

COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION

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

**THOMAS C. DUFFY,**  
*Appellant*

v.

**CITY OF WORCESTER,**  
*Respondent*

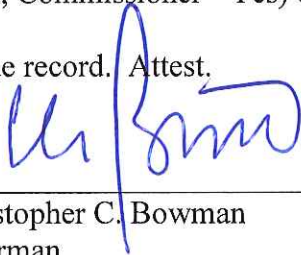
**Case No.: D-12-198**

DECISION

The Civil Service Commission (Commission) voted at an executive session on April 18, 2013 to acknowledge receipt of the Recommended Decision of the Administrative Law Magistrate dated March 1, 2013. After careful review and consideration, the Commission voted to adopt the findings of fact and the Recommended Decision of the Magistrate therein. A copy of the Magistrate's Recommended Decision is enclosed herewith. The Appellant's appeal is hereby **allowed**, his one-day suspension is vacated and he shall be reimbursed for any pay and benefits related to this one-day suspension.

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Ittleman, Commissioner - Yes; Marquis, Commissioner - No; McDowell, Commissioner - Yes; and Stein, Commissioner - Yes) on April 18, 2013.

A true record. Attest.



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Christopher C. Bowman  
Chairman

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:

Peter J. Duffy, Esq. (for Appellant)  
William R. Bagley, Jr., Esq. (for Respondent)  
Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

ONE CONGRESS STREET, 11<sup>TH</sup> FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE  
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-626-7200  
FAX: 617-626-7220

March 1, 2013

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108


Re: *Thomas C. Duffy v. City of Worcester*  
*G1-12-198; DALA Docket No. CS-12-601*

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

If either party files written objections to the recommended decision, the opposing party may file a response to the objections within 20 days of receipt of a copy of the objections

Sincerely,

  
Richard C. Heidlage, Esq.  
Chief Administrative Magistrate

Enclosure

cc: Peter J. Duffy, Esq.  
William R. Bagley, Jr., Esq.

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THE COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

**Division of Administrative Law Appeals**

**Thomas C. Duffy,**  
Appellant

v.

Docket No. D-12-198  
DALA Docket No. CS-12-601  
DATED: March 1, 2013

**Boston Police Department,**  
Respondent

**Appearance for Appellant:**

Peter J. Duffy, Esquire  
36 Elm Street, No. 1  
Worcester, MA 01609

**Appearance for Respondent:**

William R. Bagley, Jr., Esquire  
Assistant City Solicitor  
City of Worcester  
455 Main Street, Room 109  
Worcester, MA 01608

**Administrative Magistrate:**

Judithann Burke

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CIVIL SERVICE COMMISSION

**CASE SUMMARY**

The City of Worcester did not have just cause to impose a one-day suspension upon Appellant for a violation of Paragraph 1516.1 of the Rules and Regulations of the Worcester Police Department (WPD), to wit: Neglect of Duty, being absent from assigned duty without leave. In fact, his time off on December 24, 2011 was first counted as "sick leave", then changed to a "wellness day", both considered authorized leave in the WPD.

**RECOMMENDED DECISION**

Pursuant to G.L. c. 31, §§ 41-45, the Appellant, Thomas C. Duffy is appealing from the June 14, 2012 decision of the Appointing Authority, City of Worcester suspending him for a period of one (1) day without pay from his position as police officer in the City of Worcester. The appeal was timely filed. A Section 43 hearing was held on October 31, 2012 in Room 310B at 455 Main Street, Worcester, MA, the Worcester City Hall.

At the hearing, seventeen (17) exhibits were marked. The parties also proffered thirty-six (36) Stipulations of Fact. The Appointing Authority presented the testimony of: Deputy Chief Edward McGinn of the Worcester Police Department (WPD); WPD Sergeant Ronald LaPointe; and, WPD Lieutenant James Grady. The Appellant presented the testimony of retired WPD Lieutenant William Fogerty. The Appellant testified in his own behalf. Both parties stated their arguments for the record. The proceedings were digitally recorded.

**FINDINGS OF FACT**

Based upon the Stipulations of Facts, and the testimonial and documentary evidence submitted at the hearing, I hereby render the following findings of fact:

1. The Appellant, Thomas C. Duffy has been a police officer with the WPD for twenty-five (25) years. His rank is patrolman. (Appellant Testimony and Stipulation No. 1.)
2. The WPD has several divisions, including the Operations and Service Divisions, as well as the Vice Squad, Detectives, Traffic, Impact and Licensing Divisions. The

WPD's Governing Work Schedules Policy and Procedure (Policy 900) provides that "no more than 10% of personnel can be on vacation at the same time. The use of the 10% is a guide and needs to be balanced against the staffing needs of the department." (Time Off Restriction) The respective Deputy Chiefs monitor the staffing levels and sick time use within the maximum allowable 10%. (McGinn Testimony and Stipulation No. 5.)

3. An officer can earn two (2) days off per year, with pay, for meeting a physical fitness requirement. The Time Off Restriction also applies to the scheduling of these so called "wellness days." The Time Off Restriction applies to each shift in each Division. For example, if there are twenty (20) officers regularly assigned to a particular shift in a Division, the general rule is that just two (2) can take furlough or wellness days on any one shift. (McGinn Testimony and Stipulation No. 6.)

4. Annually, on January 1, an officer is credited with his allotment of furlough and wellness days for the year. Under Policy 900 and past practice, an officer is required to schedule time off for the entire year prior to April 1 of that year. An officer can schedule two (2) weeks during the summer vacation period and a week in each of the spring, fall and winter vacation periods. Scheduling is done through the circulation of a vacation selection sheet. As part of the annual scheduling procedure, if there are more requests for time off than slots available under the Time Off Restriction, the officer with more seniority in the WPD gets preference. (McGinn Testimony and Stipulation No. 7.)

5. An officer can schedule individual days off through his Division supervisors. For individual days, it is first come, first served. But, when there are more simultaneous requests for an individual day than there are time off slots available, seniority prevails.

Each shift in each Division keeps a handwritten record of approved time off for that shift in a red, hardcover journal called the "Red Book." The Red Book is controlled by the shift supervisors (generally sergeants and lieutenants.) The Red Book is the most up-to-date record of approved time off. (McGinn, Appellant and Fogerty Testimony and Stipulation No. 8.)

6. A patrol officer wanting to schedule time off asks one of his shift supervisors. The supervisor approves the day as long as the Red Book indicates that allowing the officer to take the time off would not violate the Time Off Restriction, i.e. there is an open slot for time on the shift requested. (McGinn Testimony and Stipulation No. 9.)

7. Any furlough or wellness days actually taken by an officer are recorded into the WPD's computer system. (McGinn Testimony and Stipulation No. 10.)

8. It was the Appellant's practice to keep with him a pocket calendar that included his work days and days off, including days for which he was scheduled to use a furlough or wellness day. This is a common practice among WPD officers. (Appellant Testimony and Stipulation No. 11.)

9. On January 1, 2011, the Appellant was assigned to the Operations Division (OD). Based upon his length of service with the WPD, he was credited with twenty-eight (28) furlough days for 2011. He had earned and was also credited with two (2) wellness days. (Appellant Testimony, Exhibit 3 and Stipulation No. 12.)

10. While the Appellant was in the OD, at various times, he requested and was approved to take the following time off as indicated by his name being entered on the following days in the OD Red Book:

- January 4, 5, 6, 14, 15, 25, 26, 27 (8 days)
- February 24, 25, 26 (3 days)
- April 8, 9, 19 (3 days)
- May 7, 20, 21 (3 days)
- June 2, 9, 18, 24, 25 (5 days)
- July 1, 2 (2 days)
- August 7, 8, 11, 12, 13, 14, 17, 18, 19, 20 (10 days)
- November 23 (1 day)
- December 24, 27, 28, 29, 30 (5 days)

(Appellant Testimony, Exhibits 9, 10 and 14 and Stipulation No. 13.)

11. Some of the days that the Appellant scheduled were apparently changed so that he did not actually end up taking every day off that he had initially scheduled. Through August 20, 2011, a WPD Time Analysis Report shows that the Petitioner actually took the following days off:

- January 14, 15, 25, 26, 27 (5 days)
- February 25 (1 day)
- April 8, 9, 19 (3 days)
- May 20, 21 (2 days)
- June 2, 18, 25 (3 days)
- July 1, 2 (2 days)
- August 7, 8, 11, 12, 13, 14, 17, 18, 19, 20 (10 days)

(Appellant Testimony and Stipulation No. 14.)

12. The Appellant was arrested on August 10, 2011, and, as a result, he was placed on restricted duty, without a firearm, and transferred to the 11:00 p.m.-7 a.m. shift in the Service Division (SD), where he was to be assigned to the cell room. (Stipulation No. 15.)

13. The Appellant received the Chief's notice of his reassignment while he was out on furlough time he had previously scheduled in the OD. Lieutenant James Grady, a

supervisor on the Appellant's new shift in the SD, contacted the OD to determine the latter's status. Grady was told that the Appellant was out on furlough time that he had scheduled in the OD. (Grady Testimony and Stipulation No. 16.)

14. The Appellant reported to the SD after August 20, 2011. At that time, he had used twenty-six (26) days off. He had four (4) days remaining in 2011. There are usually about fourteen (14) officers assigned to the 11 p.m. to 7 a.m. shift in the SD. Under the Time Off Restriction, two officers at one time on one shift can take a furlough or wellness day. (The WPD applies the 10% rule, but "rounds up" to 2.) (Stipulation Nos. 14 & 17.)

15. The Appellant's previously requested furlough days from the OD were counted as furlough days in the SD. These days were: August 12, 13, 14, 17, 18, 19, and 20. (Appellant Testimony.)

16. There were more officers regularly scheduled on the 11 p.m.-7 a.m. shift in the OD than on the same shift in the SD. (Appellant Testimony and Stipulation No. 12.)

17. After he began active service with the SD (after August 20, 2011), the Appellant asked for and received approval from Sergeant Ronald LaPointe to take one (1) furlough day on September 6 and one (1) on October 10. In each instance, the Petitioner called or spoke with Sgt. LaPointe and requested the time. Sgt. LaPointe approved the Appellant's request by entering his name in the SD Red Book with his own initials next to it. (Exhibits 4 and 5 and Stipulation No. 18.)

18. It was the Appellant's understanding that, after his involuntary transfer, all of his previously scheduled time off would be carried over from the OD to the SD. His



expectation was that the shift supervisors of the two units would communicate and the time off would be transferred to the SD without further action on his part. This had been the practice during his periodic transfers between divisions during his twenty-five (25) year police career. (Appellant Testimony and Fogarty Testimony.)

19. While in the OD, the Appellant had been approved to take November 23, 2011 as a day off. He did not report for work. Sgt. LaPointe telephoned him at home and asked why he was not at work. The Appellant responded that he was on a furlough day approved when he was in the OD.

Sgt. LaPointe did not order the Appellant to come into the station. Instead, his name was entered into the SD Red Book as being on furlough, noting that it was a day scheduled in the OD. (Appellant and LaPointe Testimony, Exhibit 6 and Stipulation No. 19.)

20. The furlough day taken by the Appellant on November 23, 2011 was the twenty-ninth day he had taken in 2011. (Stipulation No. 20.)

21. On December 24, 2011, Lt. Grady was the shift supervisor in the SD. He noticed that the Appellant had not reported to work. At approximately 11:20 p.m., he telephoned the Appellant. When the Appellant answered, the lieutenant asked what he was doing. The Appellant answered that he was having a glass of wine and enjoying his family. Lt. Grady told him that he was supposed to be at work. The Petitioner responded that he was on a furlough day granted by the OD. (Grady and Appellant Testimony and Stipulation No. 21.)

22. Lt. Grady did not order the Appellant into work on December 24, 2011. Instead, he recorded the Appellant's absence as a sick day; as, the SD had already allowed the maximum amount of officers to use furlough days for Christmas Eve. (Grady and Appellant Testimony and Stipulation Nos. 22 and 33.)

23. When the Appellant next reported to duty and saw Lt. Grady, he asked why he was put down as "sick" on Christmas Eve. Lt. Grady informed the Appellant that he had not been approved for a furlough day in the SD, he did not have a furlough day to use, and there was no open slot for a furlough day on the Christmas Eve shift. (Grady and Appellant Testimony and Stipulation No. 23.)

24. In the WPD, the taking of a sick day before a holiday may call into question whether the officer should be paid for the holiday. The Appellant did not lose the holiday as a result of being recorded as out sick for his Christmas Eve shift. (Stipulation No. 24.)

25. After learning that his absence on Christmas Eve had been recorded as a sick day, the Appellant protested to the Patrol Officers' Union that he had been denied the right to take a wellness day on Christmas Eve. The Union grieved the matter. Several weeks later, the WPD changed the record and charged the Appellant with a wellness day, rather than a sick day for Christmas Eve. (Appellant Testimony and Stipulation Nos. 25 and 34-36.)

26. In a letter dated February 10, 2012, Police Chief Gary Gemme suspended the Appellant for two (2) days (February 13 and 14) for insubordination and neglect of duty. The Appellant appealed the Chief's decision to the City Manager. (Exhibit 2 and Stipulation No. 2.)

27. On June 14, 2012, the City reduced the suspension to one (1) shift for Neglect of Duty.

28. The Appellant filed a timely appeal.

29. Paragraph 1516.1 of the WPD Rules and Regulations defines Neglect of Duty, in operative part, as follows: "Being absent from assigned duty *without leave*..." (Exhibit 1 and Stipulation No. 26.)

30. Sick time is considered a form of leave by the City of Worcester. (Exhibit 15 and Stipulation No. 27.)

#### **CONCLUSION AND RECOMMENDED DECISION**

After a careful review of all of the testimony and documents in this case, I have concluded that the Appointing Authority did not have just cause to impose the one-day suspension on the Appellant. The Appointing Authority has not proven by a preponderance of the evidence that the Appellant violated Paragraph 1516.1 of the WPD Rules and Regulations on December 24, 2011.

Rule 1516.1 is labeled "Neglect of Duty" and defines same as being absent from assigned duty without leave. In actuality, after Lt. Grady spoke to the Appellant on December 24, 2011, he put the latter down as "sick." Sick leave is a form of leave in the WPD. Several weeks later, after the Union's filing of the grievance, December 24 was recorded as a "wellness" day. This is also an authorized leave. Under either scenario, sick day or wellness day, the Appellant was granted leave for December 24. Ergo, he was not absent from assigned duty on December 24 **without leave**.

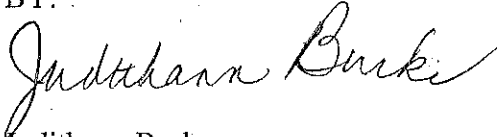
Next, the testimony of all parties was found to be credible with regard to the individual beliefs of each concerning the use of single wellness and furlough days in the various divisions as well as the use of the Red Book. In this case, the Deputy Chief and the superior officers in the SD all believe that it was incumbent upon the Appellant to re-request his desired days off in the SD after the transfer from the OD. At the same time, the Appellant and Lt. Fogarty share the legitimate belief that past practice dictated that the Red Book entries were shared among shift supervisors after transfers and the Appellant did not need to take the initiative.

The fissure in this case appears to be the lack of communication among the parties. Deputy Chief McGinn, Sgt. LaPointe and Lt. Grady all acknowledged that there is no written rule or regulation compelling an officer who is involuntarily transferred to approach the supervisor in his new division and re-request his desired days off. As such, the Appellant's belief that he did not need to do anything further regarding his time off appears reasonable. He had already used furlough days in August, September and October as a member of the SD. On November 23, he was phoned at home, but not ordered into work. He was given a furlough day for that time. It is unclear exactly what additional message he may have received concerning future furlough days in the SD in his November 23 conversation with Sgt. LaPointe. As such, there is no evidence that he should have known he was required to report to work on December 24.

The best remedy in this and similar situations is a clear set of written directives concerning the transfer of furlough and wellness time among divisions in the WPD.

I recommend that the Civil Service Commission reverse the decision of the City of Worcester imposing the one (1) day suspension and reinstate the Appellant without loss of compensation or other rights.

Division of Administrative Law Appeals,  
BY:



Judithann Burke  
Administrative Magistrate

DATED: March 1, 2013