<sup>1</sup> The Commission held a pre-hearing in Boston on August 7, 2018. A full hearing was held at that location on November 14, 2018 and December 19, 2018, which was declared private, with witnesses sequestered, and digitally recorded.<sup>2</sup> Seventeen (17) exhibits were received in evidence (*CityExh.1 – CityExh.3; CityExh.4w/enclosures (1)-(14); CityExh.5 – CityExh.14; Exhs.15 – Exh.17*). The Commission received Proposed Decisions on March 22, 2019. For the reasons stated below, the Appellant’s appeal is denied.

<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> CDs of the full hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

## **FINDINGS OF FACT**

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

### **Called by the SPD**

- SPD Police Chief Mary E. Butler
- SPD Police Captain Kate Stephens
- SPD Administrative Aide Robert Mulligan

### **Called by the Appellant:**

- Ryan T. Davis, Appellant
- Hayden Duggan, Ed.D.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Ryan T. Davis, was appointed as a full-time permanent police officer with the SPD effective July 1, 2000 and served in that position until he was terminated, effective June 12, 2018. (*Stipulated Facts; Exh. 1; Testimony of Appellant & Chief Butler*)

2. Before his appointment as a permanent, full-time SPD police officer, Officer Davis had served several years as an SPD Reserve Police Officer. (*Testimony of Appellant*)

3. During his service as a tenured SPD police officer, prior to the incidents that led to his termination, Officer Davis was the subject of the following prior disciplinary action:

- March 8, 2006 – Two day suspension for failing to follow proper police procedure during a detail on February 2, 2006.
- December 19, 2011 – Written warning for attending non-police event in uniform and allowing civilian to operate police vehicle.
- December 19, 2011 – One day suspension for unauthorized deployment of Pepperball gun on October 31, 2011.
- May 18, 2016 -- Written reprimand and eight-day suspension for neglect of duty during details on April 22, 2016.
- April 3, 2017 -- One-day suspension for violating expected and standard protocols in responding to a motor vehicle accident.
- April 5, 2017 – Verbal warning (documented) for failure to follow protocol in responding to a report of a 209A violation.
- April 5, 2017 – Written reprimand for failure to report complaint of indecent assault with alleged perpetrator remained at large.

- May 10, 2017 – Two day suspension for reporting late for duty.
- June 2, 2017 – Agreement between Appellant and SPD (the 2017 Agreement) for eighteen (18) month suspension (6/1/2017 through 11/30/2018) to settle a pending disciplinary charge concerning his “misconduct on May 1-2, 2017 which violated the Department’s Rules and Regulations.”

*(CityExhs.4(2) & 4(5) through 4(12)*

4. The 2017 Agreement included, in part, the following provisions:

- “2. **Apology.** Davis agrees to acknowledge his misconduct in writing and provide a written apology to his superior officers – Chief Butler, Captain Ryan, Lieutenant Engelhard, and Sergeant Verrette.
3. **Counseling.** For the duration of the unpaid suspension, Davis agrees to continue to attend stress counseling session and provide monthly proof of the same to Chief Butler. No further information as to the counseling received will be required unless Davis has been found to be at risk of injury to himself or others, in which case this information shall be provided to the Chief.
4. **Training.** Davis agrees to maintain his training while on unpaid suspension as follows and he acknowledges that he is to (i) report to work upon the end of his suspension with current and valid first responder and CPR certifications; (ii) attend the MPTC in the fall of 2018 to recertify for firearms prior to his return; and (iii) participate in the Department’s online training as directed by the Chief. All time spent pursuing this training will be uncompensated and any out-of-pocket costs associated will not be reimbursed by the Department.
5. **Fitness for Duty upon Return.** Davis agrees to submit to a fitness for duty examination in November 2018 prior to returning on December 1, 2018.
7. **Insurance.** The parties acknowledge that while on unpaid suspension, Davis may maintain his health, life, dental, and accidental death and disability insurance through the City’s sponsored plans. Davis shall be responsible for the full amount of each premium. The Human Resources Department will provide Davis with all information regarding his rights to continue his coverage under any existing plans as well as the payment requirements. Davis acknowledges that non-payment of any premium(s) shall result in cancellation(s) of the same.”

*(CityExh.4(2))*

5. At the outset of his suspension, consistent with SPD’s standard practice, Officer Davis surrendered his SPD firearm, badge and secure access card. He was not authorized to enter the building unaccompanied and needed to use the front (public entrance), which he did on a few

occasions. The SPD did not change or block his department email account or his ability to access that account. (*Testimony of Appellant, Chief Butler & Capt. Stephens*)

6. As required by the 2017 Agreement, Officer Davis acknowledged his misconduct in writing and provided a written letter of apology for his actions to the four superior officers named in the 2017 Agreement. (*Testimony of Appellant*)<sup>3</sup>

7. Also as required by the 2017 Agreement, Officer Davis arranged to begin monthly stress counseling sessions with Dr. Hayden Duggan, a licensed psychologist and founder of the On Site Academy, a non-profit organization that specializes in counseling police and other public safety officers. Dr. Duggan serves as the Chief Psychologist for the Boston Police Peer Support Unit, with whom On Site Academy has contracted to provide such psychological counseling services to Boston Police Department personnel and, on occasion, to other municipal officers, when approved by the BPD to use the services of On Site Academy as was the case with Officer Davis here. (*Testimony of Appellant & Dr. Duggan*)

8. On Site Academy provides its services without charge to the participants and does not get reimbursed through any insurance plans or policies. The organization has a limited staff to handle administrative paperwork and is not accustomed to providing treatment documentation or information to a participant or his or her department. (*Testimony of Dr. Duggan*)

9. By letter to Officer Davis dated September 14, 2017, SPD Police Chief Mary Butler inquired why she had not received any of the monthly reports proving that he had attended attend stress counseling. Chief Butler reminded Officer Davis of the requirement of “monthly reporting

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<sup>3</sup> The apology was not introduced into evidence, but it is not disputed that it was provided. According to the SPD’s Notice of Discipline, dated May 12, 2017, the misconduct involved Officer Davis’s false report that he had cut his foot on some glass in the police station locker room, when the incident had actually occurred at a private apartment off-duty and his related “misleading and untruthful” statements to the SPD and to the 911 responders to the scene of the incident. (*CityExh.4(2);Testimony of Appellant*).

of your attendance” and directed him to “provide documentation of your attendance at all stress counseling sessions that you have attended since execution of the [2017] Agreement.” Chief Butler also stated: “Failure to comply with the terms of the [2017] Agreement will result in further disciplinary proceedings.” (*CityExh.4(3); Testimony of Chief Butler*)

10. Officer Davis understood that the directive to him in the September 14, 2017 letter constituted a lawful order from Chief Butler. (*Testimony of Appellant*)

11. On October 4, 2017, Chief Butler’s Administrative Aide, Robert Mulligan, received an e-mail letter on the letterhead of On Site Academy, electronically signed by Dr. Duggan. The letter verified that “in the performance of my duties I have been seeing Patrolman Ryan Davis of the Salem Police Department on a regular basis at our unit. Patrolman Ryan will continue in treatment until further notice . . . [he] has been fully cooperative with treatment and has never missed an appointment. He is motivated and is making good progress. He is always punctual.” (*CityExh.4(4); Testimony of Chief Butler, Mulligan & Dr. Duggan*)

12. On November 13, 2017, Chief Butler again wrote to Officer Davis. The letter confirmed that the October 4, 2017 letter from Dr. Duggan proved attendance at stress counseling through September 14, 2017, but stated:

“It is now November 13, 2017; over a month has passed without me having received the agreed upon **monthly proof** that you have been attending the required stress counseling sessions. The requirement that you provide me with **monthly proof** of your attendance at stress counseling sessions is **your** responsibility and was clearly articulated in the [2017 Agreement] and my September 14, 2017 letter to you. To be clear, . . . monthly documentation must be received . . . no later than the 4<sup>th</sup> day of the month. . . No further reminders of the **monthly** reporting requirements of your attendance at stress counseling

sessions will be forthcoming from this office. Henceforth, any further failure to comply with the reporting requirements of the [2017] Agreement will result in disciplinary proceedings, up to and including your discharge.” (*emphasis in original*)

(*CityExh.4(5); Testimony of Chief Butler*)

13. Officer Davis understood that the directive to him in the November 13, 2017 letter constituted a lawful order from Chief Butler. (*Testimony of Appellant*)

14. On December 1, 2017, Mr. Mulligan received an email letter electronically signed by Dr. Duggan stating that Officer Davis “attended a session with me on Tuesday October 17, 2017 and also on Tuesday November 21, 2017. We will confirm his December session and all additional sessions as well.” (*CityExh.4(6); Testimony of Chief Butler, Mulligan & Dr. Duggan*)

15. Chief Butler received no further confirmation, either on or before January 4, 2018 or any time thereafter, that Officer Duggan had attended counseling during the month of December 2017. (*Testimony of Chief Butler & Mulligan*)

16. Meanwhile, on or about October 5, 2017, the SPD in-house training system (known as PMAMHCM) sent an automated message to Officer Davis’s SPD email account, assigning him a training module on Use of Force with a target completion date of 10/16/2017. (*CityExh.4(7) & 13; Testimony of Chief Butler & Capt. Stephens*)<sup>4</sup>

17. On October 16, 2017, and on October 25, 2017, the PMAMHCM system sent an automated email reminder to Officer Davis’s SPD account stating that the Use of Force training module was overdue. (*CityExh.4(7) & 13; Testimony of Chief Butler & Capt. Stephens*)

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<sup>4</sup> The responsibility to “maintain” training on a timely basis is considered a critical part of the duties of the position of an SPD officer as it is essential to demonstrate that the officer force is up-to-date on all new policies and laws (e.g., legalization of marijuana and handling issues of operating while impaired) as well as necessary to document compliance with the standards that the SPD must meet to maintain its accreditation from the Commonwealth. (*CityExh.4(14)[SPD Department Manual Ch.42-Training]; Testimony of Chief Butler & Capt. Stephens*)

18. On October 23, 2017, Officer Davis reached out to Capt. Stephens, then the commander of the SPD Professional Standards Unit responsible to oversee officer training. In a text message to Capt. Stephens, Officer Davis stated:

“I keep getting an alert on my phone that says my department email is unable to refresh/update: . . . I will stop by Verizon and see what if anything I can do to fix it. I just wanted to touch base with you so you didn’t think I forgot. I will contact you tomorrow and hopefully have it resolved. I do not know how to access my depth [sic] email on my desktop.”

*(Exh. 17: Testimony of Appellant & Capt. Stephens)*

19. After receiving the text from Officer Stephens, she spoke with Officer Davis over the telephone and referred him to the IT manager to get his email issues resolved. She also informed Chief Butler of her communications with Officer Davis. *(CityExh.4(7), 16 & 17; Testimony Capt. Stephens)*

20. On November 21, 2017, the PMAMHMC system sent Officer Davis a second training assignment (OUI and Marijuana) with a target completion date of 12/22/2017 and, on December 19, 2017 sent a reminder of the due date. On December 22, 2017, January 21, 2018, January 28, 2018 and February 4, 2017, the PHAMHMC system sent Officer Davis reminders that the assignment was overdue. *(CityExh.4(7)&13)*

21. On January 30, 2018, the PMAMHMC system sent Officer Davis a third training assignment (Harassment) with a target completion date of 2/2/2018. On February 7, 2018, the PHAMHMC system sent Officer Davis a reminder that the assignment was overdue. *(CityExh.4(7)&13)*

22. The SPD also requires officers to complete another on-line training program through MPI, consisting of seven courses. All officers were informed by Capt. Stephens through their

departmental email of the MPI training requirement on or about December 4, 2017 with a completion date of May 1, 2018. (*CityExh.4(7), 4(8) & 14*)

23. On or about December 26, 2018, Capt. Stephens noted that Officer Davis had not yet logged into the MPI training website. She sent an email to Officer Davis's departmental email account, noting: "This is something you should be able to do from any computer. If you need assistance please let me know. Were you able to contact [the IT manager] and access PMAM?"

Officer Davis did not reply. (*CityExh.4(7) & 14; Testimony of Capt. Stephens*)<sup>5</sup>

24. By letter hand-delivered to Officer Davis on February 8, 2018, Chief Butler informed Officer Davis that a hearing would be held on February 14, 2018 to consider his discharge from employment with the SPD based on four charges set forth in the letter.

- I. Noncompliance with the 2017 Agreement "as it pertains to the monthly reporting of your attendance at stress counseling sessions."
- II. Noncompliance with the 2017 Agreement "as it pertains to your participation in the Department's online training programs and subsequent failure to follow an order" from Capt. Stephens.
- III. Failure to comply with the SPD's Rules and Regulations, Section 1, Subsection E (Orders); Subsection F.31 (Required Conduct-Submitting Reports; Subsection G.9(a) & (b) (Prohibited Conduct-Incompetence; and Subsection G.11 (Prohibited Conduct-Insubordination)
- IV. Failure to comply with "the job criteria established for patrol officers as delineated in the 'Duties by Assignment for Salem Police Department Personnel' and Policy Document Number 42 (Training)" of the SPD's Manual of Policies and Procedures.

(*CityExh.4; Testimony of Chief Butler*)

25. There were fourteen enclosures to the February 8, 2018 letter, including, among other things, copies of the 2017 Agreement, Chief Butler's two prior letters to Officer Davis, the email

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<sup>5</sup> The MPI training was subsequently put on hold. (*CityExh.4; Testimony of Appellant*)



letters received from Dr. Duggan, the email notices issued by the PMAMHCM system, Capt. Stephens's message to Chief Butler concerning her October 2017 contacts with Officer Stephens about his problem accessing his SPD email account and the applicable sections of the SPD Rules and Regulations and Manual of Policies and Procedures. (*CityExh.4 w/enclosures (1) through (14); Testimony of Chief Butler*)

26. The same day that Chief Butler's February 8, 2018 letter was delivered to Officer Davis, he sent an email (@8:45 pm) to the IT director in which he stated:

"Jake, could you please, at your convenience, call me? I need your assistance in setting up my new phone so I can receive emails from the police department. Please call anytime. Thank you. Ryan Davis [phone #] Sent from XFINITY Connect Application"

(*CityExh.14*)

27. The IT director had not previously communicated with Officer Davis and the Salem email server did not recognize the sender and put the message in the IT director's spam folder. The IT director first discovered the message on or about March 7, 2018, after being queried by Mr. Mulligan and performing a search of his email account. The next day, March 8, 2018, the IT director reported this information to Mr. Mulligan and Chief Butler. (*CityExh.14*)

28. After several postponements of the date of the appointing authority hearing, made to accommodate Officer Davis, an evidentiary hearing was held on May 14, 2018 before the Salem Director of Human Resources, designated by Chief Butler to preside at the hearing. (*CityExhs. 1 through 3; Testimony of Appellant, Chief Butler & Capt. Stephens*)

29. Officer Davis did not testify at the appointing authority hearing, but the hearing officer expressly stated that she drew no adverse inference from his failure to do so. (*CityExh.2; Testimony of Appellant*)

30. The On Site Academy letters from Dr. Duggan dated October 4, 2017 and December 1, 2017 were proffered on the Appellant's behalf, as well as a third letter from On Site Academy, dated January 25, 2018, and electronically signed by Dr. Duggan. The January 25, 2018 letter stated, in part, that "Patrolman Ryan [sic] will continue in treatment until further notice. He was seen on Tuesday December 12, 2107 [sic] and again on January 23, 2018." (*CityExhs.2 &15*)

31. The January 25, 2018 letter from Dr. Duggan was meant to be sent to Chief Butler, but through a scrivener's error, it was directed to an erroneous email address and never received at the SPD. Neither Chief Butler, nor anyone else at the SPD had seen the January 25, 2018 letter from Dr. Duggan until it was presented at the May 14, 2018 appointing authority hearing. (*CityExhs; 2 & 15; Testimony of Chief Butler & Mulligan*)

32. At the Commission hearing, the Appellant claimed to be unaware of how this letter was generated or sent, but Dr. Duggan authenticated the document during his testimony before the Commission. (*Testimony of Appellant & Dr. Duggan*)

33. On June 8, 2018, the Hearing Officer submitted her recommendation. She credited the documentary evidence presented by the SPD and the testimony of Chief Butler that Officer Davis had failed to make monthly reports of his counseling as required by the 2017 Agreement, the express orders of Chief Butler and the SPD Rules and Regulations; that Officer Davis had failed to comply with his duty to maintain his training as required by the 2017 Agreement as well as the SPD's Rules and Regulations and Manual of Policies and Procedures; and had demonstrated his incompetence to perform the duties of an SPD police officer. (*CityExh.2*)

34. Among other facts, the Hearing Officer relied on the fact that Officer Davis was an eighteen year veteran officer who was well aware of the duties and responsibilities of his position which included the duty to “maintain” training, submit timely reports and follow orders, that he had a significant history of prior discipline, and that he knew, in particular, that compliance with the 2017 Agreement was meant to give him the benefit of a “second chance” and avoid termination. The Hearing Officer noted that, even after being notified in February 2018 that further discipline was pending, Officer Davis provided no additional counseling reports or completed any training assignments. The Hearing Officer concluded that, “despite such disciplinary actions, [Officer] Davis has yet to possess or demonstrate any understanding for the personal and professional responsibility required of a sworn police officer” and his conduct “demonstrates incompetence, insubordination, and an utter lack of respect for the authority of his superior officers.” The Hearing Officer recommended that Officer Davis be terminated from his position with the SPD. (*CityExh.2*)

35. By letter dated June 11, 2018 to Officer Davis, Chief Butler concurred with the Hearing Officer’s report and informed him that she concluded “there is just cause for your termination based on the aforementioned [i.e., failure to comply with the 2107 Agreement, to provide reports as required, to follow orders and to “maintain” training], your disciplinary record, and the lack of responsibility of an officer with twenty years of service. You failed to take responsibility to adhere to the Agreement. I cannot reason that another decision, aside from termination, would be

suitable, as it would undeniably undermine the importance of adherence to the Rules and Regulations and Policies and Procedures and the integrity of the Department.” Chief Butler ordered Officer Davis terminated effective June 12, 2018. (*CityExh.1; Testimony of Chief Butler*)

36. This appeal duly ensued. (*Claim of Appeal*)

### **APPLICABLE LEGAL STANDARD**

G.L.c.31,§41-§43 requires that discipline of a tenured civil servant may be imposed only for “just cause” after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states “fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such disciplinary action may appeal to the Commission, pursuant to G.L.c.31,§42 and/or §43, for de novo review by the Commission “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited.

The Commission’s role 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, rev.den., 426 Mass. 1102 (1997). See also 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 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence<sup>6</sup>, when weighed by an unprejudiced mind; guided by common sense and by correct

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<sup>6</sup> It is within the hearing officer’s purview to determine the credibility of live testimony. E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. 37 Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Ret. Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where witnesses gave conflicting testimony, assessment of their relative credibility cannot be made by someone not present at the hearing).

rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service 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 (1928) See also Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

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 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. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

G.L.c.31, Section 43 vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) ("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority") Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct . . . . Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. . . . they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm’n, 39 Mass.App.Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, rev.den. 398 Mass. 1103 (1986) See also Spargo v. Civil Service Comm’n, 50 Mass.App.Ct. 1106 (2000), rev.den., 433 Mass. 1102 (2001).

### **ANALYSIS**

The SPD had just cause to terminate the employment of Officer Davis from his position as a police officer based on his demonstrated failure to conform to the requirements imposed upon him by the Rules and Regulations of the SPD as well as his non-compliance with the 2017 Agreement in which he agreed to accept an 18-month suspension with conditions in lieu of termination. Officer Davis’s contentions that his non-compliance was the result of snafus for which he does not accept responsibility and that he has not been afforded a fair chance to cure

his deficiencies and that his termination was premature are not supported by a preponderance of the evidence.

First, the preponderance of the evidence established a mind-boggling level of non-compliance with Officer Davis's duty to provide timely reports of his attendance at counseling. Despite the clear duty imposed on him to provide monthly reports of his attendance under the 2017 Agreement as well as Section 1, Subsection F.31 of the SPD's Rules and Regulations, he provided no such reports until Chief Butler issued the September 14, 2017 letter that noted his prior noncompliance and ordered him to furnish such required reports in the future. Despite this direct order, however, it required a second letter on November 13, 2017 which, again, ordered him to provide such monthly reports, and set a reporting deadline of the 4<sup>th</sup> of each month, before Officer Davis produced another required report. Although a third report was generated on or about January 25, 2018, it did not meet the January 4<sup>th</sup> reporting deadline and, from that time until the Appointing Authority hearing in May, 2018, no further reports were submitted. This malfeasance by a twenty-year career police officer who knew that his job was on the line can only be explained as a willful indifference for authority, incompetence, or both, in violation of the 2017 Agreement and the SPD's Rules and Regulations, Section 1, Subsection E (Orders) and Subsection G.11 (Insubordination), and Subsection G.9 (Incompetence).

I have not overlooked the fact that, to some extent, there may have been some initial confusion on the part of Dr. Duggan, who is not accustomed to treating patients that require the type of reporting mandated of Officer Davis. The duty to report, however, was always Officer Davis's obligation (both under the 2017 Agreement, specifically, and the SPD's Rules and Regulations, generally). The logistical problems Officer Davis may have faced, notwithstanding,

the obligation to comply rested with him. By the middle of December, he knew what Chief Butler had ordered him to do and that, if he did not comply, his job could be in jeopardy.

While it is not disputed that Officer Davis did attend monthly counseling with Dr. Duggan through the date of the Commission hearing, he also failed to comply with the monthly reporting requirement. Chief Butler made clear that the two obligations were independent and both were important benchmarks needed to regain her confidence that he was competent to continue his employment with the SPD. Given his past disciplinary history of failing to make reports and other failures that exhibited a “pattern of behavior whereby you lack the diligence necessary to follow through with a completion of a task” as recently as April 2017 (CityExh.6), Chief Butler was fully entitled to expect that Officer Davis demonstrate due diligence and compliance to follow through with both obligations, and, when he failed to do so, she reasonably concluded that his misconduct could not be remediated and that he must be terminated.

Second, the undisputed facts establish that Officer Davis did not maintain the training required of him during his suspension. In particular, he was expected to complete training on Use of Force, OUI & Marijuana and Harassment prior to the date that he was informed that Chief Butler had initiated a new disciplinary action against him for reasons that included, among other things, his failure to complete that specific training. Nevertheless, even after receiving that notice, he took no action other than sending an email to the IT director the night he got the February 8, 2018 notice of discipline from Chief Butler. As a twenty-year veteran of the SPD, Officer Davis knew that he had a duty to maintain his training and, by October 23, 2017, he had been in contact with Capt. Stephens to be sure she knew he hadn't “forgotten” about his need to complete training. Nevertheless, neither before February 8, 2018 nor anytime thereafter, did he reach out to anyone for assistance, although he had been counseled by Capt. Stephens to do so in



October 2017, yet another example of a lack of due diligence on his part and explicit violation of his duty under the 2017 Agreement and the SPD Department Manual (Chapter 42-Training).

I do not credit the Appellant's claim that he was stymied by his inability to access his departmental email once he was put on suspension. His text message to Capt. Stephens mentions that he was getting some sort of messages from the SPD email server and his February 8, 2018 email to the IT director that asks for help setting up his "new" cell phone. This evidence contradicts the Appellant's testimony that he faced any obstacles to accessing his SPD email other than problems of his own making. Similarly, I do not credit the Appellant's testimony that the only way he knew how to access his department email was through one of the SPD's computers in the "Muster Room" of the police station and that he could not do so because "for all practical purposes he wasn't an employee while on suspension" and no longer had an access card to the building. Officer Davis was never barred from the police station and, on occasion, did come into the building, albeit accompanied and through the front (public access) door. He knew that, if he wanted access to his department email through a "Muster Room" computer, all he needed to do was make arrangements with Chief Butler or Capt. Stephens to do so.

Third, I have considered whether, on all of the evidence, the Commission should exercise its discretion to modify the Appellant's termination and impose some lesser form of discipline. My findings do not differ in any material respect from those relied upon by the appointing authority. I find no evidence that the discipline imposed upon Officer Davis resulted from any disparate treatment, favoritism, bias or other arbitrary or unlawful motivation. To the contrary, Chief Butler gave Officer Davis more than ample opportunity to demonstrate that he had remediated his behavior. Chief Butler had concluded that he had not done so and that, no matter what "babysitting" (her words) she undertook, he was not going to change. This conclusion is

supported by a preponderance of the evidence and a modification of the termination is not warranted.

## **CONCLUSION**

For these reasons, the Appellant's appeal, Case No. D1-18-110 is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein  
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on January 30, 2020.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice:

Peter T. Marano, Esq. (for Appellant)  
Victoria B. Caldwell, Esq. (for Respondent)