COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

GEORGE P. FOLEY
Appellant
v. D-07-148 & D-07-235

BOSTON POLICE DEPARTMENT
Respondent

Appellant's Attorney: Edward J. McNelley
Barnicle, McNelley & Nugent
101 Tremont Street
Suite 700
Boston, MA 02108

Respondent's Attorney: David Jellenik
Office of the Legal Advisor
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Commissioner: John E. Taylor

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 41 thru 43 the Appellant, George P. Foley (hereafter "Appellant" or "Foley"), filed appeals with the Commission on July 3, 2006 and April 11, 2007 claiming that the Appointing Authority, Boston Police Department (hereafter "Department") did not have just cause to suspend him for violating Department Rule 102 § 10c (Reporting for Duty) ("the 90 hour rule") and for not holding a hearing within five days after receiving a written request from Appellant to determine if there was just cause for his suspension. A hearing on both appeals was held on November 27, 2007 at the offices of the Commission. As no written notice was received from either

party, the hearing was declared private. The witnesses were sequestered. Three audiotapes were made of the proceedings.

FINDINGS OF FACT:

At the hearing, nineteen joint exhibits were entered into evidence for the appeal regarding Appellant's three day suspension and twenty-one exhibits were entered into evidence for the appeal regarding Appellant's one day suspension. Based on those submissions and the testimony of Captain Mark Hayes, Boston Police Department, Lieutenant Robert Harrington, Boston Police Department and Attorney Tara Chisholm, Boston Police Department,

I make the following findings of fact:

1. The Appellant is a tenured civil service employee of the Department in the position of Detective. He had been employed by the Department for approximately 32 years at the time of the discipline that is the subject of this appeal. Appellant's prior discipline includes an oral reprimand on November 28, 2005 for violation of the Department's ninety (90) hour rule. (3 day Exhibit 2 and testimony of Captain Mark Hayes)
2. The Department through its rules and regulations: Rule 102, Section 10 (c) states: No officer shall work more than ninety (90) hours in one week, from 8:00 a.m. Saturday until 8:00 a.m. the following Saturday. These hours shall include a regularly scheduled tour of duty, court time, overtime and paid details…..An officer may only be exempt from this policy with the expressed written approval of his/her Commanding Officer…Exceptions to this policy

may be made only in the interest of public safety, specifically: Court Appearances, Mandatory Overtime or any Public Necessity as determined by the Bureau Chief. (3 day Exhibit 19)

3. Lieutenant Robert Harrington, the Commander of the Special Investigations Unit, testified that prior to this assignment, he was a Superintendent in charge of the Bureau of Professional Standards and Development, which contains the Internal Affairs Division ("IAD"). Harrington testified that IAD investigates violations of the Department's Rules and Procedures, including Rule 102, Subsection 10C, governing the maximum number of hours an officer may work in a weekly period.
4. Harrington testified that 90 hour rule prohibits officers from working more than 90 hours during any one week period. He testified that there are exceptions to the 90 rule for reasonable and necessary police related activities and that, in some cases, it is not a violation of the 90 hour rule if an officer works overtime without prior approval if he is in the middle of a situation requiring he continue working. He also stated that although there are times when investigatory overtime is mandatory and thus acceptable as a rational for working more than 90 hours in a week, there is no blanket exception for investigative overtime.
5. Harrington acknowledged that there has been some confusion regarding the 90 hour rule. On November 6, 2006, the Police Commissioner issued a Special Order (Subject: Amendment to Rule 102, Section 10) that stated in relevant part: Exceptions to this policy may be made only in the interest of public safety,

specifically: Court Appearances, Mandatory Overtime or any Public Necessity as determined by the Bureau Chief. (1 day Exhibit 18)

6. Harrington subsequently drafted the Department's guidelines for compliance with the 90 hour rule concerning permissible exceptions of the rule. The Guidelines acknowledge: "Recent efforts to ensure compliance with the provision of Rule 102 §10 (C) have resulted in some confusion." They list examples of hours that are calculated towards the 90 hours, including overtime, including court time. They also state, with regard to investigative overtime, that each officer is expected to complete an assigned call or investigative task that he may be presently involved in, even if that time would contribute to hours putting the officer beyond the 90 hours. (3 day Exhibit 14 and testimony of Harrington)
7. Harrington testified that it is an officer's responsibility to keep track of the number of hours they have worked in any given week.
8. Harrington was a credible witness and extremely knowledgeable with regard to the 90 hour rule, its history and its interpretation.
9. Mark Hayes, Captain of District D-14, testified that he was responsible for enforcing the 90 hour rule in his station and that Appellant was assigned to District D-14. On or about November 2, 2006, Hayes received a notice from Harrington that Appellant had violated the 90 hour rule between September 9 and 15, 2006. (1 day Exhibit 6 and testimony of Hayes)
10. On November 15, 2006, Appellant wrote to Hayes explaining that his working a total of 99 hours during the week of September 9 to September 15, 2006 was

due to court appearances, regularly scheduled/performed tour of duty, additional investigative and court overtime as Appellant worked eleven hours of court time on September 14, 2006 and 7.75 hours of ordered overtime on September 15, 2006. He stated that the alleged violation of the ninety hour rule was caused by both the extended court appearance and the ordered overtime.

(1 day, Exhibit 8)

11. Hayes testified that while Court time is mandatory overtime, and therefore an exception to the 90 hour rule, the next overtime that Appellant worked was not mandatory and resulted in Appellant's violation of the rule.
12. On December 1, 2006, Hayes suspended Appellant for one day without pay for violation Rule 102, to be served on December 17, 2006. The Notice of Suspension stated that Appellant worked 99 hours. (1 day Exhibit 3-5)
13. On December 2, 2006, Appellant requested that a hearing be held by the Department to show just cause for the one day suspension, putting his request in writing to Hayes within 48 hours of his suspension in compliance with G.L. c. 31 §41 and the rules and regulations of the Department. (1 day Exhibit 9)
14. Pursuant to G.L. c. 31 § 41 and the Rules and Regulations of the Department, if a request for a hearing before the appointing authority on the question of whether there was just cause for the suspension is filed by the person receiving the suspension within 48 hours of the receipt of the notice of suspension, the suspended person shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. (3 day Exhibits 10, 13)

15. The Department through its rules and regulations: Rule 108, § 7 read in pertinent part: that "At any time the employee may waive his rights to a hearing and sign a written statement that he waived his right to a hearing under MG, C 31, s. 41…" (3 day Exhibit 11)
16. Appellant did not file a written waiver of his right to a hearing but was not given a hearing by the appointing authority within the five days as required.
17. Hayes testified that Appellant went on vacation to Florida immediately after the Notice of Suspension until December 13, 2006 and in essence waived his right to a hearing within the five days of the notice of suspension.
18. A two page fax was sent from Hayes to the Legal Advisor's Office on or about December 4, 2006 with a note by Hayes stating: "Hearing Date after 12/13/06. Det. is on vacation." At this time, Margaret Buckley, formally an attorney in the Legal Advisor's Office, was assigned to Appellant's case. Although Hayes testified that he spoke with Buckley about Appellant's waiving his right to a hearing by leaving the state, there was no evidence submitted that Buckley spoke with Appellant regarding the case. (1 day Exhibit. 10 and testimony of Hayes)
19. On or about January 21, 2007, Appellant received a notice from the Department that his one day suspension had been sustained. (1 day Exhibit 20)
20. On December 4, 2006, Harrington wrote a memorandum to Hayes stating it appeared that Appellant was in violation of the 90 hour rule for the week of September 23 through 29, 2006 and requested Appellant submits a report. (3 day Exhibit 3)

21. On September 29, 2006 Detective Foley worked four hours of investigative overtime. These four hours of investigative overtime put Appellant over the ninety hours by fifteen minutes. (3 day Exhibit 9)
22. On January 4, 2007, Appellant wrote Hayes that the apparent violation was due to the four hour investigative overtime he worked on September 29, 2006 and that he believed Harrington had ruled Investigative Overtime cannot be the source for a Rule 102, §10 violation. (3 day Exhibit 6)
23. On or about February 17, 2007, Hayes filed a complaint against Appellant, writing that he violated the 90 hour rule when he worked 90.25 hours during the week of September 23 to 29, 2006. Hayes wrote that this was Appellant's third offense which mandated he be suspended for three days. Hayes testified that Appellant received the three day suspension because he worked investigatory overtime but did not have prior permission from a supervisor to do so. (3 day Exhibit 2)
24. It was disputed, and unclear, whether the overtime was approved by his supervisor Sergeant Detective John McDonough. (3 day Exhibit 9)
25. Sergeant Detective McDonough did not testify at the Civil Service Commission hearing.
26. On February 20, 2007, Appellant was suspended for three days without pay on March 4, 5 and 6, 2007 by Hayes. (3 day Exhibit 7)
27. On February 20, 2007, the Appellant requested a hearing in writing to determine whether there was just cause for the pending three day suspension. (3 day Exhibit 8)

28. Hayes testified that he sent Appellant's hearing request to the Legal Advisor's office.

29. Attorney Tara Chisholm, an attorney in Department's Legal Advisor office, testified that she spoke with Appellant on February 21, 2007. She stated that pursuant to their discussion, Appellant verbally waived his right to a hearing within five days. In his appeal, Appellant states that he waived his right only on the guarantee that the Department would insure that he would be given a public hearing on the matter and that he received this guarantee.
(3 day Exhibit 18 and testimony of Chisholm)

30. The Department's Rule 109, § 65, Review from Imposition of Immediate Suspension or Punishment Duty (regarding Hearings) similarly reads that, in pertinent part that when an employee is suspended for five days or less, "The employee may then, if so wished and within forty-eight hours of the receipt of the notice, request a hearing to determine whether there is just cause for such an action. If such a request is made then a hearing must be held within five days of the receipt of the request by the Police Commissioner." (3 day Exhibit 13)

31. The Department's rules and regulations: Rule 108, § 8 and Rule 109, § 31, reads in pertinent part that an employee may waive his/her right to a hearing before the appointing authority by signing a written statement that he/she waive his/her right to a hearing under G.L. c. 31, s 41…In such a case, the subordinate waives that right by signing a statement to that effect on the copies of the Notice of Suspension." (3 day Exhibits 12 and 13)

32. The Department through its rules and regulations requires that a hearing be waived in writing and makes no other provisions (other than in writing) for a waiver of a hearing in its rules and regulations. (3 day Exhibits 11, 12, 13)
33. A letter dated April 30, 2007 was sent to Appellant from the Legal Advisor's office stating that a hearing was scheduled for May 21, 2007 for the one day suspension. Appellant's attorney contacted the Department and informed it that the notice attached to the hearing notice was inaccurate and the hearing was cancelled by the Department. (1 day Exhibit 20)
34. On April 11, 2007, Appellant filed his appeal with the Commission. (D-07-148) regarding the three day suspension.
35. On July 2, 2007, Appellant filed his appeal with the Commission (D-07-235) regarding the one day suspension.
36. A hearing was held with regard to both suspensions on November 14, 2007.

CONCLUSION:

Section 42 Appeal

Under Section 41 of the Civil Service Law, a tenured civil service employee may be suspended for a period of more than five days only after a prior hearing by the appointing authority; but an employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. G.L. c.31, §41. In the latter case, upon request, the employee "shall" be given a hearing by the appointing authority within five days after receipt of the request and a decision rendered within seven days after the hearing. Nothing in Section 41 precludes the appointing authority from deferring the employee's service of a suspension of five days or less pending such a hearing. Id. See

Stanton v. Boston Police Dep't. 8 MCSR 33 (1995) (five-day suspension served six week prior to the Appointing Authority hearing)

Section 42 provides a remedy for procedural violations of Section 41:

> "An employee who alleges that an appointing authority has failed to follow the requirements of section forty-one . . . may file a complaint with the commission. . . . If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to this employment immediately without loss of compensation or other rights.
>
> "A person who files a complaint under this section may at the same time request a hearing [before the commission] as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of the appointing authority made pursuant to all the requirements of section forty-one. . . ."

G.L. c. 31, 42. [1]

Absent refusing to hold any hearing whatsoever or other flagrant violation of Section 41, most appellants generally face a significant burden to establish that they have suffered harm as a result of any procedural misstep, which the statute specifically requires to justify a Section 42 appeal. See, e.g., Rizzo v. Lexington, 21 MCSR 70 (2008) (discharge; §42 appeal denied); Coronella v. Mashpee, 19 MSCR 67 (2006) (discharge; §42 appeal denied); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (discharge; §42 appeal denied); Fopiano v. Scituate, 12 MCSR 154 (1999) discharge; §42 appeal denied); Dodge v. Athol Police Dep't, 11 MSCR 207 (1998) (discharge; §42 appeal denied); Carey v. Nahant, 6 MCSR 149 (1993) (discharge; §42 appeal denied). In the case of a suspension of five days or less, when a prior Appointing Authority hearing is not required, the Commission is hard-pressed to envision how any appellant could establish the necessary prejudice that would justify a Section 42 appeal in such a

[1] Section 43 authorized appeals by "persons aggrieved by a decision of an appointing authority made pursuant to section forty-one. . ." G.L. c.31, §43.

situation. See Burke v. Quincy, 19 MCSR 86 (five day suspension; §42 appeal denied); Meaney v. Woburn, 12 MCSR 253 (1999) (two day suspension; §42 appeal denied); Stanton v. Boston Police Dep't, 8 MCSR 33 (1995) (five day suspension; §42 appeal denied)

The Commission believes that the overall intent of the Civil Service Law is best accomplished by encouraging public employees and appointing authorities to make an honest, good faith use of the hearing at the Appointing Authority level as a means of expeditiously resolving disputes whenever possible, including those cases involving a suspension of five days or less. Even when the case is not resolved at the Appointing Authority level, a hearing can be useful to the parties and to the Commission to narrow the issues and produce a more efficient appeal process at the Commission level.

Accordingly, in order to facilitate this objective, the Commission construes that a tenured employee who is suspended for five days or less, as a practical matter, is given two options: (1) Forego the Appointing Authority level hearing and take an immediate appeal from the discipline under Section 43 within 10 days of the notice of the discipline. From the Commission's perspective, this is a disfavored option, but one that any such employee is lawfully entitled to exercise. (2) Request an Appointing Authority level hearing and appeal to the Commission within 10 days after the decision of the Appointing Authority in the same manner as an appeal could be taken from the decision of a pre-disciplinary hearing. In other words, by requesting a hearing at the Appointing Authority level, the time for filing a "just cause" appeal under Section 43 is suspended until such time as the Appointing Authority issues a final decision regarding the employee's appeal,

even if the hearing and decision are made outside the statutory time frames specified in Section 41.

In this case, the Commission finds that Mr. Foley has suffered no prejudice from Boston Police Department's failure to provide him with a timely hearing. The Commission, therefore, will ***deny*** the Section 42 claim and will treat this appeal solely as a "just cause" appeal under Section 43.

Section 43 Appeal

The role 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 "justified" when 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." Id. at 304, quoting Selectmen of Wakefield *v.* Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service *v.* Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). 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." Murray *v.* Second Dist. Ct. of E. Middlesex, 389 Mass.

508, 514 (1983); School Committee of Brockton *v.* Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth *v.* Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster *v.* Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Here, Respondent, regarding case number D-07-235 (one day), did meet its burden to prove by a preponderance of the evidence that its action of suspending Appellant for one day was justified. As discussed above, although the Department's 90 hour rule prohibits officers from working more than 90 hours during any one week period, there are exceptions to the 90 hour rule for reasonable and necessary police

related activities. A Special Order issued by the Department states that, "Exceptions to this policy may be made only in the interest of public safety, specifically: Court Appearances, Mandatory Overtime or any Public Necessity as determined by the Bureau Chief." In this case, it appears that the eleven hours of court time on September 14, 2006 were mandated by the Court and should be an exception to the 90 hour rule. However, the 7.75 hours of overtime on September 15, 2006 should not be an exception to the 90 hour rule as they were not Court Appearances or Mandatory overtime. As it appears those hours put Appellant over the 90 hours limit, he should be considered in violation of the 90 hour rule. Therefore the appeal of case number D-07-2359(one day) is ***dismissed.***

. With regard to the three day suspension, the four hours of investigative overtime performed by Detective Foley on September 29, 2006 arguably falls within the interest of public safety exception of the Department's Rule 102 Section 10 (c) and the guidelines as set down by Superintendent Harrington. In that case the Appellant's total number of hours worked for the week of September 23-29, 2006 would not put him in violation of the ninety hour rule.

For the above reasons, Respondent did not demonstrate by a preponderance of the evidence that it had just cause to suspend Appellant for three days. Taking into consideration the confusion surrounding exceptions to the 90 hour rule that led to Harrington's issuance of Guidelines, the exceptions that may have applied in this matter and the fact that the 3 day suspension related to an alleged 15 minute overage incurred a week before Appellant was informed of the first violation, the Commission determines that Appellant's suspension be rescinded. The Appellant is to be made whole for his loss of pay and benefits for the three days of his suspension.

The appeal under Docket No. D-07-148(1 day) is ***denied***. The appeal under Docket No. D-07-235(3 day) is ***allowed.*** The Appellant is to be made whole for his loss of pay and benefits for the three days of his suspension.

Civil Service Commission

_____

John E. Taylor

By vote of the Civil Service Commission (Bowman, Chairman, Taylor, Stein, Henderson [yes] Marquis [no], Commissioners) on January 15, 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 to:
Edward J. McNelley
David Jellenik