

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

TIMOTHY GALVIN,
Appellant

v.

D-17-032

TOWN OF WESTFORD,
Respondent

Appearance for Appellant:

Joseph P. Kittredge, Esq.
Rafanelli & Kittredge, P.C.
1 Keefe Road
Acton, MA 01720

Appearance for Respondent:

Nicholas Anastasopoulos, Esq.
Mirick, O'Connell, DeMallie & Lougee,
LLP
1800 West Park Drive, Suite 400
Westborough, MA 01581

Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

On February 16, 2017, the Appellant, Timothy Galvin (Mr. Galvin or Appellant), pursuant to G.L. c. 31, s. 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Westford (Town or Respondent) to suspend him for five (5) days. A pre-hearing conference was held on March 13, 2017 at the Mercier Community Center in Lowell. The hearing was held on June 12, 2017 at the Mercier Community Center.¹ Witnesses were sequestered. At the Appellant's written request, the hearing was declared to be a public hearing. The hearing was digitally recorded and both parties were provided with a CD of

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

the hearing². The parties filed post-hearing briefs on July 28, 2017. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Eighteen (18) exhibits were entered into evidence.³ Based on these exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Chief Thomas McEnaney
- Officer M
- Captain Mark Chambers
- Officer H
- Deputy Chief Walter Shea

Called by the Appellant:

- Officer Timothy Galvin, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations, rules, policies, testimony that I find credible, and reasonable inferences from the evidence; a preponderance of evidence establishes the following facts:

1. The Appellant has been employed as a police officer in the Town of Westford Police Department (WPD) for six (6) years when he filed this appeal. Prior to his employment at the WPD, the Appellant served in the Marine Corps for six (6) years. (Testimony of Appellant) The Appellant worked the overnight shift and Officer H worked the day shift. (Testimony of Appellant and Officer H)
2. All members of the WPD, upon hire, receive all Department Rules and Regulations, as well as WPD Policies and Procedures. All officers are trained and tested on said rules

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this 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. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

³ This includes Respondent's Exhibits (R.Ex.) 1 through 15 and Appellant's Exhibits (A.Ex.) 1 through 3.

and regulations and policies and procedures and they sign an “Acknowledgement and Receipt” form. In addition, as part of the WPD’s accreditation process, officers are tested annually on the rules and policies and receive an annual stipend for passing the test.

(Testimony of McEnaney; R.Exs. 4,5,6, and 8)

3. WPD Officers are taught the use of force and in escalation and de-escalation of the use of force at the academy and at semi-annual in-serve trainings. (Testimony of Chambers)
4. In the WPD, vacation days are given based on seniority but personal days supersede seniority for vacation days. When an officer uses a personal day, he is guaranteed the day off regardless of seniority. For example, if two (2) officers want to use a vacation day on the same day, the senior officer will be permitted to do so. However, if the junior officer opted to utilize a personal day rather than a vacation day, he would be guaranteed the day off even though he is not the senior officer. (Testimony of McEnaney)
5. Officers are not permitted to use a single vacation day if it will create an overtime shift. However, personal days are allowed to create an overtime shift and, if no one is willing to take the shift, it could result in an officer being ordered in (“order in”) to work the shift. (Testimony of Officer M)
6. Prior to November 22, 2016, the Appellant told Officer M that he heard that other officers had a problem with Officer H taking Thanksgiving off. (Testimony of Officer M) Also prior to November 22, 2016, Officer M explained to the Appellant that Officer H had made appropriate arrangements with an officer to cover the Thanksgiving shift in order to avoid inconvenience to other officers. (Testimony of Appellant and Officer M) Officer M made such arrangements months in advance of the holiday. (R.Ex. 9) In addition, Officer H told other officers that if voluntary coverage fell through on

Thanksgiving, he would work that day, rather than force another officer to work involuntarily that day. (Testimony of Officer M)

7. On Tuesday, November 22, 2016, prior to the start of Officer H's shift, in the locker room, Officer H spoke to Officer M. Officer M told Officer H that the Appellant said that some officers were upset that Officer H was taking a personal day off on Thanksgiving, alleging that he had done it in such a way as to cause an "order in", requiring another officer to be ordered to work that shift. (Testimony of Officer M and Officer H)
8. At the end of his conversation with Officer M, Officer H seemed "annoyed" that other officers were upset with his personal day off, especially since he had secured voluntary coverage. (Testimony of Officer M)
9. After leaving the locker room, Officer H eventually went out to the WPD parking lot, where he saw the Appellant coming back in to the station since his overnight shift was coming to an end. (Testimony of Officer H; R.Ex. 13)
10. While in the parking lot, Officer H asked the Appellant about taking a personal day on Thanksgiving. Officer H wanted the Appellant to understand that he had done everything to make sure that his request was not going to trigger an "order in". In addition, Officer H repeatedly asked the Appellant which officers were upset with his personal day off on Thanksgiving. (Testimony of Officer H; R.Ex. 15B⁴)
11. The Appellant would not give Officer H the names of the officers who were upset that Officer H was taking a personal day on Thanksgiving, despite Officer H's repeated

⁴ R.Ex. 15 is a thumb drive containing video recordings, from two (2) different angles, of the parking lot behind the WPD station. The recordings were apparently made on November 22, 2016. R.Ex. 15A shows a more distant view of the parking lot; Ex. 15B shows a view of the back entrance to the WPD station from the parking lot. There is no audio accompanying the video recordings. R.Ex. 15B very briefly shows Officer H and the Appellant walking into the back of the WPD station.

questions. The Appellant did not tell Officer H that, based on his conversation with Officer M, he knew that coverage was pre-arranged with a named Detective and an “order in” would not occur on Thanksgiving. (Testimony of Appellant and Officer M; R.Ex. 9)

12. As indicated in the video of the parking lot, after a brief exchange between Officer H and the Appellant, Officer H unlocked the station door and held it open for the Appellant to enter. (R.Ex. 15B)

13. Once inside the station, the Appellant and Officer H walked a short distance down a hall and both walked into the report writing room, which is diagonally across the hall from the Sergeants’ office. (Exs. 10, 11, 12 and 13)

14. At approximately 6:50 a.m., Deputy Chief Shea was talking to Sergeant Agraz when he heard Officer H and the Appellant arguing in the report writing room. Although Dep. Chief Shea could not tell exactly what they were arguing about, he observed the two (2) officers come face to face and he could hear the voices getting louder. (Testimony of Shea; R.Ex. 13)

15. At that point, Sgt. Gendron entered the Sergeants’ room. Sgt. Gendron and Sgt. Agraz could hear the argument between the Appellant and Officer H across the hall in the report writing room. Upon seeing the altercation, Dep. Chief Shea directed both sergeants to enter the report writing room to diffuse the situation. (Testimony of Shea; R.Ex. 13)

16. Neither the Appellant nor Officer H called out for assistance from supervisors that were nearby. (Testimony of Shea; R.Ex. 13)

17. Dep. Chief Shea observed the Appellant and Officer H make chest contact while Officer H’s back was facing the hall. (Testimony of Shea; R.Ex. 13)

18. The Appellant and Officer H pushed each other, perhaps to create space between them.

Then the two (2) threw punches at each other. (R.Ex. 13)

19. Sgts. Gendron and Agraz and Dep. Chief Shea rushed into the report writing room. Once

in the room, they observed Officer H and the Appellant in a physical struggle and the

Appellant had Officer H bent backwards on a writing table and throwing punches at

Officer H. (Testimony of Shea; R.Ex. 13)

20. Despite repeated commands by the Dep. Chief and two (2) Sergeants to stop fighting,

both the Appellant and Officer H continued their altercation.⁵ Eventually, after

considerable physical effort by the three (3) superior officers, the Appellant and Officer

H were separated. (Testimony of Shea and Officer H; R.Ex. 13)

21. Once separated, Dep. Chief Shea saw that the Appellant appeared to be laughing at and

taunting Officer H. (R.Ex. 13)

22. Both the Appellant and Officer H suffered minor injuries: scratches and redness on their

faces. Both declined medical attention. The Appellant, after his shift, went to his

parents' house and took photos of his injury. The photos are consistent with the

observations of the Dep. Chief and the two (2) Sergeants. (A.Exs. 1 – 3; R.Ex. 13)

23. Shortly thereafter, Dep. Chief Shea informed Chief McEnaney about the altercation. In

response to Chief McEnaney's direction, an investigation into the altercation was

initiated. Dep. Chief Shea was in charge of such investigations. However, since he was a

witness, Capt. Chambers was assigned to conduct the investigation. Capt. Chambers

supervises the patrol division and assists with internal and external investigations. In

⁵ The evidence indicates only that the superior officers repeatedly ordered the Appellant and Officer H to stop the quickly escalated altercation; it does not indicate the specific words the superior officers used in this regard.

addition, Capt. Chambers has been the primary defensive tactics and use of force instructor at WPD for sixteen (16) years. (Testimony of McEnaney and Shea; R.Ex. 13)

24. As part of the investigation, Capt. Chambers directed all witnesses and participants in the altercation to draft and submit administrative reports. (R.Ex. 13) In addition, Capt. Chambers reviewed the parking lot video but he did not see anything to suggest an altercation was imminent. (R.Ex. 15B; Testimony of Chambers)

25. The reports of the Appellant and Officer H asserted that the other was the aggressor and threw the first punch. No other member of the WPD observed who threw the first punch. Sgt. Agraz's report noted, in part, that, "[e]ven with the three of us attempting to separate [the Appellant and Officer H] they continued to try to get at each other to continue fighting. While attempting to separate the two I injured my ankle. ..." (R.Ex. 13) Sgt. Gendron's report states, in part, "... it took a great deal of physical strength from both Sgt Agraz and myself to restrain the Officers ..." and that Dep. Chief Shea assisted with the restraining of the officers" (Id.) Sgt. Gendron reported that his left thumb was sore after breaking up the altercation. (Id.) None of the participants and/or witnesses sought medical attention at the time. (Id.)

26. Capt. Chambers' report indicates, in part, that,

it was "clear to Sergeant Gendron that both officers were actively engaged in a physical fight" and that it took "a great deal of physical strength from all the supervisors to separate the Officers ..." (R.Ex. 13) prior to writing their administrative reports, the Officers were advised to speak to their union representatives;
the Appellant's report asserted that he acted in self-defense;
Dep. Chief Shea reported that repeated orders to stop fighting "had little effect";
There is "bad blood" between the Appellant and Officer [H];
Sgt. Agraz reported that the Appellant and Officer [H] had been arguing, their voices escalated and the two were swearing at each other;
Officer [H] apologized to Capt. Chambers and informed him that he had been told earlier that morning that the Appellant was complaining that other officers were

“mad” at Officer [H] for taking a personal day on Thanksgiving but that he had made arrangements so there would be no “order in”; and Officer [H] “did not deny throwing a punch, he just does not remember if he actually did”. (Id.)

Capt. Chambers’ report concludes, in part, that,

“it is undisputed the Officer Galvin and Officer [H] engaged in a physical altercation with each other while armed and in uniform. Several ranking officers ... were witness to the assault and battery and had difficulty in separating the parties. After numerous orders from three Supervisors, the Officers were finally separated ... The actions of both [officers] are violations of Rules and Regulations 4.01 Conduct Unbecoming an Officer and 8.0 Orders, as well as [G.L. c. 265, s. 13A Assault and Battery. The conduct of both Officers reflects unfavorably upon themselves and the [WPD]. Furthermore, their conduct may have a potential adverse impact on the morale, integrity, reputation or effectiveness of the [WPD]. (Id.)⁶

27. On November 23, 2016, after reviewing Capt. Chambers’ report, Chief McEnaney met individually with the Appellant and Officer H and informed them each that they were being suspended for five (5) days. When the Appellant was informed of the suspension, he informed the Chief that he would appeal it. (Id.)
28. On November 29, 2016, Chief McEnaney sent a memo to Town Manager Jodi Ross summarizing the events related to the altercation adding, “If this incident happen (sic) out on the street and the officer lost his cool and was ordered to stop by a supervisor and didn’t it could have serious consequences for the town.” The Chief also summarized the Appellant’s lengthy discipline history and added that Officer H “understood the serious (sic) of this incident and chose not to appeal the suspension.” (Id.)
29. Since 2012, the Appellant has received two (2) “verbal written warnings”, eight (8) written warnings and two (2) written reprimands in connection with: the vehicle locating system, mobile data computers, insubordination, maintenance of police vehicles, multiple instances of neglect of duty, repeated instances of incompetence, repeated

⁶ There is no indication in the record that criminal charges were filed against the Appellant.

instances involving department property, storage of weapons, and multiple instances involving reporting for duty. (R.Ex. 3)

30. By a letter dated February 7, 2017, the Respondent informed that Appellant there would be a hearing on February 10, 2017 regarding his suspension, citing information from Capt. Chambers' report. (R.Ex. 1)

31. Town Manager Ross conducted the hearing on February 10, 2017. (R.Ex. 2) On February 13, 2017, Town Manager Ross issued her decision to the Appellant affirming the suspension, referencing details of the Appellant's statements at the hearing and other evidence, concluding, in part, "[f]or a physical altercation to happen between two officers in the police station is completely unacceptable and inexcusable. In the police chief's 30 years with the department and my 20+ years of municipal experience in three towns, neither of us had ever experienced this situation. ... You did not present any evidence that this altercation was anything but completely avoidable. Officer Galvin, I am disturbed that you seem to feel you have no responsibility in this altercation. Even if you were provoked, you did participate, and you did not stop even though directly ordered to do so by several officers superior to you ..." and "this type of behavior will not be tolerated in the future. ..." (R.Ex. 2)

32. On February 16, 2017, the Appellant filed the instant appeal. (Administrative Notice)

33. At the Commission's hearing, when asked why he did not simply inform Officer H that he knew the allegations about Officer H were wrong when it was clear that that was Officer H's concern, the Appellant said "hindsight is 20 20" (Testimony of Appellant - Digital Recording of Commission Hearing, at 3 hours, 30 minutes) Further, the

Appellant acknowledged that, at a minimum, he did not deescalate the situation as officers are trained to do. (Testimony of Appellant)

34. Rule 3.0 – in the Introduction, states, in part, “Certainly law enforcement employees, both sworn and non-sworn, must obey the law, exercise their responsibilities within constitutional guidelines, and obey lawful order.”(R.Ex. 5)

35. Rule 4.02 states, in part, “[e]mployees, both sworn and non-sworn, shall not commit any specific act or acts of immoral, improper, unlawful, disorderly or intemperate conduct whether on or off duty, which reflects, discredit (sic) or reflects unfavorably upon the employee, upon other employees or upon the police department.” (R.Ex. 7)

36. Rule 8.0 states, in part, “[a]n order is defined as a command or instruction, oral or written, given by one member of the department to another member of lesser rank. It is essential to the proper operation of a police agency that employees promptly obey all lawful orders.” (R.Ex. 6)

37. Policy 4.02 states, in part, “[t]his directive establishes the structure of the Police Department and provides for the application of certain basic organization principles. It is intended to ensure that each employee understands their role and position within the department, as well as that of all of the other department members, and that the existing chain of command is clearly delineated to all personnel.” (R.Ex. 8)

Applicable Law

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 actions taken by the appointing authority.” Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997). See Watertown v. Arria, 16 Mass.App.Ct. 331 (1983). 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.” Commissioners of Civ. Serv. v. Mun. Ct. of the City of Boston, 359 211, 214 (1971). The Commission determines justification for discipline by inquiring, “whether the employee has been guilty of substantial misconduct by impairing the efficiency of public service.” Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983).

The appointing authority’s burden of proof is one of a preponderance of the evidence which is satisfied “if it is made to appear more likely or probably in the sense that actual belief in its truth, derived from the evidence, exists in the mind of 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, if the Commission finds that there was just cause for action taken against an Appellant, the Commission shall affirm the action of the appointing authority. Falmouth v. Civil Serv. Comm’n, 61 Mass.App.Ct. 796, 800 (2004).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' " 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” of 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, s. 1.

Under G.L. c. 31, s. 43, “[t]he commission may also modify any penalty imposed by the appointing authority.” Id. “Here the commission does not act without regard to the previous decision of the town, but rather decides whether ‘there was reasonable justification for the action

taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” Town of Falmouth v. Civil Service Commission & another, 447 Mass. 814, 824 (2006)(note and further citation omitted). Further, the Court stated in Town of Falmouth v. Civil Service Comm’n & another that, “[u]nless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty. Id. (citing Police Comm’r of Boston v. Civil Serv. Comm’n, 39 Mass.App.Ct. 594, 600 (1996)).

The Commission must also 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. Furthermore, “... police 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); Spargo v. Civil Service Comm’n, 50 Mass.App.Ct. 1106 (2000), *rev.den.*, 433 Mass. 1102 (2001).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. There is no disagreement that the Appellant and Officer H, both uniformed and armed officers, had a physical altercation in the WPD report writing room on November 22, 2016 during the morning shift change, they were ordered to stop the altercation and that it took two (2) Sergeants and the Deputy Police Chief to end it. Although there were no witnesses when the altercation began, the two (2) Sergeants and Deputy Chief were nearby, heard loud voices and entered the report writing room, where they found the Appellant had pinned Officer H to a desktop and they were exchanging blows. After an investigation that included the written reports of all involved, the Appellant and Officer H were each suspended for five (5) days. Officer H did not grieve, nor appeal his suspension whereas the Appellant filed the instant appeal. Regardless of who started the fight, the Appellant's behavior is simply unacceptable. Public knowledge that two (2) of the Town's police officers engaged in a physical fight at work, that they were ordered to stop and did not, and had to be separated by multiple superior officers undermines the public trust on which a police department relies to do its job. The Appellant's conduct was egregious. As such, his conduct clearly violated the cited WPD policies, as well as higher standards to which police officers are held, and it constitutes substantial misconduct by impairing the efficiency of public service.

The Appellant argues that he should not be disciplined because Officer H began and/or instigated the fight in connection with Officer H's holiday time off. Even if Officer H initiated the conflict, the Appellant should have disengaged from the conflict but he did not, as Town Manager Ross' decision after the local hearing noted. Moreover, the Appellant testified at the Commission that Officer M had earlier told him that allegations that Officer H took

Thanksgiving holiday time off in a manner that would trigger an “order in”, requiring other officers to cover for him, were wrong. When asked at the Commission hearing why he did not simply inform Officer H that he knew the allegations were wrong when it was clear that Officer H was concerned about such allegations, the Appellant said “hindsight is 20 20”, taking no responsibility for his own actions. Further, the Appellant acknowledged that, at a minimum, he did not deescalate the situation as officers are trained to do. Having reached conclusions similar to those of the Respondent, having found no bias therein, and in view of the Appellant’s prior discipline, I find that modification of the Appellant’s five (5)-day suspension is unwarranted.

Conclusion

Accordingly, for the above stated reasons, the discipline appeal of Mr. Galvin, Docket No. D-17-032, is hereby **denied**.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 14, 2019.

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:

Joseph P. Kittredge, Esq. (for Appellant)

Nicholas Anastasopoulos, Esq. (for Respondent)