

Decision mailed: 10/25/10
Civil Service Commission 08

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

CHARLES JOHNSON,
Appellant

Docket No.: D-08-204

v.

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

James W. Simpson, Atty.
7 Park Street, Suite 209
Attleboro, MA 02703

Respondent's Attorney:

Nicole I. Taub, Atty.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Daniel M. Henderson¹

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Charles Johnson (hereafter "Appellant" or "Johnson") filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that the Boston Police Department (hereinafter "BPD," or "Department") did not have just cause for suspending him for one (1) day for failing to submit a Use of Force Report. The appeal was timely filed at the Commission by the

¹ The Commission acknowledges the assistance of Legal Intern Basannya Babumba in the preparation of this decision.

Appellant. A hearing was held on June 10, 2009 at the offices of the Commission. One (1) audiotape was made of the hearing and is retained by the Commission. As no notice was received from either party, the hearing was declared private.

FINDINGS OF FACT

Eight (8) joint exhibits were entered into evidence. Based on these exhibits and the testimony of:

For the Appointing Authority:

- Sergeant Karl Strother, Detective

For the Appellant:

- Appellant, Detective Charles Johnson

I make the following findings of fact:

1. The Appellant, Detective Charles Johnson, a tenured civil service employee, has been employed by the BPD since 1979. He became a detective in 1984.. (Testimony of Appellant)
2. The Appellant was assigned to area B-2 (Roxbury) and worked a 11:45 PM-3:45AM four (4) hour, overnight tour.. (Testimony of Appellant)
3. On September 8, 2004, the Appellant was working an overtime shift, in plain clothes and operating an unmarked car during the last half hour of his tour. (Testimony of Appellant)
4. Around 12:30 a.m., he observed what appeared to be a fight outside a bar. Two (2) males and a female exited the building. One of the males attempted to place the other in a vehicle, then began hitting the female. The two (2) males then began hitting each other. (Testimony of Appellant).

5. The Appellant exited his cruiser with his portable radio in his hand and went towards the individuals. He tried to break up the fight, and got in a struggle with one (1) of the individuals. During the struggle the Appellant's portable radio struck one of the individuals in the head, breaking the skin. That person, identified as X for the purpose of this decision, was transported to the hospital via ambulance. (Testimony of Appellant).
6. X was booked at Area B-2. The booking officer noted in her report that he had an injury to the right side of his head. She also completed a visible injury to prisoner report. (Exhibits 6 and 7).
7. The Appellant returned to the station to complete an incident report of the arrest. (Testimony of Appellant; Exhibit 4)
8. The Appellant's incident report was reviewed and approved by his Supervisor, John J. Davin. (Exhibit 4)
9. On March 8, 2006, X at the instigation of his attorney, filed a letter of intent to sue the BPD, alleging that the Appellant had used excessive force during the arrest on September 8, 2004. The matter was forwarded to the Internal Affairs Division (hereinafter "IAD") for investigation. This filing initiated the investigation into the matter, approximately one and one-half years after the incident. (Testimony of Detective Strother; Exhibit 3)
10. IAD assigned the investigation to Sergeant Detective Karl Strother (hereinafter "Detective Strother"). (Testimony of Detective Strother)
11. During the course of the investigation, Detective Strother interviewed the Appellant. He could not locate X and was unable to speak to witnesses. (Testimony of Detective Strother)

12. Detective Strother found that the Appellant had engaged in a struggle with X during the arrest, had hit him on the forehead with his portable radio, resulting in injury to his forehead. (Testimony of Detective Strother)
13. The suspect X who suffered the injury to his forehead was transported from the scene via ambulance directly to the Boston Medical Center for treatment. The suspect was later brought to station Area B-2 for booking after his arrest. (Testimony of Appellant; Testimony of Detective Strother; Exhibit 5; Exhibit 6)
14. The Appellant did not transport the suspect to the hospital, but rather, returned to Area B-2 and completed his written incident report. The Appellant had no further contact with the suspect that night. (Testimony of Appellant)
15. The Appellant completed a written incident report of the arrest. (Exhibit 4) In his report, the Appellant included the names of all the parties, the circumstances which led to force, the injury, and the care X received. (Exhibit 4)
16. Detective Strother found that X was transported to District B-2 for booking after being arrested. Mary Ann O'Neill, the booking officer, completed the Arrest Booking Form and also a Visible Injury to Prisoner Report, as required by the BPD Rules and Procedures. (Testimony of Appellant; Testimony of Detective Strother; Exhibit 5; Exhibit 6)
17. In addition to the Arrest Booking Form and Visible Injury to Prisoner Report, any officer who engages in use of non-lethal force is required to report it verbally to his "patrol supervisor" and also "make out a written report describing the incident" and submit same by the end of his tour of duty, pursuant to Rule 304 §7 of the BPD's Rules and Procedures. However, Detective Strother could not locate a separate use of force report.

When he checked with IAD, they also had no copy of a separate report. (Testimony of Detective Strother; Exhibit 2)

18. The Rule 304, entitled USE OF NON-LETHAL FORCE, referred to here is a set of “...guidelines for the use of non-lethal force”. The Rule also expansively describes the potential or anticipated circumstances and exigencies that an officer might face. “Because there are an unlimited number of possibilities, allowing for a wide variety of circumstances, no rule can offer definitive answers to every situation in which the use of non-lethal force might be appropriate.” It goes on to refer to an expectation that each officer will “utilize sound judgment in making reasonable and prudent decisions, attending to the spirit over the letter of the rule.”(Exhibit 2)

19. The specific section of Rule 304 claimed to have been violated is entitled

INVESTIGATION OF USE OF FORCE and reads as follows:

Rule 304 §7 All such applications of force shall be immediately reported verbally to the involved member’s patrol supervisor. By the end of the tour of duty, an officer who has used non-lethal force shall make out a written report describing the incident including the names of the officer and other persons concerned, the circumstances under which such force was used, the nature of any injury inflicted and the care given afterwards to the injured party. Prior to the end of the tour of duty, the Patrol Supervisor shall conduct a thorough investigation on the use of such non-lethal force and submit a report to the Commanding Officer. Such report shall include the Patrol Supervisor’s findings and recommendations based upon the assessment of facts known, as to the justification for the use of force. (Exhibit 2)

20. The Appellant admitted during his interview that he had his radio in his hand during the struggle. He also admitted that he did not complete any specific use of force form but did complete an incident report which accompanied other reports thoroughly covering the incident, all of which were signed-off on by the Shift Supervisor. (Testimony of Appellant, Exhibits)

21. There is no requirement in Rule 304 § 7 that a separate form or document be used by an officer to file a written report of the use of non-lethal force. In this case several written

reports were filed by the Appellant and the booking officer to document the injury and the circumstances of the incident and arrest. (Exhibit 2)

22. Rule 304 § 7 INVESTIGATION OF USE OF FORCE does not specifically require an officer to file a separate titled form report. It specifically mandates a Departmental investigation under certain circumstances and places the burden of said investigation and reporting upon the **BPD command staff**. The officer involved in the “incident” is only required to complete a written report; as he did here by completing an “incident report”. Thereupon, “...the **Patrol Supervisor** shall conduct a thorough investigation on the use of such non-lethal force and submit such report to the **Commanding Officer**. Such report shall include the Patrol Supervisor’s findings and recommendations based upon the assessment of facts known, as to the justification of the use of force. ...” Thereafter the responsibility to follow up on the investigation and reports fall on the **Police Commissioner** and the **Bureau of Professional Standards and Development**. Ultimately, and “In every case, the authority and responsibility for final departmental disposition of a Use of Non-Lethal Force incident rests solely with the **Police Commissioner**.” (Emphasis added) (Exhibit 2)

23. After the incident, the Appellant returned to the station and completed a detailed incident report of the arrest describing the injury and the circumstances. The Appellant’s incident report was reviewed and approved by his Supervisor, (“Duty Supervisor”) Lt. John J. Davin. The suspect X was booked at Area B-2 after being returned there from hospital treatment. The Booking Officer at Area B-2 noted in her report that he had an injury to the right side of his head. She also completed a separate “Visible Injury to Prisoner” report. The Booking Officer’s separate “Visible Injury to Prisoner” report contained all of

the details required under Rule 304 § 7, and this separate report was also signed off on by the Duty Supervisor, Lt. John J. Davin. The Arrest Booking Form also contained a front and a side photograph of suspect X with his head bandaged clearly visible as evidence of the injury. There also may have been separate police transportation, medical-hospital treatment and related reports generated by this incident, yet this aspect was not addressed by the evidence. (Testimony and Exhibits, Exhibits 4, 5, 6 and 7, reasonable inferences).

24. The Appellant's "incident report" was completed and filed at 3:31 AM and the "booking sheet" separately completed by Booking Officer O'Neill, noting the injury and the circumstances of the arrest and injury was also filed sometime near that time. The separate **"Visible Injury To Prisoner"** form was also completed and signed by the Booking Officer and submitted to **Duty Supervisor Davin**. Davin also signed this report acknowledging **"Contents noted and approved"**. Davin also faxed this "Visible Injury To Prisoner" form at 4:00 AM as noted by his statement and initials at the top of this form. (Testimony and Exhibits 4, 5 and 6, reasonable inferences).

25. The Appellant's BPD Duty Supervisor, Lt. John J. Davin did receive several, timely, suitable written reports regarding: this incident, the use of force and the resulting injury; to have been sufficiently and reasonably notified of its occurrence and all its relevant circumstances. This was certainly more than adequate reporting (by the Appellant) in keeping with "the spirit over the letter of the rule." (Rule 304). Davin, the Supervisor had actual written notice of the injury and circumstances and acted on it by faxing the "Visible Injury To Prisoner" form at 4:00 AM.(Exhibits, testimony, reasonable inferences)

26. At no time did any supervisor, commanding officer or command staff from the BPD complete a report regarding the use of force by the Appellant. The specific mandatory obligation of investigating and reporting on the use of non-lethal force falls squarely on the BPD supervisory and command staff, pursuant to Rule 304 §7 . (Exhibits, testimony and testimony of Sgt./Det. Strother, reasonable inferences)
27. Detective Strother's opinion is that the Appellant's failure to complete a separate use of force report constituted a violation of Rule 304 §7 of the Department's Rules and Procedures. However, Det. Strouther could not confirm the regular practice of officers filing separate use of force reports in such situations.(Exhibits and Testimony of Detective Strother)
28. On July 11, 2008, a hearing was held before the BPD's Chief Administrative Hearing Officer. (Joint Exhibit 1)
29. The Hearing Officer concluded that the evidence presented established just cause to sustain the charge and recommended that the Appellant be suspended for one (1) day. (Joint Exhibit 7)
30. On August 18, 2008, the Police Commissioner served the Appellant with Notice that he would be suspended from his employment as a result of the sustained charge. (Joint Exhibit 7)

CONCLUSION OF THE MINORITY (HENDERSON, STEIN)

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." Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997). See Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v.

Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); 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 Civ. Serv. v. Mun. 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 by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997).

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 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. Falmouth v. Civil Serv. Comm'n, 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 Civ. Serv. v. Mun. Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

The one day suspension imposed by the BPD was based on the Appellant's failure to complete a separate Use of Force report following his arrest of a suspect on September 8, 2004. The Appellant did complete an incident report which contained all of the information that Rule 304 requires.

The Appellant included the names of the persons involved (including the officer), the circumstances under which such force was used, the nature of the injury inflicted and the care given afterward to the injured party. This report was completed prior to the end of his tour of duty and submitted to his supervisor who, reviewed it and approved it. Neither the patrol supervisor nor any supervisor for that matter, completed an investigative report, as required by Rule 304 §7. The booking officer completed her separate booking sheet noting the circumstances and injury with photographs and then documented same via a separate "Visible Injury To Prisoner" report. This report was also signed and the contents acknowledged by the Duty Supervisor Davin. Davin also faxed this injury report at 4:00 AM to another location. Therefore the BPD patrol supervisor had at least (3) three written reports detailing the injury and the circumstances of it, by the end of the Appellant's tour of duty; acknowledged same and acted upon it by faxing it on to another location. If anything this is over-reporting, which the Appellant had a right to rely on as redundant and acknowledged notice to his superiors. Conversely, no BPD supervisor was disciplined for their clearly stated obligation to investigate and report on any apparent use of force incident. This is clearly

selective enforcement against only the Appellant and disparate treatment in favor of the BPD supervisory and command staff.

The Department's witness, Detective Strother testified that he investigated the matter for Internal Affairs and could not find any investigative reports completed by any supervisors. There was no evidence that the BPD sought to charge a supervisor with a violation of Rule 304. Detective Strother testified that it was clear from the Appellant's report that force was used requiring a report of supervisor. Rule 304 does not require a separate use of force report for cases involving the use of non-lethal force, it merely requires that a report be completed documenting same. The rationale behind said rule is that in cases involving multiple officers, not every officer completes an incident report. Quite often, one officer will actually complete the report documenting the actions of other officers. If non-lethal force was used, each officer using such force must complete a report. In the present case, the Appellant was the officer completing the incident report as well as the officer using force. One report documenting same is consistent with the spirit and intent of Rule 304.

For all of the above stated findings of fact and conclusion, the Commission determines that the Boston Police Department failed to show by a preponderance of credible and reliable evidence in the record that there were sound and sufficient reasons to discipline the Appellant with a one day suspension.

We conclude that the Appellant's appeal Docket No. D-08-204 should be allowed and that the BPD should return the Appellant to his position, without any loss of pay or other benefits.

For the minority:

Civil Service Commission,



Daniel M. Henderson
Commissioner

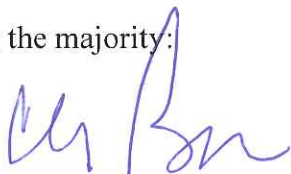
CONCLUSION OF THE MAJORITY (BOWMAN, MARQUIS, McDOWELL)

The instant appeal involves a one (1)-day suspension for failing to submit a Use of Force Report. The Appellant, while attempting to break up a physical fight between two individuals, used his portable radio to strike one of them in the head, resulting in a visible laceration. Approximately two years later, the injured individual filed a letter of intent to sue the BPD alleging that the Appellant used excessive force. As part of its investigation of this matter, the BPD attempted to locate a Use of Force report that is required to be filled out by any officer involved in a use of force incident, pursuant to Section 7 of BPD Rule 304. It is undisputed that the Appellant failed to complete this report.

The Use of Force report is intended to detail the use of force specifically, while the standard Incident Report is a general description of the arrest. Once the Use of Force report is forwarded to a commanding officer, an investigation is triggered to determine whether or not the force was appropriate. They serve as an important tool for the BPD to track trends and issues throughout the Department and identify potential officers who exhibit a pattern of potentially inappropriate behavior.

The Appellant testified that he was aware of the requirement, had received training on this requirement and still failed to complete the report. The BPD was justified in suspending him for one (1) day for violating this rule.

For the majority:

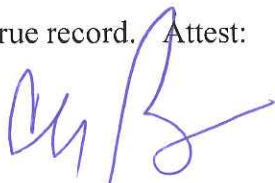


Christopher C. Bowman
Chairman
October 21, 2010

For all of the reasons stated in the Conclusion of the Majority, the Appellant's appeal under Docket No. D-08-204 is hereby *dismissed*.

By a 3-2 vote of the Commission (Bowman, Chairman – Yes; Marquis, Commissioner – Yes; McDowell, Commissioner – Yes; Henderson, Commissioner – No; Stein, Commissioner – No) on October 21, 2010.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 sent to:

James W. Simpson, Atty. (for Appellant)

Nicole I. Taub, Atty. (for Appointing Authority)