

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

ROBERT MURPHY,

Appellant

v.

D-01-2166

CHELMSFORD POLICE DEPARTMENT,

Respondent

Appellant's Attorney:

George J. Basbanes, Esq.
648 Central Street
Lowell, MA 01857
(978) 459-3333
gjb@bandclaw.net

Respondent's Attorney:

Marc L. Terry, Esq.
Mirick O'Connell
1700 W. Park Drive
Westboro, MA 01581
(508) 898-1501
mlterry@modl.com

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Robert Murphy (hereafter "Murphy" or "Appellant"), is appealing the decision of the Appointing Authority, the Chelmsford Police Department (hereafter "Town" or "Appointing Authority"), suspending him from his position as police officer for a total of 3 days for

failing to respond to an emergency call in a timely manner and for insubordination for initially failing to fill out an incident report regarding the matter as ordered. The appeal was timely filed. A hearing was held on August 11, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private.

Two tapes were made of the hearing.

FINDINGS OF FACT:

12 Exhibits were entered into evidence (Joint: 1-11; Appellant: 12) Based upon the documents entered into evidence and the testimony of:

For the Appointing Authority:

- Chelmsford Police Lieutenant (then Sergeant) John Roark, Appellant's supervisor;
- Chelmsford Deputy Police Chief (then Lieutenant) Scott Ubele;
- Chelmsford Police Chief (then Lieutenant) James Murphy;

For the Appellant:

- Appellant, Chelmsford Police Officer Robert Murphy;

I make the following findings of fact:

1. The Appellant, Robert Murphy, is a tenured civil service employee of the Chelmsford Police Department in the position of police officer. He had been employed by the Town for approximately 7 years prior to being suspended for 3 days on October 22, 2001 for an incident that occurred on September 23, 2001. (Testimony of Appellant and Exhibit 7)
2. There was no evidence presented to the Commission regarding any prior discipline of the Appellant.

3. At the time of the incident, the Appellant was assigned to the Department's Traffic Unit, a specialized unit consisting of three or four officers whose primary duty is traffic enforcement. They are not relied upon for routine calls other than extreme emergencies. (Testimony of Roark)
4. On September 23, 2001, the Appellant was working the 4:30 P.M. to 12:30 A.M. shift within the Traffic Unit. (Testimony of Roark and Appellant)
5. The Chelmsford Police Department divides the town into four sectors that must each have coverage. (Testimony of Roark)
6. Then-Sergeant Roark, the Appellant's supervisor at the time, testified before the Commission that when the Appellant arrived at the police station on September 23, 2001, he (Roark) told the Appellant that he was going to have to cover "Car Four, Sector Four" until 6:00 P.M. as another (non-traffic unit) officer (Quinn) would not be in until 6:00 P.M. (Testimony of Roark)
7. The Appellant testified before the Commission that Roark's order was more vague in that Roark stated to him, "hey Murph, Quinn's not coming in until six. Can you hang around the Center until he comes in?" Roark testified that "the Center" could either be Sector 1 or Sector 4. (Testimony of Appellant)
8. At 5:32 P.M., a call for emergency medical assistance was received from B1 Sinai Circle, which is in Sector Four. The emergency was described over the radio as "35 year-old male; diabetic; difficulty breathing." (Exhibit 8, Testimony of Roark)
9. Since the early 1990's, the Chelmsford Police Department has taken a lead role in handling medical emergency calls and probably has the best equipped police cruisers

in the Merrimack Valley, including oxygen masks, gauze and complete duty bags in each car. (Testimony of Ubele)

10. The Appellant testified that when he heard the call, he was traveling in a northerly direction on North Road, just past the old Town Hall. (Testimony of Appellant)
11. Joint Exhibits 10 and 10A are maps of the area in question and were referenced by the Appellant and Lt. Roark during their testimony. (Exhibits 10 and 10A)
12. The Appellant testified that he responded to the call by calling in his location as “Car 18, Central Square” at which time he was dispatched to the call. The Appellant testified that by the time he was dispatched, his location was just south of Route 495. (Testimony of Appellant; Exhibit 10A)
13. Roark testified that, four minutes later, he saw Officer Murphy sitting in his cruiser, stopped in a line of traffic, without his blue lights activated, in a westbound direction on Chelmsford Street. Roark testified that Murphy, “was in no rush at all”. (Testimony of Roark)
14. Roark testified that when he saw Murphy’s cruiser in a westbound direction on Chelmsford Street, he “couldn’t fathom how he (Murphy) ended up in that location; it never even came into my mind he would take a route such that he did.” (Testimony of Roark)
15. Roark testified that the Appellant should have been able to respond to the call at Sinai Circle in 30 seconds and identified more direct routes on the maps (Exhibits 10 and 10A), even if the Appellant was headed in a northerly direction toward Route 495 when he was dispatched. (Testimony of Roark)

16. Roark testified that he believed the Appellant was “dogging the call” and deliberately took an indirect route so that other first-responders, in this case, the fire department, would handle the medical emergency. (Testimony of Roark)
17. Even without being familiar with the geographic area in question, Exhibits 10 and 10A provide this Commissioner with a vivid illustration of the circuitous route taken by the Appellant that day. Further, Lt. Roark was a good witness and offered credible testimony regarding the most direct route to the scene of the call. Then-Lieutenant and now Police Chief James Murphy, testified that before he issued the discipline, he drove the route himself giving the Appellant the benefit of the doubt as to his actual location at the time of dispatch. From that beneficial location, the Chief himself drove two different routes to Sinai Circle, one which took less than a minute and the other which took approximately two minutes. Chief Murphy was also a credible witness and his decision to drive these routes, despite his intimate familiarity with the area, was evidence of his desire to be fair and impartial before deciding whether to discipline the Appellant. (Testimony of Roark and Chief Murphy)
18. When asked during direct testimony why his blue lights were not activated when Roark saw him stopped at a traffic light, the Appellant stated, “When he saw me, I was probably four-fifths, 80 percent of the way. More than that. I was only maybe six or 700 feet away from the call. I had shut them off.” (Testimony of Appellant)
19. When asked during cross-examination if he had ever activated the blue lights after getting the call, the Appellant offered varying responses, at one point answering, “probably, yes” and then “I can’t remember five years ago”.

20. When asked during direct testimony whether or not he felt that he took the proper route to Sinai Circle, the Appellant did not offer a direct “yes or no” answer. Rather, he stated “There was no thought. I just went. I got the call and I went. I went to the call. I got a call. I drove to the call. I drove fast. I got there quickly. I went to the call. I did what I was supposed to do. You know, what else can you do? I went there.” (Testimony of Appellant)
21. During cross-examination, the Appellant was given another opportunity to address the issue of whether he took the most direct route when asked, “You believe that to be the direct route?” Once again, the Appellant equivocated, answering, “That’s the route that I took. At the time I felt it was the direct route to go there. That’s the way I went. I got a call. I went. I got there.” (Testimony of Appellant)
22. A few weeks earlier, on August 21, 2001, Roark had verbally counseled the Appellant regarding his poor selection of routes to calls and poor response times to calls. (Testimony of Roark & Exhibit 3)
23. After the Appellant had cleared the call, Roark asked the Appellant to meet him at a nearby location. Roark testified that the Appellant was unable to offer an explanation as to why it took him approximately four minutes to arrive at the call or why he did not have his blue lights activated. At the conclusion of the conversation, Roark told the Appellant to expect some “paper” regarding the incident, signifying that disciplinary action may result. Roark conveyed his concerns regarding the incident to then-Lieutenant Ubele verbally and followed up with a written report the same day, September 23, 2001. (Testimony of Roark and Exhibit 3)

24. Then-Lieutenant Ubele gave the Police Chief at the time a verbal heads-up and the Chief in turn asked Ubele to investigate the incident. (Testimony of Ubele)
25. Ubele, spoke to the Appellant a day or two after the incident and informed him that he was modifying his shift hours by 30 minutes to insure greater supervision of the Appellant. Later the same day, Ubele met with the Appellant and asked him to file a written report regarding the incident in question. Ubele testified that the discussion with the Appellant was contentious and that the Appellant told him that he (the Appellant) didn't think he was going to file a report. When Ubele inquired further with the Appellant, the Appellant told him he had retained an attorney who may not want him to fill out the report. Ubele again ordered the Appellant to fill out a report. Specifically, Ubele testified that he told the Appellant, "Bob, make no mistake about what I'm telling you right now. I am giving you a direct order to write that report." Ubele and the Appellant bantered for a short while and the Appellant stood up and left the office indicating he would "think about" completing a report as ordered. Ubele testified that the Appellant was argumentative, demonstrative, arrogant and rude" throughout the discussion. (Testimony of Ubele)
26. Ubele, who once served as local union president for five years, testified that he is well aware of a union member's "Weingarten Rights", (an employee's right to have union representation present during investigatory interviews), and does not believe they allow an officer to disobey a superior officer's order to fill out an incident report. Further, Ubele testified that, during the conversation, he advised the Appellant to contact a union official if he wanted to and the Appellant said, "I would never hire a union attorney, every one of them is incompetent". Ubele eventually received a

written report from the Appellant during later that night. (Testimony of Ubele and Exhibit 5)

27. Ubele then completed his investigation and recommended to the Police Chief that the Appellant receive a three-day suspension, two days for failing to respond to an emergency call in a timely manner and one day for his insubordination. Ubele testified that “the primary thing on the insubordination was his refusing at least initially to write a report”. Further contributing to the insubordination charge was the Appellant’s “rude, demonstrative, arrogant and argumentative” demeanor during the conversation in which he asked the Appellant to fill out the report. (Testimony of Ubele)

28. The Appellant’s demeanor during the Commission hearing did not help his cause. Claiming that his suspension --and the events surrounding it-- had been “eating at him” during the past five years, the Appellant, who had been sitting stoically throughout most of the hearing, verbally unloaded on his accusers in the room during his testimony, one of whom now serves as Deputy Police Chief. When asked to recount a particular conversation between him and Mr. Ubele, he mimicked the now-Deputy Police Chief’s words in a mocking manner. At another point, when counsel for the Town posed a question which the Appellant believed had no factual basis, he looked at the attorney and said, “you’re lying”. The Appellant appears to have difficulty putting things in their proper perspective, leading to pent up frustration and the argumentative behavior described by Ubele. (Testimony, Demeanor of Appellant)

29. Then Lieutenant of Administration James Murphy reviewed the reports submitted, drove the routes referenced earlier and, based on the information provided to him,

issued a three-day suspension. The disciplinary letter was delivered in-hand on October 22, 2001 to the Appellant and it contained his rights to request a hearing before the Appointing Authority as required by G.L. c. 31, §§ 41-45. (Testimony of Murphy)

30. A disciplinary hearing was held by the Appointing Authority and the 3-day suspension was upheld on December 12, 2001. The Appellant subsequently filed a timely appeal with the Civil Service Commission. (Civil Service Commission Appeal Form & Attached Appointing Authority Decision)

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).

The Chelmsford Police Department suspended the Appellant for three days – two days for failing to respond to an emergency call in a timely manner and one day for insubordination for initially failing to complete an incident report.

In regard to the emergency call response time, the Town alleges that the Appellant deliberately took a circuitous, four-minute route to an emergency call instead of a more

direct route that would have taken anywhere from 30 seconds to two minutes. The Town has shown, by a preponderance of the evidence, that the Appellant knowingly failed to take the most direct route to the emergency call in which a 35-year old diabetic male with difficulty breathing needed assistance. The testimony before the Commission made it painfully clear that the Appellant knowingly took the longer route and the maps entered into evidence illustrate just how circuitous the route was. The Appellant himself equivocated when asked if he thought he took the most direct route possible. Further, the Appellant acknowledged that, when spotted by then-Sergeant Roark, his blue lights were not activated despite the fact that he was in traffic and had not yet arrived at the location of the emergency call – and he could not remember if had ever activated his blue lights while en route to the emergency. While the Appellant, five years after the incident, remains angry about the resulting discipline for failing to take the most direct route possible, he should recognize that this matter could have been far worse had things not worked out so well for the citizen requiring medical attention. That citizen – and the Appellant- are fortunate that members of the Fire Department responded in a more timely manner than the Appellant.

In regard to the one-day portion of the suspension related to insubordination, the Town has again shown by a preponderance of the evidence that the Appellant initially balked at filling out an incident report and, in doing so, was rude and argumentative to the superior officer who instructed him to do so. The Appellant's argument that his Weingarten rights were violated during his exchange with then-Lieutenant Ubele ring hollow. While the Appellant told Ubele that he might be obtaining counsel who may object to him filling out the incident report, the Appellant never asked for a union

representative to be present and even derided the competence of the union legal team. Instead, the Appellant's initial response to Ubele's request to fill out an incident report was to be rude and argumentative. That demeanor was on full display at the Commission hearing. Compliance with the rules and procedures of the Appointing Authority assures that its officers comport in a manner that exemplifies the operation of a paramilitary organization. Tamiko Neal-Jackson v. Boston Police Department, Civil Service Commission, D-6179, 2000. The Appellant, in this case, did not comport himself in an exemplary manner and, in doing so, sought to undermine the authority of a superior officer. As such, the discipline imposed for his insubordination was warranted and necessary.

The Chelmsford Police Department has established by a preponderance of the evidence that there is just cause for the three-day suspension of Robert Murphy and there is no evidence of inappropriate motivations or objectives that would warrant the Commission reducing the 3-day suspension imposed upon him.

For all of the above reasons, the appeal under Docket No. D-01-2166 is hereby ***dismissed.***

Civil Service Commission

Christopher C. Bowman, Commissioner

By a vote of the Civil Service Commission (Goldblatt, Chairman, Bowman, Guerin, Taylor, Marquis, Commissioners) on September 28, 2006.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:

George J. Basbanes, Esq.

Marc L. Terry, Esq.