Decision mailed: 5/22/08
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ANDREW KALP,
Appellant

v.

D-07-145

CITY OF BROCKTON,
Respondent

Appellant's Attorney:

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Commissioner:

John E. Taylor

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Andrew Kalp (hereinafter "Kalp" or "the Appellant"), timely appealed the decision of the City of Brockton (hereinafter "the City" or "the Appointing Authority") to suspend him for five days for conduct unbecoming an officer. A hearing was held on December 4, 2007 at the offices of the Commission. As no written notice was received from either party, the hearing was declared private. Two audiotapes were made of the proceedings.

FINDINGS OF FACT:

During the hearing, a total of sixteen exhibits were entered into evidence by the Appellant and the Appointing Authority. Based on those submissions and the testimony of:

For the Appointing Authority:

- William Conlon, Chief of Police for the City of Brockton;

For the Appellant:

- Andrew Kalp, Appellant and police officer for the City of Brockton;

I make the following findings of fact:

1. Kalp has been a tenured civil service employee of the City of Brockton Police Department (hereinafter the "Department") for more than a decade, beginning his career in July, 1997. During his career, Kalp has received a number of awards and accolades for his work performance. He also holds Associate's and Bachelor's degrees in criminal justice. (Testimony of Appellant)
2. During his more than ten years of service to the Department, the Appellant has not used a single sick day. (Testimony of Appellant and Conlon)
3. Prior to the discipline that forms the basis for this appeal, the Appellant received a written reprimand for Conduct Unbecoming an Officer based on an August 2002 incident in which he put his arm around a dispatcher for the City, in a friendly manner and the two lost their balance and fell to the ground. As a result of the dispatcher's injury she filed a civil lawsuit against the City and the Appellant. (Testimony of Appellant and Conlon)

4. In January, 2006 while on duty, the Appellant injured his back while attempting to arrest a resistive individual. The resulting injury was serious, causing two of the discs in his lower back to be traumatized and protrude from their normal positions, impinging upon his sciatic nerve and causing excruciating pain down his left leg. (Ex. 16 and testimony of Appellant)
5. Appellant went out on Injured On Duty (hereinafter "IOD") status. (Ex.1)
6. The Appellant's primary care physician, an orthopedic physician named Dr. Vincent Iacono,[1] prescribed pain medication and rest to treat the injury. When that approach did not resolve the situation, the Appellant began a course of physical therapy. Continuing to follow medical advice, the Appellant turned to aquatic therapy and a course of cortisone injections in further attempts to return to work. (Ex. 6 and testimony of Appellant)
7. The Appellant testified that as his treatment resulted in slow progress, he considered back surgery after consulting with Doctor Iacono. Upon Dr. Iacono's advice, he sought out Doctor Frank Pedlow, a well-regarded Boston surgeon who had been involved with the Appellant's own daughter's medical condition. (Ex. 13 and testimony of Appellant)
8. The Appellant testified that, given the intrusive nature of surgery, and the risks associated with the type of procedure that was contemplated for him, surgery was his last resort.

[1] Doctor Iacono was not available to testify before the Commission, but the Appellant did introduce an affidavit from him, without objection.

9. In approximately September, 2006, Doctor Iacono inquired as to whether the Department would be able to offer a light duty position to the Appellant. At the time, the Department did not offer light duty. (Testimony of Appellant)
10. In December, 2006, upon the request Doctor Pedlow, the Appellant underwent an MRI. The Appellant had an appointment with the surgeon in late January 2006 to determine if, based upon the results of the December, 2006 MRI, surgery was a viable option. (Ex. 16 and testimony of Appellant)
11. In January, 2007, Doctor Iacono informed the Appellant that if he completed his physical therapy successfully and if Doctor Pedlow thought he should not have surgery, the Appellant would be able to obtain a clearance to return to work after their next appointment. (Ex. 6 and testimony of Appellant)
12. Doctor Iacono scheduled the Appellant's next appointment for February 27, 2007, following Kalp's then upcoming surgical appointment and physical therapy. In addition, Doctor Iacono was scheduled to be away for a conference during February, 2007, making him unavailable for a consultation for much of that month. [2] (Ex. 6 and testimony of Appellant)
13. On January 29, 2007, the Appellant consulted with Doctor Pedlow, who concluded that surgery was not necessary. Doctor Pedlow also noted that if the Appellant completed his physical therapy program and obtained the approval of his "work physician" that he would also recommend that the Appellant return to work without restrictions. (Ex. 13 and testimony of Appellant)

[2] Doctor Iacono attested in his affidavit that this "was Mr. Kalp's first opportunity to see me in the office after my attendance at an educational meeting."

14. The Appellant testified that he completed physical therapy and was discharged from that regimen on February 9, 2007. He stated that it was his understanding that his physical therapy provider was releasing him to all normal activities. (Ex. 15)

15. The Appellant testified that he expected to be cleared to return to work at his next appointment with Doctor Iacono after the doctor's return from the conference near the end of February, 2007. (Ex. 6 and testimony of Appellant)

16. Both the Appellant and Chief Conlon testified that, pursuant to Departmental policy, the Appellant would not be allowed to return to work without written clearance from his physician.

17. The Appellant stated that he believed because Doctor Iacono had been his primary physician throughout his recovery, Doctor Iacono was the individual with the authority to clear his return to work. (Testimony of Appellant)

18. Doctor Pedlow's January 29, 2007 note makes specific reference to the then-upcoming February 27, 2007 "review and examination with his work physician." The note also states that, should the Appellant remain asymptomatic and complete his therapy, Doctor Pedlow "would also recommend that he returns to work without restrictions." (Ex. 13)

19. On February 17, 2007, the Appellant went snow-tubing with his family at Mount Cranmore Snow Tubing Center in New Hampshire. He testified that he tubed for approximately two hours with his two year old daughter in the same tube. Photographs of the tubing area at Mount Cranmore showed it to be gentle and gradual in its slope. (Ex. 7 and testimony of Appellant)

20. The Appellant testified that a supervisor in the Department, Christopher LaFrance, accompanied him and his family on the trip to Mount Cranmore. (Ex. 3 and testimony of Appellant)

21. At Mount Cranmore, the Appellant encountered another Department supervisor, Lieutenant Leon McCabe, who was also there tubing. Appellant said hello to McCabe and advised him that he expected to be returned to work shortly. (Ex 2 and testimony of Appellant)

22. After returning from New Hampshire, McCabe reported seeing the Appellant snow-tubing on February 17, 2007 to Chief Conlon. (Ex. 2)

23. In February 2007 the Department had no written rule or regulation restricting the activities of officers who were out injured. Chief Conlon testified that the issue was one of common sense and an officer should not engage in dangerous activities that could exacerbate an injury, unless the activities are prescribed by a physician. Conlon stated that the Appellant was given no directive during his leave as to any restrictions on his activities. (Testimony of Conlon)

24. On February 27, 2007, the Appellant saw Doctor Iacono and received written clearance to return to work. He returned to work that night, beginning with the midnight shift on February 28, 2007. (Ex. 6 and testimony of Appellant)

25. On March 3, 2007, an article ran in the Brockton Enterprise newspaper entitled "Brockton cop may be on a slippery slope." The focus of the article was on an unidentified Brockton police officer who, while out injured, had been observed snow-tubing in New Hampshire. (Ex. 10)

26. A newspaper article, dated March 17, 2007, ran in the Brockton Enterprise, entitled "Snow tube cop is given another vacation." The Appellant was identified by name and his five day suspension is featured. (Ex. 12)

27. At this same time, the Department was receiving scrutiny arising out of the situation of a retired lieutenant in the Department who had allegedly abused sick-time benefits for three years. On March 16, 2007 the Boston Globe ran an article that indicated that this individual had been charged by the State Ethics Commission in connection with the alleged sick leave abuse. (Ex. 9)

28. A Notice of Suspension was issued on March 13, 2007 suspending Appellant for five days: March 17 through 23, 2007. The Notice charged Appellant was charged with a violation of Roll Call Order # 170 of the Department's Policies and Procedures, which prohibits conduct unbecoming an officer, defining such conduct as "[a]ny specific type of conduct that reflects discredit upon the member as a police officer or upon his fellow officers, or upon the police department he or she serves." The violation resulted from the Appellant's snow tubing activities on February 17, 2007 while he was out from work on IOD status as a result of a work related incident. It was stated as "Advancing a fraudulent injured on duty leave, filing false and incomplete police reports, and not being forthright or honest in disclosing your physical condition and ability to work to the police department and to the city." (Ex. 5)

29. Captain Cronin issued the suspension on behalf of Chief Conlon because Conlon was on vacation and Cronin had authority as Acting Chief of Police. (Ex. 1 and 5 and testimony of Conlon)

30. Chief Conlon testified that one of the purposes in disciplining the Appellant was to "send a message" to other officers.

31. On March 27, 2007, a Hearing Officer found just cause for Appellant's suspension for Conduct Unbecoming an Officer. (Ex. 1)

32. The Appellant appeared to be a straight-forward individual who answered the questions posed clearly and directly. Chief Conlon was also a credible witness.

CONCLUSION:

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).

If the Commission decides to modify a penalty, it must provide an explanation of its reasons for so doing, because a decision to modify shall be reversible if unsupported by the facts or based upon an incorrect conclusion of law. Faria v. Third Bristol Division of the Dist. Ct. Dep., 14 Mass. App. Ct. 985, 987 (1982). Police Commissioner of Boston v. Civil Service Commission, 39 Mass. App. Ct. 594, 602 (1996). When the Commission modifies an action taken by the appointing authority, it must remember that the power to modify penalties is granted to ensure that employees are treated in a uniform and equitable manner, in accordance with the need to protect employees from partisan

political control. Id. at 600. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2000).

Here, there is little factual dispute between the parties. Both agree as to the timeline surrounding the Appellant's injury and the sequence of events relating to his treatment and physical status in January and February, 2007. The issue is whether Appellant's going snow-tubing on February 17, 2007 constituted conduct unbecoming an officer and warranted a five day suspension. This Commissioner finds that it did not, as explained below.

The evidence showed that as of February 17, 2007, the Appellant believed that he needed to secure a written clearance from Doctor Iacono prior to returning to work, a point that is corroborated by the Chief's testimony as to the Department requirements relating to returns to work after an injury. At this point, Appellant had been cleared to return to all normal activities after his completion of physical therapy, and was awaiting his physician's return in order to receive written clearance to return to work. Appellant's belief that clearance from Doctor Iacono was needed was not unreasonable or inappropriate. It was at this time that Appellant spent two hours snow tubing on February 17, 2007 with his young daughter riding in his snow tube. No evidence was presented that snow-tubing was inherently dangerous or risky.

The Appellant proved himself to be consistently forthright about the events underlying this appeal. Moreover, Chief Conlon testified that he did not believe that the Appellant had attempted to mislead him in any way. Chief Conlon testified as to his opinion that the Appellant is a truthful person and absolutely was not an abuser of leave

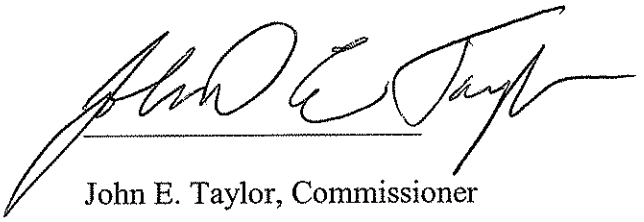
time as he never used a single sick day during his more than one decade of service with the Department.

Evidence also indicated that the imposition of Appellant's suspension and its severity appeared related to the political climate of the Department at the time based upon the unfavorable media attention and public scrutiny being devoted to a situation involving another member of the Department's alleged misuse of sick leave time. The fact that Appellant engaged in the conduct prompting his suspension on February 17, 2007 that Chief Conlon learned of it soon after but the Appellant was not suspended until March 13, 2007 suggests that the Department was not going to discipline the Appellant until the press coverage commenced in the other matter. Additionally, the fact that the suspension occurred when Chief Conlon was on vacation is another indication that the Department was bowing to considerations extraneous to basic merit principles.

In sum, the severity of the Appellant's discipline - five days for an officer who had never been suspended previously - suggests political and other impermissible motivations were part of the Department's decision-making process. Pressure to impose discipline runs counter to the notions of fair play and fundamental fairness that the civil service construct was designed to safeguard. Based on the totality of the circumstances, there was not reasonable justification to suspend the Appellant for conduct unbecoming an officer.

For all of the above reasons, the Appellant's appeal under Docket No. D-07-145 is hereby ***allowed***. The five day suspension is rescinded and those days must be restored to the Appellant without loss of benefits, seniority or compensation back to the date of the discipline.

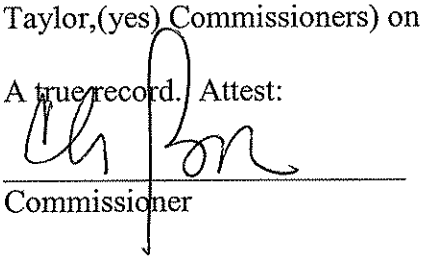
Civil Service Commission



John E. Taylor, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, (no)Henderson, and Taylor,(yes) Commissioners) on May 22, 2008.

A true record. Attest:



Commissioner

Notice to:

Andrew J. Gambaccini
James J. D'Ambrose
Jennifer Riordan

Either party may file a motion for reconsideration within ten days of a Commission order or decision. 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.