COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

DENNIS MORIARTY,
Appellant

v.

D-17-126

CITY OF HAVERHILL,
Respondent

Appearance for Appellant:

Stanley Helinski, Esq.
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Appearance for Respondent:

Carolyn M. Murray, Esq.
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Commissioner:

Cynthia A. Ittleman

DECISION

Dennis Moriarty (Mr. Moriarty or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on June 19, 2017, under G.L. c. 31, s. 43, challenging the decision of the City of Haverhill (Respondent) to suspend Mr. Moriarty for three (3) days. A prehearing conference was held in this regard on October 23, 2017 at the Mercier Community Center in Lowell. A hearing[1] was held on March 9, 2018 at the Commission's office in Boston. The hearing was deemed to be private since I did not receive a request from either party for a public hearing. The witnesses were sequestered. The hearing was digitally recorded and the parties

[1] The Standard Adjudicatory Rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

received a CD of the recording.[2] The Respondent submitted a post-hearing brief; the Appellant did not. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

Joint Exhibits (J.Ex.) 1 through 12 and the Respondent's Exhibits (R.Ex.) 1, 2A, 2B, 2C and 3 through 5 were entered into evidence at the hearing. At the hearing, the Respondent was ordered to produce the report of the Respondent's hearing officer. The Respondent produced the report thereafter and it is included in the record as Hearing Officer Report. Based on all of the exhibits, the testimony of the following witnesses:

Called by the Respondent:

- Donald Thompson, former Deputy Chief, Haverhill Police Department (HPD)
- Paul Rennie, Rennie Detention Systems
- Alan DeNaro, Chief, HPD

Called by the Appellant:

- Dennis Moriarty, Appellant

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

1. Dennis Moriarty has been a Patrol Officer in the HPD since July 27, 1997. (J.Ex. 10)
2. On April 16, 2016, Prisoner 1 and Prisoner 2 were arrested by the HPD for disorderly conduct. (Id.)

[2] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

3. Lieutenant 1 was the Officer in Charge at the time Prisoner 1 and Prisoner 2 were arrested. (Id.)
4. The Appellant performed the booking procedure for Prisoner 1 and then placed him in cell No. M2 while Officers A and B stood near the Appellant as backup. (Id.)
5. Officer A has been an HPD Patrol Officer since June 30, 2014. (Id.)
6. Officer B has been an HPD Patrol Officer since on or about October 18, 1998. (Id.)
7. Surveillance camera footage following the arrests of Prisoners 1 and 2 on April 16, 2016 shows Officer Moriarty, with the aid of Officer B, placing Prisoner 1 in cell M2. Before the door can be closed, Prisoner 1 attempted to follow the officers out of cell M2. The Appellant reentered the cell with Prisoner 1. Officers A and B stood near the doorway but outside of cell M2. Officer Moriarty then exited the cell, took hold of the door handle with his right hand, to close the door. Surveillance footage does not show Officer Moriarty tugging on or otherwise checking the door handle to ensure it is locked. Immediately after Officer Moriarty released the door handle, the door began to swing open as the officers walked away, nearly making physical contact with Officer B. As the door swung open all the way, Prisoner 1 stood in the doorway. Prisoner 1 then tried to close the door from the inside the cell. When it still failed to close, Prisoner 1 exited the cell and walked around the cell area and the adjoining booking desk for nearly one-half hour. Prisoner 1 was then returned to his cell by Lieutenant 1. (J.Ex. 1; R.Ex. 1)
8. Following this incident, Lieutenant 1 instructed the Appellant to write a report on the matter. (Id.) The Appellant filed Report No. 16012704, in which he stated that he placed Prisoner 1 in cell M2 with Officers A and B assisting/standing, that he closed the door to cell M2 as usual and that he tested the handle to ensure the door locked. (Id.)

9. On or about April 20, 2016, at the direction of a Captain, officers within the Department checked the door to cell M2 and did not find any problems with the door's locking mechanism. (Id.) There were no substantiated reports of cell lock malfunction to Chief DeNaro or Deputy Chief Anthony Haugh prior to the incident. (Id.; Testimony of DeNaro) Dep. Chief Thompson interviewed approximately five (5) other police officers who used cell M2 before and after the incident and they observed no malfunction. (Testimony of Thompson) The Respondent then requested that Rennie Detention Systems inspect all locks in the cell block area on or around April 21, 2016. (R.Exs. 11 and 12)

10. Paul Rennie ("Mr. Rennie") of Rennie Detention Systems had worked in the locksmith industry, specifically for jail cell doors, for more than ten (10) years at the time of this incident. (Testimony of Rennie). At that time, he had been servicing the Haverhill Police Department for approximately three (3) years, and had installed all cell doors and locks in the holding area. (Id.) Mr. Rennie is certified by the manufacturer of the cells/locks used at the HPD as to their purpose, design and function. Mr. Rennie inspected cell M2 on or about April 27, 2016 but did not find any malfunction with the door or its lock, nor any sticking of the door or cell lock related to recent painting. (Id.; J.Ex. 11)

11. On April 28, 2016, Chief DeNaro ordered an investigation to determine:

    a. Did the cell door malfunction?

    b. Was policy and procedure followed when placing Prisoner 1 in the cell?

    c. Was policy and procedure followed in reporting this incident?

    d. Why was Prisoner 1 not charged with escape or attempted escape? (R.Ex. 1)

12. Retired HPD Deputy Chief Donald Thompson ("Dep. Chief Thompson") conducted the investigation and reported his findings on June 12, 2016. (Id.)
13. As part of his investigation, Dep. Chief Thompson reviewed various booking reports, video surveillance footage and officer reports, in addition to interviewing various other officers of the Department to see if they had had a problem with the door or lock for cell M2 on April 5, 6, 10, 11, 15 or 16, 2016. (Id.; J.Exs. 1 – 3 and R.Ex. 1 (and attachments)).
14. Dep. Chief Thompson concluded that the cell door did not malfunction on the date of the incident, that the Appellant did not follow policy and procedure when placing Prisoner 1 in the cell, and when he reported this incident, that Prisoner 1 was not charged with Escape or Attempted Escape because Lt. 1 did not believe that Prisoner 1 had escaped since he had remained in a secure area even though he was outside of his cell, and that Lt. 1 believed that the lock on cell M2 had malfunctioned. (R.Ex. 1)
15. HPD Policy and Procedure No. 72 governs "Booking-Prisoner Security." Article IV ("Procedures"), Section C ("Security and Control"), Subsection 2 ("Cell Block Procedure"), Part (d) states, "After placing a prisoner in a holding cell, the cell door will be closed, locked, and physically checked to ensure it is securely locked." (J.Ex. 4)
16. The Appellant electronically acknowledged receipt of Policy and Procedure No. 72 on April 2, 2015. (J.Ex. 5)
17. Following retired Dep. Chief Thompson's report, Chief DeNaro notified the Appellant by letter dated August 12, 2016 that he would be suspended for three (3) days as a result of the April 16, 2016 incident. (J.Ex. 6) The Appellant's suspension was imposed on August 17, August 29, and September 13, 2016. (Id.)

18. The Appellant appealed the discipline to Mayor James Fiorentini, who appointed Attorney David Grunebaum to be a hearing officer. Attorney Grunebaum submitted a detailed report to Mayor Fiorentini on May 25, 2017 recommending that the Mayor confirm the Appellant's three (3)-day suspension. (Hearing Officer Report)[3]

19. After receiving the hearing report from Attorney Grunebaum, Mayor Fiorentini upheld the three (3)-day suspension. By letter dated June 6, 2017 and hand-delivered to the Appellant, the Mayor informed the Appellant that his three (3)-day suspension was upheld. (J.Ex. 7)

20. The Appellant filed an appeal of the three (3)-day suspension with the Civil Service Commission on June 19, 2017. (Administrative Notice)

21. During the Commission hearing, in response to questioning, the Appellant testified,

> "**Q**: What did you do to ensure that the lock to cell M2 had engaged?
> **A**: I grabbed the handle, I closed it, I believe I heard it engage and click. I let go, I walked away. I thought it was engaged.
> **Q**: Do you recall pulling on the door?
> **A**: At the time it happened, in my mind's eye, I thought I had. After reviewing the videotape, I did not."
> (Testimony of Moriarty)

22. Lt. 1 received a written reprimand for not properly reporting the April 16, 2016 incident. (Testimony of DeNaro)

23. Officers A and B were not disciplined in connection with the April 16, 2016 incident because the Respondent determined that they were not responsible for placing Prisoner 1 in the cell. (Id.)

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[3] Although the hearing officer reviewed the statements of the Appellant and witnesses by audio-visual recording, he did not observe them first-hand and, it appears, the Appellant did not have an opportunity to observe for himself the statements of the witnesses and to cross-examine them at the hearing. Going forward, the Respondent should ensure that an Appellant is afforded such opportunities.

24. A prior incident at the HPD of a prisoner escape involved Officers D and E; each received a written reprimand. The prisoner on that occasion was arrested for theft of a saw; at the time of his escape, he was not secured or placed in a cell but was waiting to be interviewed, sitting on a bench in the holding cell area. The door to the HPD Sally Port opened and the prisoner escaped. At the time of the incident, Officers D and E had approximately five (5) years of experience working at the Department, and the written reprimands were the first offenses for each officer. (Id.; R.Exs. 3 and 4)

25. The Appellant's prior discipline includes a written reprimand in August 2010 for not properly completing a vehicle checklist, a ten (10)-day suspension in November 2010 for writing on a medical victim's forehead with black magic marker, and a thirty (30)-day suspension in June 2015 for conduct unbecoming a police officer and violation of policies pertaining to the use of fire arms, the use of force, and field reports. The Appellant signed a Last Chance Agreement in connection with the thirty (30)-day suspension in June 2015. (R.Exs. 2A, 2B, 2C and 5) The Appellant did not grieve these disciplines or appeal them to the Commission. (Testimony of DeNaro)

Applicable Civil Service Law

G.L. c. 31, s. 43 provides:
"If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority."

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

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).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task ... 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], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

Also under section 43, the Commission has "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. *See, e.g*. Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996)("The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio …accorded the appointing authority.") *See also* Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

Analysis

The Respondent has established by a preponderance of the evidence that it had just cause to discipline the Appellant. Based upon the video surveillance footage, Dep. Chief Thompson's investigative report, and testimony of retired Dep. Chief Thompson, Chief DeNaro, Mr. Rennie, and the Appellant himself, the Appellant did not "physically check[] to ensure [the cell door was] securely locked" as required by Policy & Procedure No. 72, 72.4.2(d). The Appellant electronically acknowledged receipt of this policy on April 2, 2015. Moreover, as a nearly twenty (20)-year veteran of the HPD at that time, the Appellant was familiar with the cell doors, their locking mechanisms, and how to properly secure a prisoner inside a cell. In testimony at the Commission hearing, the Appellant admitted that during the incident in question he did not physically check to ensure the cell door was securely locked as in violation of Policy & Procedure No. 72, 72.4.2(d).

The Appellant avers that the door lock malfunctioned. However, there was no evidence at the time to support his contention. There had been no substantiated reports of any problems with the lock to cell M2 in the days prior to the April 16, 2016 incident or days immediately thereafter. When asked to inspect the lock, other Haverhill police officers were unable to find

any malfunctioning of the door. When called in to inspect the lock, locksmith Paul Rennie found no malfunction with the door or its lock, and testified that he "tested the lock, at least twenty times, and there was [sic] no issues." Further, there is no evidence of any malfunctioning or repair of cell M2 on the Rennie Detention Systems invoice issued on or about April 27, 2016, following inspection of the lock. Mr. Rennie testified that if he performed any repair on cell M2, it "absolutely" would have been reflected on the subsequent invoice. (Testimony of Rennie) There is no mention of malfunction of the door or lock to cell M2 in subsequent email messages between Rennie Detention Systems and the HPD.

Moreover, the video surveillance footage revealed that the door did not close from the inside when Prisoner 1 attempted to lock himself into the cell. The fact that the door did not close from the inside is not indicative of malfunction. Mr. Rennie and Dep. Chief Thompson made clear that while technically possible under the right circumstances, the doors are not designed to close from the inside. This is a safety mechanism, designed to prevent suicides. Testimony of Rennie and Thompson. Similarly, the Appellant's claim that the door to cell M2 was sticking as a result of a recent paint job performed on the door is refuted by the video surveillance footage showing the door bounce off its casing, rather than sticking, and Mr. Rennie's testimony that he did not find any paint-related sticking when he subsequently inspected cell M2. Had he found any evidence based on the foregoing, I credit Mr. Rennie's testimony and conclude that neither the door, nor the lock malfunctioned when the Appellant closed it on April 16, 2016; rather, the door bounced back open because it was not closed properly. It was not closed with sufficient force to engage the lock.

Even if the lock or door had malfunctioned, the result would be the same. Pursuant to Policy and Procedure No. 72, 72.4.2(d), the Appellant was supposed to "physically check[] to

ensure [the cell door] is securely locked." J.Ex. 4. The Appellant admitted that he did not physically check to ensure the door was securely locked. Had he done so, he would have noticed that the door immediately opened after he supposedly closed it. Whether the lock is fully functional or malfunctioning, this physical check would have alerted Officer Moriarty to the issue such that he could re-try securing the door properly, or move the prisoner to a different cell. The Appellant's failure to physically secure the door to the cell resulted in a prisoner escaping his cell for nearly half an hour, moving around the cell block and booking area freely and could have caused harm to other officers.

The Commission has upheld discipline issued for failure to follow established workplace policies and procedures. *See, e.g.,* Caggiano v. Marshfield Fire Dep't., 27 MCSR 638 (2014); Tinker v. Boston Police Dep't., 24 MCSR 551 (2011); Lett v. Boston Police Dep't., 23 MCSR 358 (2010); Dambreville v. Boston Police Dep't., 23 MCSR 333 (2010); Welch v. Boston Police Dep't., 19 MCSR 290 (2006); Sabbey v. Cambridge Police Dep't., 14 MCSR 172 (2001); Crowley v. Dep't. of Correction, 12 MCSR 42 (1999); and Zatoonian v. Waltham Police Dep't., 10 MCSR 167 (1997). Since the Appellant here did not physically check the door, in violation of a clear and established policy, I find that his actions constitute substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service. As a result of the Appellant's actions, Prisoner 1 was able to escape his cell unrestrained and walk around the area. This compromised the safety of other officers in the HPD, other prisoners, and could have compromised the safety of the public, had he found a way to escape the building. Accordingly, the Respondent has established that it had just cause to discipline the Appellant. Since the findings here are substantially the same as those found by the Respondent, I find no reason to modify the discipline, especially in view of his disciplinary record.

The Appellant alleges that he is the victim of disparate treatment on this occasion and others. In view of the testimony of the Appellant and Chief DeNaro, I find that the record does not support the Appellant's allegation of prior disparate treatment by Chief DeNaro. Similarly, the record does not support the Appellant's allegation that he was disciplined in a disparate manner in this case. The Appellant alleged that two (2) other officers (identified at the Commission hearing as Officers D and E) were treated differently when they were involved in a prisoner escape at a different time. However, the two (2) incidents are not comparable. In the prior incident, the prisoner was waiting to be interviewed in connection with the theft of a saw. The prisoner was sitting on a bench in the cell area, unrestrained and not locked in a cell and escaped from the department via an open Sally Port door. While Prisoner 1 in the April 16, 2016 incident involving the Appellant did not escape the building, he did escape from his cell, and was given the opportunity to escape from his cell because of the Appellant's failure to secure the door. Prisoner 1 had access to the book desk and could have located an item to use as a weapon against the officers. However, in the case of Officers D and E, it was their first offense and it was much earlier in their careers. The Commission, in addressing a disparate treatment allegation, has upheld harsher punishment where an appellant had a lengthier disciplinary history than those with whom he compared himself. *See* Draper v. Brookline School Dep't., 26 MCSR 320 (2013). As a result, I find that the record does not support the Appellant's allegation of disparate treatment or bias. For these reasons, modification of the discipline issued by the Respondent is not warranted.

Conclusion

Based on the findings herein, the Appellant's appeal, docketed D-17-126, is hereby ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman

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Cynthia Ittleman, Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Tivnan, and Stein, Commissioners) on February 13, 2020.

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 <u>does not</u> 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:
Stanley Helinski, Esq. (for Appellant)
Carolyn M. Murray, Esq. (for Appointing Authority)