

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

WALTER DEMELLO,
Appellant

CASE NO. D-10-176

v.

TOWN OF FAIRHAVEN,
Respondent

Attorney for the Appellant:

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Quincy, MA 02169

Attorney for the Respondent:

Michael J. Kennefick
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Commissioner:

Paul M. Stein¹

DECISION

Officer Walter DeMello, the Appellant, acting pursuant to G.L. c.31, §41-43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Fairhaven (Fairhaven), the Appointing Authority, to suspend him for three days as a police officer for failing to obey a direct order of a superior officer in violation of General Order G02-02. An evidentiary hearing was held on May 27, 2011 at the University of Massachusetts School of Law in Dartmouth, MA. The hearing was declared public by the Appellant under G.L. c.31, §43. By agreement of the parties, no witnesses were sequestered. Nine (9) exhibits were received in evidence. The hearing was digitally recorded. Both parties submitted post-hearing briefs.

¹ The Commission acknowledges the assistance of Law Clerk Ashley Francisque in the preparation of this decision.

After the hearing, it was suggested to the parties to consider settlement rather than proceeding with the case. The parties reported they had reached a settlement and the Commission dismissed the case, which was to be effective on a future date after Officer DeMello's retirement. However, there was miscommunication between the parties as to the terms of the settlement. Officer DeMello believed his suspension would be eradicated from his personnel file while Fairhaven did not believe that was part of the agreement. As a result, Officer DeMello asked the Commission to vacate the dismissal order and have the case go forward to a decision. Fairhaven opposed this action claiming that the settlement was final. The Commission agreed to vacate the dismissal order without prejudice. This decision addresses the issue of the settlement as well as the merits of Officer DeMello's appeal from his suspension.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the testimony of Officer Walter DeMello (Officer DeMello), Fairhaven Police Chief Michael Meyers (Chief Meyers) and Fairhaven Police Sergeant Michael Botelho (Sgt. Botelho) as well as inferences reasonably drawn from the evidence, I make the following findings of fact:

1. The Appellant, Officer DeMello, served as a duly appointed police officer for the Fairhaven Police Department ("FPD") for over 25 years. (*Testimony of Appellant*)
2. The Respondent, Chief Michael Meyers, (Chief Meyers), is the Chief of Police for FPD and has served in the department for approximately 18 years and has served as the Chief since 2009. (*Testimony of Chief Meyers*)
3. On April 12, 2010, Chief Meyers sent out an interdepartmental email calling for a General Meeting under Article III, Section F of the police contract to be held on May 23, 2010 at 8:30 a.m. (*Testimony of Officer DeMello, Chief Meyers and Sgt. Botelho*)

4. Chief Meyers sent a second interdepartmental email prior to the general meeting on May 18, 2010 instructing all officers to bring their Class A uniform shirts and hats for a departmental photograph. (*Testimony of Officer DeMello, Chief Meyers and Sgt. Botelho*)
5. A professional photographer was hired for the photographs, which were individual shots of each officer from the chest up. Officer Macy Joseph was concerned about the purposes of the photographs and Sergeant Michael Bothelo (Sgt. Botelho) had the photographer sign a release form stating that he would not disseminate the pictures and their only purpose was for the collage in the department classroom. (*Testimony of Chief Meyers and Sgt. Botelho*)
6. Officer DeMello was late to the general meeting and did not have his Class A uniform with him and did not take his picture that day. (*Testimony of Officer DeMello and Chief Meyers*)
7. Chief Meyers approached Officer DeMello and asked him why he did not have his Class A uniform to take his picture. Officer DeMello told Chief Meyers that he had his reasons for not taking the picture. Chief Meyers then advised Officer DeMello to speak to him sometime later if he had a problem regarding the photographs. (*Testimony of Officer DeMello and Chief Meyers*)
8. Officer DeMello never went to speak to Chief Meyers to explain why he would not take his picture for the collage. (*Testimony of Officer DeMello and Chief Meyers*)
9. There were three or four other officers who did not take their picture that day due to previously scheduled vacations. (*Testimony of Chief Meyers and Sgt. Botelho*)

10. Sergeant Michael Botehlo (Sgt. Botehlo) scheduled a make-up day for June 16, 2010 for those who were unable to have their pictures taken during the general meeting and sent an interdepartmental email out informing those officers on June 3, 2010. (*Testimony of Chief Meyers and Sgt. Botehlo*)
11. During the week of June 6, 2010, Chief Meyers had a conversation with Officer DeMello concerning the make-up day. Chief Meyers told Officer DeMello to be present that day to take his picture. (*Testimony of Chief Meyers and Officer DeMello*)
12. Officer DeMello did not appear at the station to have his picture taken on June 16, 2010. Chief Meyers had Sgt. Botehlo call Officer DeMello and ask him if he was coming in to have his picture taken. When Sgt. Botehlo called Officer DeMello, Officer DeMello told him he was “tied up with fish,” meaning he was working at his second job as a commercial fisherman. (*Testimony of Officer DeMello, Chief Meyers and Sgt. Botehlo*)
13. Sgt. Botehlo reported the conversation to Chief Meyers, at which point Chief Meyers told Sgt. Botehlo to call Officer DeMello back and tell him it was an order and that he would be disciplined if he disobeyed. Officer DeMello replied, stating he would not come in to take his photograph and disregarded the order. (*Officer DeMello, Chief Meyers and Sgt. Botehlo*)
14. Within thirty minutes of that telephone conversation, Officer DeMello testified that he had finished fishing and called into the station and accepted a police detail to work a road job for that day. Officer DeMello then (*Testimony of Officer DeMello and Chief Meyers*)
15. Officer DeMello testified that he believed Chief Meyers’ order was unlawful or conflicting because he had already told Chief Meyers he would not take the picture. (*Testimony of Officer DeMello*)

16. If an officer believes an order is unlawful or conflicting, they must follow a procedure outlined under the department's General Orders, which Officer DeMello did not follow. *(Exhibit 7 and testimony of Officer DeMello)*
17. On June 23, 2010, Chief Meyers served Officer DeMello with a notice of a three-day suspension without pay for "Failure to Obey the Lawful Order of a Superior Officer on or about June 16, 2010." *(Exhibit 1)*
18. In Chief Meyers' notice of suspension, he stated it was his belief that Officer DeMello's "failure to appear at the police station on June 16, 2010 at 9:00 a.m. as ordered by the Chief of Police constituted failure to obey a direct order of a superior officer in violation of General Order G02-02 (Chapter 2 §IV (A) of the Fairhaven Police Manual)". The notice was properly served in accordance with G.L. c.31 §41. *(Exhibit 1)*
19. The three-day suspension was in part based on Officer DeMello's personnel file which showed that:
- a. "on March 28, 1987 [he] received a one (1) day suspension for failure to appear at a meeting called by the Chief of Police"; and
 - b. "on July 9, 1989 and July 10, 1989 [he] received a two (2) day suspension for sick time abuse." *(Exhibit 1)*
20. The suspension was served from Thursday, June 24, 2010 through Saturday, June 26, 2010. *(Exhibit 1)*
21. Chief Meyers notified the Fairhaven Board of Selectmen of the suspension by letter, dated June 23, 2010. *(Exhibit 2)*

22. On June 24, 2010, Officer DeMello filed a timely request for a suspension review hearing with the Board of Selectmen pursuant to G.L. ch. 31, §41. The hearing was scheduled for July 12, 2010 at 7:10 p.m. (*Exhibit 3 and 4*)
23. After the hearing, the Selectmen voted unanimously to uphold the Chief's suspension. Thereafter, Officer DeMello filed a timely appeal to the Commission. (*Exhibit 5 and 6*)
24. After hearing the case, this Commissioner suggested that the parties consider a settlement on the matter based on representations that Officer DeMello intended to retire in a few months.
25. The parties reported to have reached an agreement and the Commission dismissed the case, which was to be effective at a future date after Officer DeMello would have retired. (*Order of Dismissal Letter*)
26. Due to miscommunication, Officer DeMello believed that the terms of the settlement expunged his suspension while Fairhaven did not believe that was part of the settlement. Officer DeMello then "rescinded" the settlement and requested that the Commission to vacate the dismissal order and issue a decision. (*Brief for Appellant's motion to revoke order of dismissal*)
27. Fairhaven opposed the dismissal order stating the settlement was final and Officer DeMello should adhere to the terms of the settlement. (*Brief for Respondent's opposition to Appellant's Motion to Revoke order of Dismissal*)
28. The Commission's dismissal order was vacated without prejudice.

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, § 43, a permanent civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, § 41, may appeal to the Commission. The duty of the Civil Service 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 Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003).

An action is considered “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighted 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 (1971); Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304, rev. den., 426 Mass. 1102 (1997); Selectman of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). 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 the “merit principle” which governs 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.

The appointing authority’s burden of proof 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); Selectman of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1998); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dept of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing).

In performing its function, “the commission does not view a snapshot of what was before the appointing authority...the commission hears evidence and finds facts anew...[after] ‘a

hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer'...For the commission, the question is...‘whether, on the facts found by the commission, 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.’”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003) (affirming Commission decision rejecting evidence of appellant’s failed polygraph test and domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found insufficient to hold appointing authority’s justification unreasonable); City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1007) (commission arbitrarily discounted undisputed evidence of appellant’s perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer). See generally Villaire v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same).

“Likewise, 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).

Motion to Vacate Dismissal Order

Before giving the analysis of this case, the issue of the vacated dismissal order must be addressed. The Commission may, but is not required to, vacate a prior dismissal order at its discretion. Ung v. Lowell Police Dep’t, 22 MCSR 471, 473 (2009); see Adams v. Billerica Police Dep’t, 10 MCSR 56 (1997) (Denying motion to reopen, applying prior Commission Rule 4.3 (o)). Fairhaven claims the settlement was final and therefore Officer DeMello should adhere to the agreement. However, since the parties did not agree to the same terms, they never had an agreement because there was never a “meeting of the minds.” Consequently, the Commission need not consider the terms of the disputed settlement and will decide the appeal solely on the merits.

Justification for Discipline

Applying the above principles to the facts of this case, I find that Fairhaven has met its burden of proving reasonable justification for administering a three-day suspension to Officer DeMello for disregarding an order to appear at the police station for a photograph. Furthermore, I find Officer DeMello’s suspension reasonable considering his failure to obey Chief Meyers’ order. Although Officer DeMello’s personnel file contains two other disciplinary actions, the

Commission will not weigh those two previous actions in this decision and finds Officer DeMello's action in the present case sufficient to uphold the suspension.

Officer DeMello never gave a justified reason for refusing to take his photograph for the department collage. At the general meeting, which was the first scheduled day for photographs, Officer DeMello was late and came without his Class A uniform as directed by the interdepartmental email. When Chief Meyers approached Officer DeMello to ask him why he was not prepared to take a picture, he responded that he would not submit to taking a photograph and did not elaborate any further. Although Chief Meyers had advised Officer DeMello to speak to him if he did have any issues with the photographs, Officer DeMello never tried to discuss with Chief Meyers any concerns he may have had.

Officer DeMello testified that since he had already told Chief Meyers he would not submit to the photographs, the matter was resolved. However, it is significant that he never explained his reason for not submitting to the photograph. Had he given Chief Meyers a reason for not taking the picture, he may have been excused or Chief Meyers may have tried to alleviate the situation as he did for Officer Joseph. Also, it is less likely that Officer DeMello did believe the matter was resolved since Chief Meyers approached him before the make-up day to ask him if he would be present. Furthermore, on the make-up day, Officer DeMello's excuse changed. Although he testified that he reiterated the same excuse to Sgt. Botelho, I find it more credible that he told Sgt. Botelho he was fishing that morning because there would have been no need for Officer DeMello to bring up the fact that he was fishing unless that was his reason for not being able to have his photograph taken. When Sgt. Botelho questioned Officer DeMello on the make-up day whether he would be present at the station, Officer DeMello said he would not be present because he was preoccupied at his second job as a commercial fisherman. Within a half hour

after this conversation, Officer DeMello accepted a police detail job. This shows that he was fully capable of arranging to come into the police station that morning even if he planned to work at his second job that day.

Additionally, Chief Meyers ordered Officer DeMello to appear for a photograph. Although Officer DeMello argues an order was not given to him on June 6, 2010 when Chief Meyers asked him if he was aware of the make-up day, nothing in the FPD regulations requires a superior to specifically use the word “order” to issue a command when the obligation to comply is otherwise clear. And even if Officer DeMello reasonably believed Chief Meyers did not give him an order on June 6, 2010, an order was made the morning of the make-up day, of which Officer DeMello was made fully aware of by Sgt. Botelho. It is unclear what Officer DeMello’s response was in regard to the order, but it is apparent that he acknowledged the order and the warning of disciplinary action and chose to disregard Chief Meyers’ command.

Officer DeMello stated at his hearing that he did not believe the photographs were mandatory and that he believed it was an unlawful or conflicting order, yet this argument is unpersuasive. Furthermore, there are guidelines in the FPD Regulations which direct officers on actions they should undertake if they do receive an unlawful or conflicting order. Chapter 2, Section IV, subparagraph B and C of the Department Manual state respectively,

“Employee shall respectfully request clarification of any order which reasonably appears unlawful and then request to confer with the person issuing that order if it is not retracted. It is the duty of the person receiving an unlawful order to bring the matter to the attention of the Chief of Police as soon as possible.” (Exhibit 7).

“Employees who receive a lawful order which is in conflict with a previously issued lawful order shall inform the superior issuing the latter order of the conflict and request

clarification. If the conflicting order is not withdrawn, the employee shall follow the more recent instruction then notify the superior issuing the first order as soon as practical.” (Exhibit 7).

Office DeMello had access to the regulations and failed to take such steps. From these facts it can be inferred Officer DeMello did not believe the order to be unlawful or conflicting.

There is also the issue of Officer DeMello’s concern over the photographs being disseminated to third parties. Though this may have been a valid excuse; Officer DeMello never discussed this concern with Chief Meyers or any other specific issues he had about the photographs even though Chief Meyers welcomed him to communicate any of his concerns. Also, this matter was settled after Officer Joseph brought the matter to Chief Meyers’ attention, which Officer DeMello would have been informed of had he spoken to Chief Meyers. Moreover, Officer DeMello had already decided he would not take his picture before Officer Joseph expressed his concern over the purpose of the photographs since he showed up without his Class A uniform the morning of the general meeting.

It is inferred from Officer DeMello’s testimony that there was an issue concerning whether the officers would receive compensation for appearing at the station for the make-up date. This does not justify Officer DeMello’s refusal because had he asked, he would have been notified that officers could be compensated for the make-up day. If Officer DeMello believed he would have been unpaid for the rescheduled date he should have asked for clarification. Moreover, the collective bargaining manual, which Officer DeMello admitted he keeps in his police bag, articulates when a public employee can receive compensation.

Clearly there is an underlying reason why Officer DeMello was adamant about refusing to have his picture taken as none of his excuses were consistent nor were they justifiable. When

this commissioner questioned Officer DeMello at the hearing, he expressed his opinion that senior officers were not respected in the department and that he no longer felt part of the department, which was his main reason for not agreeing to take his picture. It seems that his true reason for not following the order was to challenge a new chief and this type of behavior cannot be tolerated in a paramilitary organization such as a police department. Obedience is necessary in order to run a paramilitary organization. For such organizations to function, orders must be followed and disciplinary actions are just when a member disobeys a superior. Smith v. Town of Falmouth, 20 MCSR 544, 545 (2007). In his testimony, Chief Meyers stated that Officer DeMello's behavior did affect the morale of the department which is foreseeable when an order is disregarded. Officer DeMello's suspension was in part an example to the rest of the department which was necessary in order to preserve the stability of the police department.

The Commission takes note that Officer DeMello's behavior in no way reflects the service he provided to the FPD in his 25 years as a police officer. Fairhaven, however, has the right to hold its employees accountable for any missteps that are related to their work.

For the reasons stated above, the appeal of the Appellant, Walter DeMello, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein, Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman [ABSENT], Marquis, McDowell, and Stein, Commissioners) on July 12, 2012.
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 to:

Diane S. Byrnes, Esq. (Appellant)

Michael J. Kennefick, Esq. (Respondent)