

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STEPHEN MUISE,
Appellant

v.

D-15-154

CITY OF CHICOPEE,
Respondent

Appearance for Appellant:

Andrew J. Gambaccini, Esq.
Reardon, Joyce & Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Appearance for Respondent:

Thomas J. Rooke, Esq.
Associate City Solicitor
City of Chicopee
17 Springfield Street
Chicopee, MA 01013

Commissioner:

Christopher C. Bowman¹

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Stephen Muese (Captain Muese), appealed the decision of the City of Chicopee (City) to suspend him for a period of three (3) days from his position as Captain in the City's Police Department. Captain Muese also raised a G.L. c. 31, § 42 (procedural) claim.

¹ The Commission acknowledges the assistance of Law Clerk Demetrios Spanos in the drafting of this decision.

On August 12, 2015, I held a pre-hearing conference at the Springfield State Building. A full hearing was conducted at the same location on September 30, 2015.² A digital recording was created of the hearing and both parties were provided with a CD of that recording. Following the hearing, the parties had the recording transcribed and a copy of the transcript was provided to the Commission. Captain Muise submitted a proposed decision; the City did not.

FINDINGS OF FACT:

During the hearing, the City entered into evidence a total of 20 (twenty) exhibits, including one with three subparts, and Captain Muise entered a total of five (5) exhibits.³ Based upon the documents admitted into evidence and the testimony of:

For the City:

- William Jebb, Chief of Police for the City of Chicopee Police Department;
- Lonny Dakin, Captain for the City of Chicopee Police Department;

For Captain Muise:

- Stephen Muise, Captain for the City of Chicopee Police Department;

I make the following findings of fact:

1. Captain Muise is a long-time resident of Chicopee, where he has lived for approximately thirty years. He has two children, aged twenty-seven and twenty-five. He has an Associate's

² The Standard Adjudicatory Rules of Practice and Procedure; 801 CMR §§ 1.00 et seq.; apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

³ The Appellant's exhibits actually are marked from two through six because, after marking of the exhibits, the City raised an objection to the first exhibit, an objection that I sustained. Rather than redesignating the exhibits, the remaining exhibits remained as marked originally.

degree in criminal justice from Springfield Technical Community College. (Testimony of Captain Muisse)

2. Captain Muisse has been employed by the City's Police Department since October 1987. After serving in a patrol capacity for approximately four and a half years, he was promoted to the rank of Sergeant and, after two and a half years at that rank, again was promoted and began serving as a lieutenant. Following six years of service as a lieutenant, in 2003, he was promoted to captain. (Testimony of Captain Muisse) As the captain with the most seniority, he is considered the Senior Captain. (Testimony of Chief Jebb)
3. Structurally, the Chicopee Police Department is staffed by one Chief of Police, five captains, seven lieutenants, fifteen sergeants and 111 patrol personnel. Captains can be assigned to several positions, including commander of one of the three shifts. (Testimony of Chief Jebb)
4. Upon promotion to Captain, for approximately six years, Captain Muisse's assignment was as the commander of the 4 p.m. to midnight shift. Additionally, for some years, Captain Muisse was in charge of the Department's underwater rescue team. (Testimony of Captain Muisse)
5. For about one year, Captain Muisse was assigned for periods as the shift commander of either the midnight shift or the day shift. (Testimony of Captain Muisse)
6. In 2009, under then-Chief John Ferraro, Captain Muisse was assigned as the communications and technology manager for the Department, a role that he occupied as Captain for approximately three years. (Testimony of Captain Muisse)
7. In 2012, during the tenure of Chief Thomas Charette, Captain Muisse was assigned, in

addition to his role with respect to communications and technology, as the Captain in charge of internal affairs, the traffic bureau, school resource officers and grants.

(Testimony of Captain Muisse)

8. When assigned to internal affairs by Chief Charette in 2012, Captain Muisse replaced then-Deputy Chief Jebb. (Testimony of Captain Muisse) Chief Jebb felt slighted by his removal as head of internal affairs and believes he was subsequently the target of an investigation based on “lies”. (Testimony of Chief Jebb)
9. In 2013, then-Deputy Chief Jebb filed a bypass appeal challenging the decision of the former Mayor to bypass him for selection as Chief of Police in Chicopee in favor of Thomas Charette. As a result of the allowance of that appeal, the Commission vacated the permanent appointment of Charette and directed that Charette serve as temporary Chief of Police until such time as the newly elected Mayor, Richard Kos, made a permanent selection. Thereafter, Jebb was promoted to Chief in July, 2014. (Testimony of Chief Jebb; Administrative Notice: Jebb v. City of Chicopee, 27 MCSR 208 (2014))
10. The contested selection of Chief caused divisions within the ranks of the Police Department. Chief Jebb considered Captain Muisse to be a supporter of then-Chief Charette. (Testimony of Chief Jebb)
11. When Chief Jebb assumed his position as Chief of Police in July, 2014, he made a number of personnel moves, including removing Captain Muisse from his position as the Captain in charge of internal affairs and reassigning and designating him as the day shift commander. (Testimony of Captain Muisse)

12. The day shift commander is responsible for documenting time and attendance, comp time, sick time, overtime, and for creating a two week projective calendar for the daily operations of the day shift in the department, for everyone that works between 8 am and 4 pm.
(Testimony of Chief Jebb)
13. Every two weeks a biweekly accrual report is issued to shift commanding officers along with a multipage spreadsheet that contains compensatory time information for all officers on the shift, identifying the sick, vacation, personal and comp time for each officer at the start of the year, earned in that year, used in that year and the resultant running balance. (Exhibit R-9 and A-5)
14. In addition, there is maintained another single-page document that contains the name of each officer on the shift, along with columns for earned and used comp time, and two columns for office use designating whether the time is to be placed in the first or second week of the period. At the bottom of that form is an instruction that if earned time from another pay period is being accounted for on the form, it is to be designated with an asterisk and the date earned. (Exhibit R-10)
15. There also is maintained a document entitled "Officer's Accumulated Comp Time" that, for each officer, has columns indicating the date the time was entered into the biweekly report, the date the time was earned or used, the amount of time earned, the amount of time used, the total hours and then the initials of the supervisor. (Exhibit A-4 and Testimony of Chief Jebb)
16. Chief Jebb described the system as "antiquated" and indicated that it creates problems, which is why he now is in the process of revamping the record-keeping system with new software.
(Testimony of Chief Jebb)

17. Sometime in July of 2014, Captain Muise delegated to a sergeant the task of completing comp time sheets every week and then, every other week, to do the accrual sheets. This delegation continued until Captain Muise was notified of inconsistencies. (Testimony of Captain Muise)
18. Captain Muise acknowledges that he has, at times, spent too much time at work on Facebook and viewing other non-work related websites. (Testimony of Captain Muise)
19. On August 1, 2014, Chief Jebb sent an email to Captain Muise stating:
- “This is the third request regarding the SA time computations. This needs to be accomplished ASAP and the biweekly totals were due yesterday. I will give you until 1600 hours today to complete both as you are holding up other shifts.”
- (Testimony of Chief Jebb; Exhibit R-7)
20. On August 3, 2014, Captain Muise sent a reply email to Chief Jebb:
- “I was in the room when [a lieutenant] ran the NIRBS check at 1530. I did not realize that he did not do it properly. I have since taught him the proper way to run NIRBS, so he will not miss the reports again. I caught up with the SA times and accruals on Friday 8/1/14. All other units that were affected were notified of the adjustments.” (Testimony of Chief Jebb; Exhibit R-7)
21. On August 19, 2014, Chief Jebb sent an email to Captain Muise:
- “It has come to my attention that sick time usage has become a problem on your shift. As Captain it is your responsibility to ensure that officers under your command are not violating Article 8 (Sick Leave Program) of the collective bargaining agreement. Therefore, I am

requesting a To/From regarding what corrective measures are being taken.”

(Testimony of Chief Jebb; Exhibit R-7)

22. Sometime in August or September of 2014, Captain Muise was placed on a medication regimen that made him very groggy in the mornings until his body could get use to the medication and build a tolerance. It took three months for Captain Muise to get used to the new regimen and during that time he would wake up and fall back asleep and would have to call and let the Police Department know he would be running late. (Testimony of Captain Muise)

23. On September 5, 2014, Chief Jebb sent an email to Captain Muise stating:

“I am requesting an update in writing from you on the status of the internal affairs investigations, which were incomplete. Hopefully these cases don’t involve a potential for disciplinary action as you may have exceeded the allowed time frame.”

(Testimony of Chief Jebb; Exhibit R-7)

24. On September 8, 2014, Captain Muise sent a reply email to Chief Jebb:

“I turned one in last week. None of them involve any disciplinary action. I will continue working on them.”(Testimony of Chief Jebb; Exhibit R-7)

25. On September 29, 2014, Chief Jebb sent an email to Captain Muise stating:

“It has come to my attention that you took Internal Affairs folders home, and that you haven’t completed investigations, which took place over three months ago. At this time I am ordering you to return all IA files to Capt. Sullivan.” (Testimony of Chief Jebb; Exhibit R-7)

26. Lonny Dakin is a Captain with the Chicopee Police Department. He was in charge of the 4:00 to 12:00 uniform shift for four (4) years. In July of 2014, he took over command of the detectives' bureau, drug unit and SROs. (Testimony of Capt. Dakin)
27. On November 24, 2014, Chief Jebb asked Captain Muisse to come to his office along with Captain Lonny Dakin. This was after multiple conversations and emails to Captain Muisse regarding his failure to complete his shift schedules, compensatory accrual sheets, and internal affairs investigations. It was during this meeting that Captain Muisse disclosed to Chief Jebb that he was on a new medication regimen. Captain Muisse stated that his medicine was affecting his ability to perform his duties and that his doctor had recently changed his prescription. Captain Muisse assured Chief Jebb that his performance would improve as a result of this new medication. Chief Jebb ordered Captain Muisse to submit a complete list of his medications to him. (Testimony of Chief Jebb and Capt. Dakin; Exhibit R-3)
28. Captain Muisse knew that he had been ordered to provide a list of his prescription medications at the November 24, 2014 meeting, even though the Chief had not said "this is an order." (Testimony of Captain Muisse)
29. On December 11, 2014, Chief Jebb sent an email to Captain Muisse:
- "It has come to my attention that you have not completed the vacation picks for your shift. This is unacceptable, and I am ordering you to complete these picks ASAP. I am also requesting a To/From as to why you were unable to complete these picks in a timely manner." (Testimony of Chief Jebb; Exhibit R-7)
30. On December 11, 2014, Captain Muisse sent a reply email to Chief Jebb:
- "We ran into problems with officers returning our calls. We have now been calling them and

leaving messages that they have 1 hour to respond or we are bypassing them. We should be done tomorrow.” (Testimony of Chief Jebb; Exhibit R-7)

31. On December 15, 2014, Chief Jebb issued Captain Muise a written reprimand for the issues discussed in the November 24, 2014 meeting, including the failure to complete shift schedules, accrual sheets and internal affairs investigations. (Exhibit R-15)
32. Sometime in March of 2015, Captain Muise told Chief Jebb’s administrative assistant that he was trying to track down some errors and that he was going to give her the comp time and accrual sheets late. (Testimony of Captain Muise)
33. Sometime in March or April of 2015, Captain Muise had a bad cold, and was up late at night, and knew that the Chicopee Police Department was short-handed for supervisors so he went into work, although he was very tired. Once at work, he was at one point in time in the dispatchers’ room situated on a raised floor and as the dispatchers were busy on calls, Captain Muise believes that he must have fallen asleep and fell to the ground. He does not believe that he passed out because he tried to balance himself as he was falling and watched the ceiling tiles until his body made contact with the floor. (Testimony of Captain Muise)
34. On May 26, 2015, Captain Dakin sent an email to all “shift supervisors” reminding them to check reports every day throughout the day and before leaving to ensure that officers are completing thorough “preliminary investigations.” Chief Jebb forwarded that email to Captain Muise with the following message: “Steve, It is your responsibility to ensure ‘All’ reports are being checked. I understand if it’s a late call, or a report which goes past 1600 hours. There is no acceptable excuse for this pattern to continue, therefore consider this your final notice on this issue.” (Exhibit R-7)

35. On June 19, 2015, Chief Jebb discovered that Captain Muise was not entering payroll in a timely manner, and had not submitted his shifts' 'bi-weekly accruals' since March 28, 2015.

Chief Jebb's administrative assistant had been aware of this for several weeks but did not pass this information on to Chief Jebb. (Testimony of Chief Jebb and Exhibit R-3)

36. On June 19, 2015, Chief Jebb sent an email to Captain Muise stating:

"Effective immediately you are ordered to have your shifts payroll completed and enter by 1000 hrs., daily. You are also ordered to complete and submit your shifts Bi-weekly Accrual Report when it is due. Failure to comply with this order will result in disciplinary action. This is in direct response to your inability to complete the aforementioned on a regular basis. The last accrual sheet received was for March 15-28th pay period and just last week I went into payroll at 1430 hours and it had not been entered as of that time. This is unacceptable and will not be tolerated." (Testimony of Chief Jebb; Exhibit R-7)

37. On July 2, 2015, Chief Jebb met with Captain Muise, his union representative and Captain Dakin. At this meeting, Chief Jebb asked Captain Muise to explain why he had not submitted the bi-weekly accruals since March and why he hadn't complied with the Chief's orders to provide him with a list of his prescription medications, issued several months ago. (Testimony of Chief Jebb and Exhibit R-3)

38. During the July 2nd meeting, Captain Muise attributed the problems regarding the bi-weekly accruals to the fact that he had delegated the responsibility to a sergeant, now retired. In regard to not providing Chief Jebb with a list of his prescription medicines, Captain Muise suggested that he was being singled out, as other officers were not subject to the same order. (Testimony of Chief Jebb and Exhibit R-3)

39. Also during the July 2nd meeting, Chief Jebb asked Captain Muise about a “rumor” that Captain Muise had passed out and struck his head while standing in the dispatch area. Captain Muise told Chief Jebb that he had slipped and not fallen. (Testimony of Chief Jebb and Exhibit R-3)
40. In a memo penned by Chief Jebb on July 6, 2015, Chief Jebb, recounting the July 5th meeting, wrote: “At this time, Captain Muise was becoming insubordinate, and I advised him that he was being suspended for a period of three (3) days (July 7th -9th). I further advised him that I was placing him on administrative duties effective immediately and ordered him to submit a complete list of prescription medications to me. I explained to him that he would remain on administrative duty until the police department receives a note from his doctor stating that he was fit for full duty. I found Capt. Muise to be in violation of the following department rules and regulations: 1) Incompetence [300:19, sub sections B, C, and D]; 2) Intoxicating beverage / narcotics [300:25].” (Exhibit R-3)
41. Chicopee Police Department Rules and Regulations, Section 300:19 states:
- “Incompetence – An Officer shall maintain sufficient competency to perform his / her duty and to assume responsibilities of his / her position. Incompetence may be demonstrated, but not limited to, the following:
- A. A lack of knowledge of the application of laws required to be enforced.
 - B. An unwillingness or inability to perform assigned tasks.
 - C. The failure to conform to work standards established for the officers’ rank, grade or position.
 - D. Repeated infractions of the rules and regulations.” (Exhibit R-11)

42. Chicopee Police Department Rules and Regulations, Section 300:25 states:

“Intoxicating beverage / narcotics; Employees shall not, while on duty, consume any intoxicating beverage except for a proper police purpose with the specific approval of the Chief. Employees shall not while on duty use a narcotic / controlled substance or any other toxic drug except at the direction of a physician, with prior notification to the Chief.

Employees shall not report to duty under the influence of intoxicating liquor or under the influence of any narcotic / controlled substance unlawfully administered. Employees shall not report for duty with the odor of intoxicants on their breath. (Exhibit R-11)

43. Shortly after the July 2nd meeting, Chief Jebb sent an email to Captain Muise stating: “As a result of our meeting today, I am ordering you to complete your shifts Bi-weekly accruals and submit them to me on Monday, July 6, 2015, no later than 0900 hours. To be clear, I am requesting the current and past accruals dating back to March 2015.” (Exhibit R-7)

44. In a letter dated July 2, 2015, Captain Muise’s physician penned a letter stating that Captain Muise should be able to work while taking his medication as long as his medical conditions are under good control and does not have any side effects to his medications should be able to work while taking his medications as long as his medical conditions are under good control and he does not have any side effects to his medications. (Exhibit R-18)

45. On July 4, 2015, Captain Muise submitted a detailed medical history, including a list of any prescriptions he had or was taking, to Chief Jebb, with the letter from his physician attached. (Exhibit R-17)

46. On July 4, 2015, Captain Muise reviewed the bi-weekly accrual sheets, identified the source of the problems regarding the calculations and completed all of the bi-weekly accrual sheets, back to March 2015. (Testimony of Captain Muise and Exhibits A-3 through A-6)
47. On July 8, 2015, Captain Muise filed an appeal with the Mayor of Chicopee, who is the Appointing Authority, contesting the three-day suspension. (Exhibit R-4)
48. In a letter to Captain Muise dated July 13, 2015, Chief Jebb acknowledged receipt of the medical history and physician's letter submitted by Captain Muise. Chief Jebb's letter also states in relevant part: "I am going to contact him [physician] in order to ensure that he is aware of my concerns and to apprise me, based on his best medical opinion, as to your fitness for duty based on my concerns." The letter directs Captain Muise to take the attached letter to his physician and have the physician respond directly to Chief Jebb by July 24, 2015. (Exhibit R-19)
49. The letter attached to the Chief's July 13th letter contains a detailed account of the incident in the dispatch room that Chief Jebb did not witness, along with other observations, for which it is unclear if Chief Jebb is referencing personal observations of Captain Muise or observations conveyed to him by others. (Exhibit R-20a)
50. On July 16, 2015, a hearing was held before the Mayor. (Stipulated Fact and Exhibit R-1)
51. On July 23, 2015, the Mayor issued Captain Muise a letter upholding the three (3)-day suspension. The Mayor's letter stated in part:
- "At the hearing, I heard direct testimony of Chief Jebb and reviewed numerous exhibits introduced to support the allegations of your incompetence to submit timely biweekly accrual sheets, shift schedules and entering payroll in a timely manner to ensure current and accurate

record keeping by you for the 8:00 A.M. to 4:00 P.M. shift and all officers under your command. This dereliction of duty dates back to March 2015 despite repeated requests, as well as verbal and written orders by Chief Jebb for you to submit them in a timely fashion. In fact, you did not submit them in complete detail until July 6, 2015, after your suspension was ordered.

In addition, you admitted to failing to report to the Chief of Police the narcotic / prescription medications you were taking that, by your own admission, caused you to fall asleep while standing up and falling to the floor in the dispatch area of the police station. You further admitted that the medication made it extremely difficult for you to awaken in the mornings and it interfered with your ability to concentrate and perform the essential tasks of a police captain as a shift supervisor in a timely fashion.” (Exhibit R-1)

52. As of the date of the full hearing before the Commission, Mr. Muise was still undergoing a series of medical screenings. (Testimony of Muise)

Legal Standard

G.L. c. 31, § 41 provides:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack

of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two.

A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. Whenever such hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. A person whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended, and he shall be entitled to compensation for the period for which he was suspended. A person suspended under this paragraph shall automatically be reinstated at the end of such suspension. An appointing authority shall not be barred from taking action pursuant to the first paragraph of this section for the same specific reason or reasons for which a suspension was made under this paragraph.”

G.L. c. 31, § 42 provides:

“Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the

appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.

A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of an appointing authority made pursuant to all the requirements of section forty-one. In the event the commission determines that the subject matter of such complaint has been previously resolved or litigated with respect to such employee, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with said section eight, the commission shall forthwith dismiss such complaint. If said complaint is denied, such hearing shall be conducted and a decision rendered as provided by section forty-three.”

G.L. c. 31, § 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, op.cit. 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, Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting internally from Watertown

Analysis

As a preliminary matter, Captain Muise's Section 42 (procedural) appeal is denied. Section forty-one of chapter thirty-one of the Massachusetts General Laws provides that a civil service employee shall receive a "written notice stating the specific reason or reasons for" a suspension imposed pursuant to that statutory provision. In turn, G.L. c. 31, § 42 provides that a civil service employee who demonstrates that an appointing authority failed to follow the

requirements of § 41, and who has had civil service rights prejudiced by that failure, is entitled to a remedy from the Commission.

Captain Muise argues that the July 6, 2015 suspension letter from Chief Jebb, and the investigatory report of the same date state only two (2) reasons for the suspension: untimely submissions of accrual sheets and the list of prescription medication. Captain Muise argues that the City violated the provisions of Section 41 related to providing specific reasons by also considering, as part of the Appointing Authority hearing, that Captain Muise failed to submit shift schedules and payroll information on a timely basis.

First, the July 6th letter does not limit the City to the two (2) reasons cited by Captain Muise. In fact, the July 6th letter references the Chief's investigate report which specifically references the untimely submission of bi-weekly accruals, prescription information *and payroll information*, which could reasonably be construed to also include shift schedules.

Second, even if the City was limited to reviewing only the untimely submission of bi-weekly accrual and prescription information, it is painfully obvious that, even standing alone, the City considered those alleged transgressions to be worthy of at least a short-term suspension.

In short, the City's letter to Captain Muise did provide the specific reasons for his suspension. Even if it did not, there was no prejudice suffered by Captain Muise.

On the merits, the City has shown, by a preponderance of the evidence, that Captain Muise failed to complete essential functions of his job and that he failed to comply with a lawful order of the Police Chief in a timely manner.

According to Captain Muise's own testimony, he delegated responsibility for submitting bi-weekly accrual information to a subordinate in late 2014. It was not until March 2015 that

Captain Muise discovered numerous errors in the accrual sheets. Captain Muise seems to argue that his delegation of this duty relieved him of the *responsibility* for ensuring that the duty was completed. He is mistaken. Ultimately, it was Captain Muise's responsibility to ensure that the bi-weekly accrual information was submitted in a timely and accurate manner. Either by failing to do it himself, or by failing to properly supervise an employee who was tasked with this assignment, Captain Muise exhibited incompetence.

Even after discovering the numerous errors, Captain Muise failed to directly notify Chief Jebb of the problem and/or that it might not be resolved for several weeks. I considered – and rejected – the suggestion that Captain Muise met this burden by notifying the Chief's Administrative Assistant. Put simply, Captain Muise does not report to the Chief's Administrative Assistant. He is well aware of the chain of command and he had a responsibility to notify the Chief of the ongoing problems related to the submission of accurate bi-weekly accrual information, particularly since he had been previously reprimanded for this same offense. Had Captain Muise made Chief Jebb aware of the ongoing problems, corrective action could have been taken sooner regarding the bi-weekly accrual information.

Instead, the problem persisted for at least three (3) additional months, while Captain Muise was, inexplicably, unable to rectify the problem. I did consider that the reporting system, even as described by Chief Jebb, is “antiquated” and prone to reporting errors. That, however, only reinforces the need to carefully monitor the reporting system and ensure that the Police Chief is made aware of any problems sooner, rather than later. Here, Captain Muise failed to do either.

As to the prescription medication issue, Captain Muise acknowledges that, on November 24, 2014, he was ordered by Chief Jebb to provide a list of his prescription medications. Captain

Muise was not being singled out or targeted by this order. Rather, Chief Jebb's order came only after Captain Muise stated that a change in his medication regimen was affecting his work performance. Based on that information, it was appropriate, if not incumbent upon, Chief Jebb to inquire about these prescription medicines to determine whether they had an ongoing impact on Captain Muise's ability to perform his job duties, which includes possession of a firearm. While Chief Jebb should have provided a firm deadline for compliance, and followed up on this order, that does not absolve Captain Muise of the responsibility to comply with this lawful order in a timely manner. He did not. For this reason, in addition to failing to submit bi-weekly accrual reports in a timely manner, there was just cause to discipline Captain Muise.

Having determined that it was appropriate to discipline Captain Muise, I must determine if the City was justified in the level of discipline imposed here – a three (3)-day suspension.

“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.”

Falmouth v. Civ. Serv. Comm'n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass.App.Ct. 594, 600 (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., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

The Commission is also 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.” Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited.

Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee’s discipline to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

My findings do not differ significantly (if at all) from those reported by the City nor do I interpret the just cause standard any differently than the City. I did, however, carefully consider Captain Muise’s argument that the disciplinary action imposed here was the result of bias that Chief Jebb had or has against Captain Muise.

Chief Jebb acknowledges that, while he (Chief Jebb) was contesting the former Mayor’s decision to bypass him for promotional appointment to Police Chief, he considered Captain Muise to be in the “camp” of now-former Chief Charette. More than a year after that matter was settled, I was dismayed to hear about two factions and a sense that Chief Jebb himself has failed to move beyond what he considers a grave injustice against him.

Emails penned by Chief Jebb to Captain Muise, as outlined in the findings, appeared to be tinged with animosity and driven by a desire to box Captain Muise into a corner, as opposed to those of a Police Chief seeking to move the Department forward. For example, in one email exchange, Chief Jebb demands that outstanding internal affairs investigations be completed. Then, only days later, he chides Captain Muise for bringing the files home with him, which I presume was done to comply with deadline set by Chief Jebb.

Moving any fractured organization forward requires leadership, compromise and a demonstrated commitment (from the top) to let bygones be bygones. Until that happens, disciplinary actions by Chief Jebb require a heightened degree of scrutiny to determine if they are improperly influenced by a misguided sense of perceived allegiances and loyalties.

Even when viewed in that lens, however, the disciplinary action here against Captain Muise was warranted. Even after receiving a written warning, Captain Muise failed to notify the Chief of his inability to complete the bi-weekly accruals and failed to correct the problem for months. Further, he disobeyed a lawful (and prudent) order to timely provide the Chief with a list of his prescription medications after telling the Chief that said medications were impacting his ability to perform his duties and responsibilities as a Police Captain. Those are not minor offenses and they warrant an appropriate degree of discipline. Had the discipline here been greater than a three (3)-day suspension, I would be inclined to recommend a modification of the penalty. Based on the findings here, however, a three-day suspension appears to be appropriate and consistent with the principles of progressive discipline.

For these reasons, Captain Muise's appeal under Docket No. D-15-154 is *denied*.

Civil Service Commission

Christopher Bowman

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 18, 2016.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Andrew J. Gambaccini, Esq. (for Appellant)

Thomas J. Rooke, Esq. (for Respondent)