

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RAYMOND LAKE,
Appellant

CASE NO. D1-10-97

v.

TOWN OF DARTMOUTH,
Respondent

Attorney for the Appellant:

Douglas I. Louison, Esq.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

Attorney for the Respondent:

Anthony C. Savastano, Esq.
Anthony C. Savastano, Attorney at Law, P.C.
404 County Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein¹

DECISION

The Appellant, Raymond Lake, pursuant to G.L. c.31, §43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Dartmouth (Dartmouth), the Appointing Authority, to terminate him as a Police Sergeant for appearing tardy on a 12:00 a.m. to 8:00 a.m. overtime shift on February 11, 2010. A two day hearing was held on November 9, 2010 and December 3, 2010 at the University Of Massachusetts School Of Law at Dartmouth. The hearing was digitally recorded.. Eighteen (18) exhibits were accepted into evidence during the hearing. DArtomuth called six witnesses and the Appellant called two witnesses and testified on his own behalf. . The witnesses were sequestered As no written notice was received from either party, the hearing was declared private. Both parties submitted post-hearing proposed decisions on February 11, 2011.

¹ The Commission acknowledges the assistance of Law Clerk Ashley Francisque in the preparation of this decision.

FINDINGS OF FACT

I make the following findings of fact based on the exhibits and the testimony of the following witnesses:

For the Town of Dartmouth:

- Mark Zalinski, Lt.
- Charles Lackie, Sgt.
- Allan Shaw, Esq.
- Robert Szala, Lt.
- Gary Soares, Chief.
- Timothy Lee, Chief.

For the Appellant:

- Scott Lake, Sgt.
- Robert Miller.
- Raymond Lake, Appellant.

1. The Appellant, Raymond Lake (Sgt. Lake) was a tenured civil service employee of the Town of Dartmouth in the position of Police Sergeant. He had been employed by the Town for approximately thirty years at the time of his termination. (*Testimony of Appellant; Testimony of Deputy Soares*)

2. On March 22, 2010, Timothy Lee was sworn in as Chief of Police, coming from a distinguished career in law enforcement in the State of Rhode Island. He succeeded Chief Mark Pacheco. Chief Lee (*Testimony of Deputy Soare & Chief Lee*)

Prior Discipline

3. When Chief Lee assumed his position, Sgt. Lake had numerous disciplinary actions in his file due to his tardiness. (*Testimony of Chief Lee*)

4. Prior to Chief Pacheco's tenure, Sgt. Lake received the following discipline:
- a. 10/11/94 - written warning issued for tardiness.
 - b. 01/14/00 - oral reprimand was issued for three unexcused incidents of tardiness within a six month period.
 - c. 06/02/01 - letter of reprimand was issued for failure to report for duty.

- d. 09/26/01 - letter of reprimand was issued for failure to report for duty.
- e. 08/19/02 - written reprimand for failure to report for duty; the Town's decision included a warning that further absences without leave would not be tolerated.

(Testimony of Cpt. Brooks; Exhibit 6)

5. After the commencement of Chief Pacheco's tenure, he adopted a "start over" policy that, in effect, granted all officers a "clean slate". Thereafter, Sgt. Lake continued to be disciplined under the "start over" progressive disciplinary policy as follows:

- a. 12/30/04 Sgt. Lake was tardy and was ordered to submit a memo detailing his infraction and was counseled.
- b. 03/26/05 Sgt. Lake was tardy and was ordered to submit a memo detailing his infraction and was counseled.
- c. 09/11/05 Sgt. Lake was tardy and was ordered to submit a memo detailing his infraction and was counseled.
- d. 11/11/05 Sgt. Lake was tardy on 11/11/05 and was ordered to submit a memo detailing his infraction and was counseled.
- e. 02/02/06 - Sgt. Lake failed to report for duty on 1/17/06 and arrived one hour late after being contacted. He received a permanent letter of reprimand.
- f. 05/04/06 - Sgt. Lake failed to report for duty on 03/24/06 and on 03/31/06 and was replaced overtime; he received a one-day suspension.
- g. 02/21/07 Sgt. Lake failed to report for duty on 01/25/07 and was replaced overtime; he received a two-day suspension.
- h. 04/27/07- 05/01/07 Sgt. Lake failed to report for duty on 04/12/07 and was replaced at overtime, but subsequently reported for duty one hour late; he received a three-day suspension. (The disciplinary action letter was written on 04/27/07 but signed by Sgt. Lake on 05/01/07)

(Exhibits 3 & 6, 8 thru 12; Testimony of Cpt. Brooks)

6. At a meeting on April 19, 2007 concerning the February 12, 2007 incident of tardiness, Sgt. Lake was warned that further violations would lead to more severe disciplinary action,.

(A.A. Exhibits 1, 7, 14; Testimony of Chief Pacheco & Cpt. Brooks)

7. On February 28, 2007, Sgt. Lake again failed to report to duty. He received a 90-day demotion in rank to Patrolman. This discipline was upheld after appeal to the Commission by Decision (Docket No. D-07-203) dated February 14, 2008 [2007 Appeal]. (*Exh. 3*)

8. At the conclusion of the hearing on the 2007 Appeal,, Sgt. Lake and his attorney met with then Chief Mark Pacheco, Town Counsel, and other ranking officers, to discuss the Appellant's future conduct. At that meeting, Sgt. Lake agreed that at the next annual bidding for shifts, in March 2007, he would not bid for the 12:00 a.m. to 8:00 a.m. shift. Instead he would bid for an earlier shift because he had trouble showing up for work on time at midnight. (*Testimony of Deputy Soares & Sgt. Laket*)

9. In the intervening period between the Prior Decision and the subject incident, Sgt. Lake was disciplined four additional times. For each of those four matters, Sgt. Lake accepted punishment and failed to assert any appeal. Those intervening four matters are as followed:

- a. January 28, 2008 - Late for duty - 5-day suspension
- b. May 19, 2008 - Failure to report to duty - 10-day suspension and 120 day demotion to Patrolman
- c. July 15, 2008 - Failure to check prisoner and lying to Commanding Officer
Discipline: 3-day suspension (added to 10-day suspension under disciplinary action listed above)
- d. September 1, 2009 - Failure to report for duty - 5 day suspension

(*Exhibits 2, 8 & 9; Testimony of Deptuy Soares & Sgt. Lake*)

10. When Sgt. Lake was late again on September 1, 2009, Chief Pacheco was near retiring. Chief Pacheco told Deputy Soares that he did not want to be responsible for Sgt. Lake being fired just before Chief Pacheco was retiring and believed that if he issued a discipline greater than five days, thereby requiring that Sgt. Lake appear before the Select Board, the Select Board would discharge Sgt. Lake. Consequently, Chief Pacheco issued Sgt. Lake another five day suspension. (*Testimony of Deputy Soares*)

The February 2010 Incident

11. On February 11, 2010, Sgt. Lake was scheduled to work a 4:00 p.m. to 12:00 a.m. shift. Prior to that shift, he was scheduled for in-service training for the 8:00 a.m. to 4:00 p.m. shift on February 10, 2010. Sgt. Lake also was to cover the 12:00 a.m. to 8:00 a.m. shift on February 11, 2010. This would have resulted in Sgt. Lake working three (3) consecutive shifts, which the department does not allow. (*Testimony of Deputy Soares. & Sgt. Lake; Exhibit 7*)

12. At approximately 5:30 p.m. on February 10, 2010, Deputy Soares received a phone call from Sgt. Lake and Deputy Soares informed him that he could not work three (3) consecutive shifts. During this conversation, Deputy Soares noted that Sgt. Lake exhibited signs of intoxication. He stated it was clear Sgt. Lake had been drinking. During this conversation, Deputy Soares informed Sgt. Lake that his drinking had been responsible for his frequent tardiness and it needed to stop. (*Testimony of Soares; Exhibits 7 & 10*)

13. Sgt. Lake agreed to not work the 4:00 pm to 12:00 a.m. shift and stated he would go to sleep for the rest of the evening before his shift so that he would be clear-minded when he reported for duty at midnight. (*Testimony of Deputy Soares & Sgt. Lake*)

14. By department regulations, the shift started at 12:00 a.m. However, it is a long standing practice at the Dartmouth Police Department that the Shift Commanders report fifteen minutes early. (*Testimony of Deputy Soares & Lt. Zielinski*)

15. Sgt. Lake did not report at 11:45 p.m. on February 10, 2010 and had not reported as of 12:00 a.m. on February 11, 2010. (*Testimony of Lt. Zielinski & Sgt. Lake; Exhibits 7 & 10*)

16. Lt. Zielinski, who was the Commanding Officer, on the 4:00 p.m. to 12:00 a.m. shift on February 10, 2010, was required to stay into the next shift and the Town was charged one hour of overtime. (*Testimony of Deputy Soares, Lt. Zielinski & Sgt. Lake; Exhibit 7 & 10*)

17. At midnight, Lt Zielinski made a phone call to Sgt. Lake but Sgt. Lake did not answer. Lt. Zielinski left a message. (*Testimony of Lt. Zielinski; Exhibit 4*)
18. Sgt. Lake did not return the call until approximately 12:05 a.m., stating he was “on his way.” (*Testimony of Lt. Zielinski; Exhibit 4*)
19. The Appellant did not arrive until around 12:25 a.m. (*Testimony of Lt. Zielinski; Exhibits 4, 7 & 10*)
20. The Appellant did not inform Lt. Zielinski of any reason why he was late for work. (*Testimony of Lt Zielinski; Exhibit 4*)
21. It was not until the Appellant’s 8:00 a.m. replacement, Sgt. Shaw, arrived at work at approximately 7:45 a.m. that Sgt. Lake told anyone of his excuse for why he was late for work. (*Testimony of Lt. Zielinski, Sgt. Shaw & Sgt. Lake*)
22. Sgt. Lake offered the following explanation for his tardiness:
- a. He claims while he was exiting his driveway, his car became stuck in the snow and was unaware of the time. He shoveled for a lengthy period of time without looking at the time to determine whether he was late. He eventually freed his vehicle and then drove to the top of the street.
 - b. After reaching the top of the street he realized that he would be late and attempted to call the police station. He then noticed his cell phone battery was missing and believes it was dislodged from his phone and into the snow while he was shoveling. Sgt. Lake then went back to his house to retrieve a spare battery for his cell phone to call the police station.
 - c. When Sgt. Lake arrived at his house, he determined that he did not have the key for his house. The key for his house is not kept on his keychain with his car keys, but is kept

separately in his pocket. He then had to kick his front door open to retrieve his spare battery to his cell phone in order to call the police station.

(Testimony of Sgt. Shaw & Sgt. Lake; Exhibits 6, 7 & 10)

23. Chief Lee and Deputy Soares notified the Select Board disciplinary action up to and including termination should be imposed on Sgt. Lake. For the matter concerning the present incident, the hearing before the Select Board was held on May 10, 2010 and the Select Board voted unanimously to discharge Sgt. Lake as a result of his recurrent discipline problem and unprecedented number of tardiness, failures to report, and associated disciplines. *(Testimony of Chief Lee & Deputy Soares; Exhibit 12)*

CONCLUSION

Applicable Legal Standards

Under G.L.c.31,§43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission. The Commission has the duty to determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102, (1983). Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the 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 Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

An action is "justified" if "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 Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). 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." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" 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" which governs 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,§1.

The Appointing Authority's burden of proof by a preponderance of the evidence 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); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001).

“The commission’s task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the appointing authority, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited. 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. . . .in the circumstances found by the commission to have existed when the appointing authority made its decision." Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

“Likewise, the ‘power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.’ ” Town of Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 659 N.E.2d 1190 (1996). Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation” E.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

Justification for Discipline

Applying these principles to the facts of this appeal, Dartmouth has met its burden to establish just cause for discipline imposed on Sgt. Lake. The evidence shows that Sgt. Lake had an issue with reporting for duty on time which progressive disciplinary action could not correct and therefore termination was appropriate.

Sgt. Lake’s testimony regarding the present incident of him failing to report for duty is unconvincing. He claims that because it was snowing that night he had difficulty driving his car on his way to work. Either Sgt. Lake is being untruthful or he was negligent. The snow began hours before his shift, so he was fully aware that he would have to take precautions in order to get to work that evening. Moreover, he was the only officer that night who did not come on time. Also, he testified that his cellphone battery had been dislodged due to his cellphone cover falling off. His excuse that his cellphone battery was missing and that he was unable to check the time and therefore was unaware that he would be late is unpersuasive. Sgt. Lake knew that

his timeliness was important, especially considering the numerous warnings he had been given in the past as well as the warning he had been given after the Prior Decision that termination would be expected if his tardiness continued. Additionally, I do not find Sgt. Lake's story concerning his house keys and him having to break into his home in order to call the department credible. Even though he did have Sgt. Shaw inspect his cellphone and front door, Sgt. Shaw testified that he did not know when Sgt. Lake's battery cover went missing and made note that Sgt. Lake's door seemed intact and no visible damage had been done to it, although he did notice that the front door lock was inoperable. I also find it questionable that it took Sgt. Lake seven hours to report his story to another officer. Sgt. Lake's story does not add up and seems to be an attempt to cover up his tardiness in order to secure his job since he knew further disciplinary action would be taken if he was found at fault.

Also, prior to Sgt. Lake's shift, he did speak to Sgt. Soares hours earlier. Sgt. Soares testified that when he was talking to Sgt. Lake, he noticed Sgt. Lake's speech was slurred and that he had a hard time focusing during the conversation. Sgt. Soares suspected that Lake may be drunk and advised Sgt. Lake that he should not report for duty if he was not of the right mind state. During that conversation, Sgt. Lake admitted that he was "all screwed up" but said he would sleep before his shift started and promised he would be refreshed and ready for duty.

The latest instance of Sgt. Lake's tardiness follows a long history of (unsuccessful) attempts at remedial discipline. Sgt. Lake has a history of approximately sixteen (16) reported incidents. There were also other incidents which were not reported due to other officers covering for Sgt. Lake so he would not be reprimanded. Also, Chief Pacheco refused to suspend Sgt. Lake for more than five days after the Prior Decision because it would result in Sgt. Lake meeting before the Select Board and possibly being terminated. Other remedial actions had taken place as well

due to Sgt. Lake's inability to appear for duty on time and it was believed this change would better accommodate him. Sgt. Lake entered into an agreement in which he would not bid on 4:00 pm to 12:00 am shifts because he had trouble getting into work at that time. All of these measures, however, were not effective as Sgt. Lake was habitually tardy and failed to report for duty. Sgt. Lake was given many chances in his career to correct his behavior and he did not. Officer Lee stated that out of all the years he has held his position, Sgt. Lake's record was the worst example of ineffective prior remedial discipline that he had ever seen. Thus, Chief Lee's decision to terminate Sgt. Lake was proper given Sgt. Lake's record and failure to correct his own behavior.

There was a question regarding the number of times an officer could be tardy in a year. Sgt. Lake's brother, Sgt. Scott Lake, testified that the Union allows an officer to be tardy two to three times a year. However, there is nothing to suggest that this policy stands in the department. Union policy states that an officer can be punished by the organization for incidents relating to detail jobs. However, when it comes to overtime shifts, the Chief of the department has the authority to punish an officer. Moreover, the punishments regarding details are a collective bargaining matter, designed to make sure that detail jobs are distributed equitably.

Moreover, it is not solely the issue of the frequency of Sgt. Lake's tardiness, but the period of time that his behavior continued, that justifies termination. Reporting to work on time is important in a police department. In a field where emergencies are bound to occur, officers need to be prompt when reporting for duty. If an officer is consistently incapable of reporting to work on time, his fitness is questioned. "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 475, 648 N.E.2d 1312, 1314 (1995) (negligent off-duty handling of firearm)

Chief Lee was fully justified to conclude that, given the history, that disciplinary actions short of termination was not going to solve the problem. Sgt. Lake was given many warnings and was even demoted from his position for 120 days and even that was not enough to change his behavior.

Furthermore, Sgt. Lake was a superior officer and served as the commanding officer for some of the shifts he appeared late for, including the shift at issue. Sgt. Lake served as an example to other officers in the department. "Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." Police Comm'r v. Civil Service Comm'n, 22 Mass.App.Ct. 364, 371, 494 N.E.2d 27, 32 rev.den. 398 Mass. 1103, 497 N.E.2d 1096 (1986).

I respectfully acknowledges that Sgt. Lake served the Town of Dartmouth for approximately 30 years and, other than his struggle with tardiness, he never caused any serious problems in the police department. However, after considering all the circumstances, the Commission concludes that terminating Sgt. Lake from the Dartmouth Police Department was reasonably justified under all of the circumstances presented.

For the reasons stated above, the appeal of the Appellant, Raymond Lake, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein, Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on August 23, 2012.

A true record. Attest:

Commissioner

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.

Notice to:

Douglas I. Louison, Esq. (for Appellant)
Anthony C. Savastano, Esq.. (for Respondent)