

# The Commonwealth of Massachusetts

Decision mailed: 10/2/09  
Civil Service Commission  
OS

## CIVIL SERVICE COMMISSION

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

**GEORGE HOUHOULIS,**

*Appellant*

v.

**TOWN OF AVON,**

*Respondent*

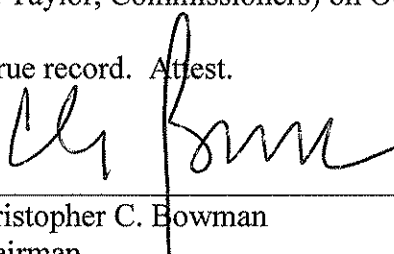
**Case No.: D-07-418**

## DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 1, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 18, 2009. No comments were received by the Commission from either party. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 1, 2009.

A true record. Attest.

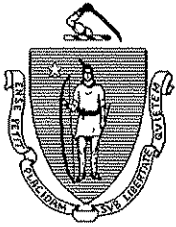
  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

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)(I), 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:

Timothy G. Bailey, Esq. (for Appellant)  
Scott E. Bettencourt, Esq. (for Appointing Authority)  
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
98 NORTH WASHINGTON STREET, 4<sup>TH</sup> FLOOR  
Boston, MA 02114

Tel: 617-727-7060  
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August 18, 2009

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

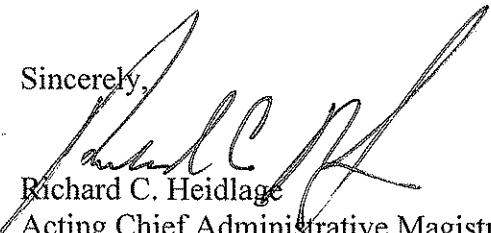
Re: George Houhoulis v. Town of Avon  
DALA Docket No. CS-08-516

RECEIVED  
2009 AUG 19 A 9:50  
COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

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.

Sincerely,



Richard C. Heidlage

Acting Chief Administrative Magistrate

RCH/das

Enclosure

cc: Timothy G. Bailey, Esq.  
Scott E. Bettencourt, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

**George Houhoulis,**  
Appellant

v.

Docket Nos. D-07-418/  
CS-08-516 (DALA)

**Town of Avon (Police Dept.),**  
Appointing Authority

**Appearance for Appellant:**

Timothy G. Bailey, Esq.  
International Brotherhood of Police Officers (I.B.P.O.)  
159 Burgin Parkway  
Quincy, MA 02169

**Appearance for Appointing Authority:**

**Scott E. Bettencourt, Esq.**  
167 Washington Street  
Norwell, MA 02061

**Administrative Magistrate:**

**Sarah H. Luick, Esq.**

SUMMARY OF RECOMMENDED DECISION

The Appointing Authority has just cause for imposing a two day suspension without pay on the Appellant for use of excessive speed in driving his cruiser to the scene of a car accident, barely escaping a collision with a mini-van and crashing the cruiser into a stone wall causing damage to it. The Appointing Authority was able to prove use of excessive speed by relying on the opinion of the state police expert who conducted a collision reconstruction at the location of the cruiser accident, and to show the Appellant misled the Police Chief by asserting he was traveling about fifteen mph less than he was driving at the time of the incident. The Appellant's collision reconstruction expert did not overcome the worth of the state police expert opinion, and in any event, had not been presented at the Appointing Authority hearing. *See, Falmouth v. Civil Service Commission and Deutchmann*, 447 Mass. 814 (2006).

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CIVIL SERVICE COMMISSION

## **RECOMMENDED DECISION**

Pursuant to G. L. c. 31, § 43, the Appellant, George Houhoulis, is appealing the November 26, 2007 decision of the Appointing Authority, the Town of Avon, upholding the two day suspension without pay he was given by the Avon Police Chief based on his actions involving his police cruiser on June 25, 2007. (Exs. 2 & 3) The appeal was timely filed. (Ex. 1) A hearing was held for the Civil Service Commission on August 6, 2008 at the offices of the Division of Administrative Law Appeals (DALA), 98 North Washington Street, 4<sup>th</sup> Floor, Boston, MA 02114. The hearing was private as no written request was received from either party for a public hearing.

Various documents are in evidence. (Exs. 1 – 16) Four (4) tapes were used. The Appointing Authority presented the testimony of Avon Police Chief Warren Phillips and Sergeant Andrew S. Klane of the Massachusetts State Police Collision Analysis & Reconstruction Section. The Appellant testified on his own behalf, and presented the testimony of Stephen Benanti, a collision/crashes analyst consultant and former Lieutenant State Trooper with the Massachusetts State Police. Both parties made arguments on the record.

## **FINDINGS OF FACT**

Based on the testimony and evidence presented, and the reasonable inferences drawn therefrom, I make the following findings of fact:

1. George Houhoulis was appointed a Special Avon Police Officer in July 1980. He became a Permanent Intermittent Avon Police Officer in February 1983, and a

full-time Permanent Avon Police Officer in December 1985. He worked as a Patrol Officer until April 2005 when he gained the rank of Sergeant. He has no prior formal discipline. (Testimony)

2. Sgt. Houhoulis is the day shift supervisor, 8:00 AM – 4:00 PM. The Avon Police Department has always had about fifteen officers. His morning routine often involves securing coffee off-site from the Police Station and then driving to the place where he is going to start his assignment. This practice is acceptable to Avon Police Chief Warren Phillips. (Testimony)

3. Sgt. Houhoulis's duties include helping other police officers in their work, giving them advice, and responding to calls. This includes responding to the scenes of motor vehicle accidents, and can include being in-charge at the scene. Personal injury motor vehicle accidents are a Code Three/high priority response. If a police officer is in a police cruiser and responds to such a high priority call, the officer, including a supervising sergeant, is able to drive to the scene at a speed over the posted speed limit, although the officer must exercise caution with due regard for the particular circumstances and conditions (s)he is driving in. (Ex. 4. Testimony)

4. The Avon Police Department has a written Policy & Procedure in place at 4.08, effective February 1, 2005, that is called, "Response To Calls." The Policy covers in pertinent part at C. Emergency Calls: Code Three Response, the following:

2. Officers responding to Emergency Calls will use both emergency lights and siren .... Officers must bear in mind that during the response, they have a responsibility to the public to ensure that their actions do not create a greater public hazard than is presented by the nature of the situation to which they are responding. (Ex. 4)
3. Conditions that will define an Emergency/Code Three Response

are:

- a. Any imminent threat to life or danger of serious physical injury or major property damage. (Ex. 4)

...

4. Examples of Emergency Calls could include: A shooting or stabbing; personal injury motor vehicle accidents; life threatening need for medical assistance; .... (Ex. 4)

5. West High Street in Avon goes through a residential neighborhood. It is a two lane street that runs east and west with a sidewalk along its south side. The two lanes are created by a double yellow line that runs down the center of the street. The posted speed limit is 30 miles per hour (MPH) until the street gets closer to Main Street/Route 28 when it becomes 25 MPH. West High Street runs into Page Street at its west end. West High Street become East High Street once it crosses Main Street, Route 28. West High Street has two streets off its south side; Foster and Old Pratt. They are about 800 feet apart. Old Pratt Street is about 700 feet from Main Street/Route 27. Driving east on West High Street, Foster Street comes first, then Old Pratt Street. There are no roads off the north side of West High Street. (Exs. 5, 6, 11 & 16. Testimony.)

6. In late June 2007, Page Street was being resurfaced. There were detour signs on West High Street to alert the driver approaching Page Street. (Exs. 5, 6, 11 & 16. Testimony.)

7. The Avon Police Department Dispatchers log in all events that occur during shifts, including police officers performing traffic speed radar checks and their responses to calls. (Ex. 7. Testimony.)

8. During the morning of June 25, 2007, Sgt. Houhoulis left the Police Station to get coffee at a Dunkin Donuts before starting his scheduled radar checks near

the town hall located on Main Street/Route 28. The Dispatcher logged in Sgt. Houhoulis as starting his radar check assignment at 8:05 AM. Officer Gjelsvik and Officer Gill also had radar check assignments that morning that were logged in as starting at 8:05 AM.

(Ex. 7. Testimony.)

9. After getting his coffee, Sgt. Houhoulis heard a radio transmission of a two car accident where air bags had deployed, and that the Fire Department had been alerted. This accident was logged in as occurring at 8:23 AM. To Sgt. Houhoulis, this message meant possible personal injuries. The location was Main Street/Route 28 and Spring Street. This was not far from where he was and from town hall where he was going to start his radar check assignment. The information about this motor vehicle accident came from Office Chapman. (Ex. 7. Testimony.)

10. Although he knew other police officers would be at the scene, Sgt. Houhoulis felt he should be there. He planned his route as taking Page Street to West High Street to Main Street/Route 28 to the intersection with Spring Street. There was a curb-setting work crew on Page Street using a bobcat machine. He did not put on his emergency lights or use his siren until he was on West High Street. At this time he saw no cars on West High Street and no pedestrians. West High Street is straight and mostly flat. Sgt. Houhoulis is familiar with West High Street. It is near where he lives and is a road he takes frequently. He knows where the homes are and he always checks for the dogs, cats, bicycles, deliveries, lawnmowers, and pedestrians near the street as he travels down West High Street as these are conditions he has found driving on this street. He did no differently this morning with his emergency lights and siren on. (Exs. 5, 6, 11 & 16. Testimony.)

11. The road surfaces were dry and the weather conditions were clear with daylight. Sgt. Houhoulis increased the speed of the cruiser as he drove down West High Street toward the motor vehicle accident. He did not constantly check his speedometer. He reached a speed of about 66 MPH on the portion of West High Street that has a 30 MPH posted speed limit. He was able to see Old Pratt Street as he was traveling. He saw a white Windstar mini-van stopped at Old Pratt Street and West High Street. He was about 200 feet away from it at the time. He did not think the mini-van was going to move until he passed it, but as he came near to its location, the mini-van suddenly entered the easterly lane of West High Street from Old Pratt Street to make a left turn onto West High Street. At this point, Sgt. Houhoulis was going too fast to stop, so he steered the cruiser with additional acceleration to the left and then ahead, going over grass along the north side of the road, and then back to the right, successfully avoided a collision with the mini-van. At the time he was swerving and accelerating forward and to the right, he was traveling at about 66 MPH. He did not know exactly how fast he was going as he was focused on steering the cruiser and was not watching the speedometer. (Exs. 5, 6, 8, 9, 10, 11 & 16. Testimony.)

12. When he swerved the cruiser, marks were left on the roadway by the tires and in the grass along the north side of West High Street where there was no sidewalk. (Exs. 6, 8, 9, 10, 11 & 16. Testimony.)

13. After the cruiser passed the mini-van, it went into a clockwise spin on the roadway. This happened after the cruiser's left side tires had gone over the grass on the north side of West High Street and as he was steering toward the right to get back into the easterly lane. During the spin, the front corner of the cruiser hit a stone wall on the south



side of the road. Then, the cruiser moved backwards with force and the rear of the cruiser hit the same stone wall. The first blow to the cruiser caused the underside of the front bumper and the bumper itself to fall off. The second blow caused the trunk to pop up, the rear bumper to be bent in, and caused damage to the middle back area of the cruiser. This blow also damaged the left rear wheel axle. The air bags did not deploy. There was no interior damage to the cruiser. The accident occurred about 8:25 AM. (Exs. 6, 8, 9, 10, 11 & 16. Testimony.)

14. Officer Gill was the first responder to the cruiser accident. He found Sgt. Houhoulis outside the cruiser, shaken up, but talking to the driver of the mini-van. No damage was found on the mini-van, and no passenger(s) appeared to be injured. No information was provided that the mini-van had some mechanical problem. Officer Gill learned from the driver of the mini-van that she had begun to enter West High Street by taking a left turn from Old Pratt Street, and had not noticed the cruiser approaching. Officer Gill cited the driver of the mini-van for "failure to yield the right of way. M-4787543." Sgt. Houhoulis was later seen at the South Shore Hospital where he was found to have sustained only minor injuries. (Exs. 8, 9 & 10. Testimony.)

15. The cruiser had been in good operating condition at the time of the accident, but it was totaled as a result of the accident. The cruiser was worth about \$9,000, and insurance covered the damage to it. (Exs. 6, 11 & 16. Testimony.)

16. Chief Phillips went to the scene. He spoke to Sgt. Houhoulis, asking him what happened. He also asked him about the speed of the cruiser at the time of the accident. Sgt. Houhoulis told him he was traveling about 50 MPH. Chief Phillips viewed the extensive damage to the cruiser along with skid marks on the road, and

concluded that Sgt. Houhoulis was probably driving much faster than 50 MPH. As a result, he sought help from the State Police for an accident reconstruction analysis toward uncovering the speed of the cruiser. The State Police agreed to do this. Avon did not have to pay for this service. (Testimony)

17. Sergeant State Trooper Andrew S. Klane of the Massachusetts State Police Collision & Reconstruction Section, who is skilled in doing motor vehicle accident reconstructions having done about 470-480 such investigations, came to Avon to West High Street during the day on June 29, 2007 along with Chief Phillips to do the accident reconstruction. He did not know Chief Phillips or Sgt. Houhoulis. Although Chief Phillips was at the scene with Sgt. Klane, he only assisted in the investigation by following the orders of Sgt. Klane who closely oversaw the investigation and accident reconstruction. Sgt. Klane reviewed all the documentation about the cruiser accident, and viewed the damaged cruiser that had been towed to the Avon Police Station. This kind of investigation of background facts is a routine and necessary part of performing the accident reconstruction work at the scene. Sgt. Klane also downloaded the cruiser's restraint control module that reports back whether or not the restraint devices were deployed by the accident and other information. He used the proper tools and devices for taking various required measurements at the scene. He looked at photographs that had been taken the day of the accident before the cruiser had been towed. He also took photographs of the scene while there. He examined the skid marks and yaw marks left by the cruiser. (Exs. 6, 8, 9, 10, 11, 12, 13 & 16. Testimony.)

18. Sgt. Klane understood that Sgt. Houhoulis was driving easterly on West High Street with his emergency lights and siren on at a high rate of speed during the

morning of June 25, 2007, when a mini-van that had been stopped at Old Pratt Street suddenly entered into the easterly lane of West High Street into the path of the cruiser. He understood that Sgt. Houhoulis successfully swerved the cruiser to avoid striking the mini-van, and then began to steer the cruiser back in the direction of the easterly lane. He understood that Sgt. Houhoulis's left tires went over grass on the north side of West High Street during this maneuver, and that he was not able to control the cruiser after that. He understood the cruiser began to rotate clockwise going from the easterly lane back into the westerly lane and then hitting a stone wall ahead and on the south side of the road. He understood the front corner of the cruiser struck a stone wall and that it then moved backwards with speed hitting the same stone wall with the rear of the cruiser. He understood the cruiser then came to rest. He understood the driver of the mini-van was cited at the scene for failure to yield right of way to the cruiser. This is the account provided by those at the scene of the accident on June 25, 2007, and which is contained in the various reports of the accident. This is also the account told to Sgt. Klane by Chief Phillips. (Exs. 8, 9, 10, 12, 13 & 14. Testimony.)

19. Sgt. Klane concluded that he had sufficient information to proceed with the accident reconstruction toward determining the speed of the cruiser before it went into its spin and hit the stone wall. He saw sufficient tire marks and yaws for taking necessary measurements. He felt he could secure the evidence he needed to calculate a critical speed value; "the speed ... at the time ... [the cruiser] left the critical speed scuff mark." He was not able to measure a 30 to 50 foot chord as is favored for doing the kind of calculation he was doing, but he felt he had sufficient tire scuff marks and yaws to measure a 22 foot chord. This meant he would need to be very precise in determining a

middle ordinate because the smaller the chord the greater the need for this precision since even one inch could throw off the usefulness of the calculation for determining the speed of the vehicle. He tested the pavement of the roadway for the friction score by using a drag sled, a tool used for many years by the state police for such investigations. He came up with a friction coefficient of .75. He took precise measurements to the point at which there was a cross-over of the tire marks, after which no chord could be accurately measured for use in the calculation. He carefully measured the middle ordinate and came up with 1 ¾ inches. He felt confident this middle ordinate measurement was correct. He documented his measurements with photographs and data so that the process he followed could be available for review. He felt he was never off as much as one inch in the measurement of the middle ordinate. (Exs. 11 & 16. Testimony.)

20. In terms of locating the chord, Sgt. Klane opined:

A critical speed scuff mark which began in the westbound travel lane was located. This scuff mark continued across the eastbound travel lane and terminated on the north shoulder of the roadway. This scuff mark was made by vehicle #1 [the cruiser] as it swerved to avoid vehicle #2 [the mini-van]. (Ex. 11)

21. Sgt. Klane used a photograph of the area where he located the chord to support his opinion on the use of the 22 feet he found. (Ex. 16(1). Testimony.) He also used a photo of the roadway after the cross-over had occurred and where the cruiser hit the stone wall. (Ex. 16(2). Testimony.)

22. Sgt. Klane performed the following calculation and came up with a critical speed of 69 MPH. He used the critical speed scuff mark left by the left front tire of the cruiser. He used the .75 friction coefficient. He used the chord length of 22 feet. He used the 1 ¾ inch middle ordinate. He determined that the radius of the critical speed

scuff mark was 432.21 feet. Using the radius and the friction coefficient, he calculated the speed of the cruiser at the time it left the critical speed scuff mark to be approximately 69 MPH. He noted there is an error margin of 2 to 3 MPH. He determined that the mini-van had traveled a total distance of about 15 feet into West High Street from its stop position which blocked part of the easterly lane. He used a conservative acceleration rate of .20 to calculate the mini-van traveled this distance in 2.15 seconds. Using this time, he calculated that the cruiser would have been about 217.58 feet west of the intersection when the mini-van started to enter onto the easterly lane. (Ex. 11. Testimony.)

23. Chief Phillips waited for the official report from Sgt. Klane before determining whether or not to discipline Sgt. Houhoulis. He received the report in early November 2007. He had no consultations with Sgt. Klane in regard to the determinations he made. Before releasing his report, Sgt. Klane, following the normal course, had submitted his report for review to Sgt. Wilson of his Unit on or about November 1, 2007. (Testimony)

24. On November 6, 2007, Chief Phillips imposed a two day suspension without pay on Sgt. Houhoulis based on his conduct with the cruiser on June 25, 2007. He listed the following reasons in the written notice he provided to Sgt. Houhoulis:

1. You were traveling at speeds that not only had the potential to cause a collision with another motorist, but also, endangered the public. You were driving at 69 mph in a 25 mph zone. This incident would have ended tragically if you had hit the motorist who was pulling out of Old Pratt Street broadside, if there had been a vehicle heading westbound on West High Street, or if there were a pedestrian on the sidewalk.
2. You misled me to believe that you were traveling at 50 mph at the time of the accident; however, the Massachusetts State Police Accident Reconstruction

Specialist determined that you were traveling at 69 mph after you passed the motorist that had started to pull out of Old Pratt Street.

3. On June 25, 2007 at 8:05 A.M., you signed off on your radar assignment on East Main Street. Had you not left your assignment, this accident would not have occurred. Your failure to properly carry out your duty as a sergeant resulted in unnecessary consequences in which a cruiser was totaled. (Ex. 3)

25. Sgt. Houhoulis sought a hearing before the Appointing Authority on the two day suspension. The hearing occurred on November 15, 2007. Chief Phillips testified at the hearing and relied on the report of Sgt. Klane to support his finding of operating the cruiser at 69 MPH in a 25 MPH zone. Chief Phillips also noted that Sgt. Houhoulis had not admitted at the scene or in his report to operating at more than 50 MPH; a speed at which Chief Phillips would not have imposed this discipline. Sgt. Houhoulis testified at the hearing that he had been traveling at 50 MPH prior to swerving to avoid hitting the mini-van. Sgt. Houhoulis only acknowledged that he accelerated from that rate of speed as he entered into the swerve in order to get ahead of the mini-van. He contended that the speed limit in the area of the incident was 30 MPH. Sgt. Houhoulis did not present any expert opinion to support his claim of driving at 50 MPH. He agreed that if he had been driving at 69 MPH that this would have been an excessive speed. The driver of the mini-van did not testify. The Appointing Authority relied on the evidence presented by Chief Phillips, the background documents about the accident, and the assessment of the speed made by Sgt. Klane in affirming the two day suspension without pay by upholding "the Chief's decision." (Ex. 2)

26. Sgt. Houhoulis filed a timely appeal with the Civil Service Commission seeking a G. L. c. 31, § 43 hearing on the merits of the two day suspension. (Ex. 1)

27. Sgt. Houhoulis employed the services of an expert in motor vehicle crash and accident reconstruction, Stephen R. Benanti, to review the work done by Sgt. Klane, and to provide an opinion on the speed Sgt. Houhoulis was operating the cruiser at the time he swerved to avoid hitting the mini-van. He secured this expert for testifying at his Civil Service hearing. (Stipulation. Ex. 15. Testimony.)

28. Mr. Benanti did the same work Sgt. Klane is doing when he was a Massachusetts State Trooper from 1984 to 2004. He retired from the State Police at the rank of Lieutenant with 25 years of service. (Ex. 15. Testimony.)

29. Mr. Benanti did not view the scene of the cruiser accident until August 8, 2008. By then, West High Street had been resurfaced. He reviewed all the collected documentation and photographs concerning the incident of June 25, 2007, including Sgt. Klane's report and the underlying data he had relied on including his photographs of the measurements he took. (Testimony)

30. Mr. Benanti concluded the tire marks were simply too degraded to support use of a 22 foot chord. He opined that four days was too long after the incident because the photographs Sgt. Klane used show key tire marks had faded. He opined it was not possible to determine the cross-over point which is essential to the measurement of a useful chord length. Mr. Benanti also found the degraded or faded tire marks made the measurement of the middle ordinate not as precise as it should have been, and that being just one inch off would mean the difference between 69 MPH and 55 MPH based on a 22 foot chord. (Ex. 16(1 & 2). Testimony.)

31. Mr. Benanti employed an alternative evaluation to come up with a likely speed at the time Sgt. Houhoulis swerved to avoid hitting the mini-van and accelerated

his speed. His method relied on data other than just the skid marks such as the damage to the cruiser and the importance of the air bags not deploying upon the cruiser striking the stone wall, and the distances between the two places the cruiser hit the stone wall. He relied on the information taken at the scene from Sgt. Houhoulis and the photographs showing how the cruiser came to rest against the stone wall. He calculated the distance the cruiser traveled between its two strikes to the stone wall and used a drag factor of .75. He assumed use of 50 percent braking efficiency. He opined that the cruiser was only going at most 55 MPH since that speed is consistent with the damage done to the cruiser and the fact that the air bags did not deploy. He opined that if the speed had been so high as 69 MPH that the damage to the cruiser would have been greater and that the air bags would have deployed. (Testimony)

### **Conclusion and Recommendation**

I conclude there is sufficient proof to support the two day suspension. The Appointing Authority had just cause to affirm Chief Phillips' two day suspension. Like Chief Phillips and the Appointing Authority, I rely on the expert opinion of Sgt. Klane to support a determination that the rate of speed at which Sgt. Houhoulis was operating the cruiser at the time he swerved to miss hitting the mini-van, was excessive for the roadway he was traveling, even acknowledging that the posted speed limit where the accident happened was 30 MPH and not 25 MPH as Chief Phillips and Sgt. Klane assumed.

Although Mr. Benanti provided a well reasoned expert opinion based on his experience and extensive training in performing crash and accident reconstructions to support finding a slower speed of around 55 MPH, his opinion does not overcome the



opinion of Sgt. Klane. Mr. Benanti's opinion was based on a review of the data Sgt. Klane developed, and on his review of the photographs in evidence which he found did not show sufficiently fresh tire marks to support use of a 22 foot chord or being able to measure precisely, a middle ordinate for calculating the speed of the cruiser. But, Sgt. Klane was adamant in his testimony that he had sufficiently fresh and clear tire skid marks to produce a proper calculation of the cruiser's speed, even though his evidence was four days old. He was also sure he came up with a precise and reliable middle ordinate of  $1 \frac{3}{4}$  inches, and that no matter what, he was not off as much as one inch which would have resulted in a speed calculated at 55 MPH; a speed at which Chief Phillips would likely not have sought discipline against Sgt. Houhoulis. I conclude that being at the scene four days following the incident, and finding credible Sgt. Klane's expert assessment of the quality of the tire marks he actually saw that day, to be sufficient to rely upon his calculation of the speed. I do not find that the photographs Sgt. Klane used, which were an important component of Mr. Benanti's opinion, can take the place of Sgt. Klane's testimony and opinion regarding the clarity and quality of the tire marks he saw at the scene and his assessment of them based on his extensive experience. I do not find sufficient proof in Mr. Benanti's opinion to overcome use of Sgt. Klane's 22 foot chord or use of his measurement of the middle ordinate. I conclude the expert opinion of Mr. Benanti has not shown Sgt. Klane's expert opinion is inaccurate. Robinson v. Contributory Retirement Appeal Board, 20 Mass. App. Ct. 634 (1985) (Agency must provide reasons for believing one expert over another.)

Sgt. Klane testified that his error rate could be 2 to 3 MPH. Reforming his calculation of the speed down from 69 MPH to 66 MPH may be more accurate. That

speed is closer to the speed Sgt. Houhoulis said he reached of 50 MPH with some acceleration of that speed as he tried to move ahead of the mini-van to avoid hitting it. Sgt. Houhoulis credibly testified that at the time he began to swerve to avoid hitting the mini-van he was not focusing on watching the speedometer, but in avoiding a collision. I do find he was likely traveling closer to 66 MPH when he reached Old Pratt Street. He acknowledged and knew he was speeding on that roadway and simply did not anticipate the mini-van would enter West High Street just as he was traveling by it with his siren and emergency lights on during clear weather conditions and in daylight. The testimony of the driver of the mini-van might have helped to get a sense of how fast the cruiser was traveling as it swerved by her car, but her testimony was not presented at the Appointing Authority hearing, and no evidence addresses her observation of how fast the cruiser was traveling.

I also found to be believable Sgt. Klane's assessment of the damage done to the cruiser and his assessment that the damage is consistent with the speed he determined from his calculations. The cruiser was totaled with extensive front and rear damage. I found there was insufficient expert evidence one way or the other to know whether air bags would have deployed if the speed at the time the cruiser hit the stonewall was based on a skid that started at a speed of 66 to 69 MPH as Mr. Benanti opines. Also, the findings made show the cruiser first struck the stone wall at the front corner of the cruiser, not head on. There was some evidence presented that this could explain why the air bags did not deploy.

I conclude that even without an air bag expert, and even without the testimony of the driver of the mini-van, that the record contains sufficient proof that the Appointing

Authority had just cause for disciplining Sgt. Houhoulis for driving at too high a speed on his way to the scene of the car accident.

Also, Mr. Benanti did not testify at the Appointing Authority hearing. His information might have led to a different outcome had the Appointing Authority had the benefit of it to question the worth of Sgt. Klane's calculations of the speed of the cruiser, but the failure to present that expert opinion evidence has to be taken into account now at the Civil Service Commission hearing. This means, even if the Civil Service Commission concludes, based on the findings I have made that Mr. Benanti's expert opinion shows Sgt. Klane's expert opinion is likely not as sound as I conclude it is, I find Mr. Benanti's opinion cannot be used to overturn the determinations made by the Appointing Authority in relying on the expert opinion of Sgt. Klane.

The reasoning of the Supreme Judicial Court in Falmouth v. Civil Service Commission and Deutschmann, 447 Mass. 814 (2006) supports this conclusion. In Falmouth, Officer Deutschmann chose not to testify at his Appointing Authority hearing, citing his right against incrimination. He faced charges of using unreasonable force and threats against a juvenile. The juvenile testified at the Appointing Authority hearing, and an adverse inference was drawn against Officer Deutschmann for not testifying. The juvenile's account of what happened was used to justify the imposition of a 180 day suspension for use of excessive force and threats in violation of the Falmouth Police Department's rules and regulations. Officer Deutschmann appealed and subsequently testified at his Civil Service Commission de novo hearing. The Civil Service Commission relied on his testimony which it found did not show excessive force or threats had been used against the juvenile. The Commission did not find credible the

testimony of the juvenile. The Commission still found Officer Deutschmann had acted in violation of the Police Department rules and regulations, but reduced the discipline to a 60 day suspension.

The Supreme Judicial Court found this reduction of penalty could not be justified, and explained:

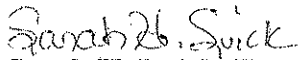
Although the [civil service] commission found the victim and his friends not credible, and therefore the manner of violence effected by Deutschmann to be less egregious, the nature and gravamen of the violations [of the police rules and regulations] remain substantially unchanged ... [so that] “the different subsidiary fact findings did not justify modification of discipline by the commission.” *Falmouth v. Civil Serv. Comm’n*, 61 Mass. App. Ct. 796, 802-803 (2004). The town’s 180-day suspension of Deutschmann was reasonably justified by the facts found by the commission, regardless of whether he grabbed ... [the victim] by the neck or pushed him in the chest .... [T]he commission failed to account for the negative inference that the town ... was permitted to draw from the refusal of Deutschmann to testify .... [that] established a case adverse to the party invoking the privilege. ... In light of Deutschmann’s refusal to tell his side of the story before the town ... an integral part of 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)] ... the discipline imposed by the town was reasonable. To pass judgment on the town’s conclusion without accounting for Deutschmann’s silence at its hearing would be fundamentally unfair to the town and, in doing so, the commission committed error. *Id.* at 825-827.

As another ground to support the two day suspension, Chief Phillips found and the Appointing Authority did not dispute, that Sgt. Houhoulis was aware at the scene of the accident that he was driving faster than 50 MPH, but did not acknowledge this. Given that the actual speed of the cruiser was at least 66 MPH, I conclude Sgt. Houhoulis did not provide to the Chief a fair assessment of the high rate of speed he had reached even if he had not been examining the speedometer. There is just cause for disciplining

Sgt. Houhoulis for this misleading statement. I do not find there was sufficient evidence to discipline Sgt. Houhoulis based on his failure to be at his radar assignment at 8:05 AM as the log entry indicated he was to start it. The practice to get coffee before starting an assignment was allowed. And, the Chief's claim that he would not have been involved in the cruiser accident if he had been at his radar assignment location is not sufficiently connected to his decision to drive too fast on West High Street to be a ground to support this discipline. Despite this determination, I do not recommend any reduction of the discipline.

For these reasons, I find just cause for the action taken by the Appointing Authority and recommend that the Civil Service Commission affirm the two day suspension.

**DIVISION OF ADMINISTRATIVE  
LAW APPEALS**

  
**Sarah H. Luick, Esq.**  
Administrative Magistrate

**DATED: AUG 18 2009**