

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

SCOTT O'MALLEY,

Appellant

v.

D-05-426

DEPARTMENT OF STATE POLICE,

Respondent

Appellant's Attorney:

Timothy M. Burke, Esq.
Law Offices of Timothy M. Burke
160 Gould Street, Suite 111
Needham, MA 02494
(781) 455-0707
tburke@timburkelaw.com

Respondent's Attorney:

Michael B. Halpin, Esq.
Office of the Chief Legal Counsel
Department of State Police
470 Worcester Road
Framingham, MA 01702
(508) 820-2300
michael.halpin@state.ma.us

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43 and G.L. c. 22C, s. 13 as amended by Chapter 43 of the Acts of 2002, the Appellant, Scott O'Malley (hereafter "O'Malley" or "Appellant"), is appealing the decision of the Department of State Police (hereafter "State Police"), suspending him from his position as state trooper for ten (10) days. The appeal

was timely filed. A hearing was held on August 23, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. The one witness other than the Appellant was sequestered.

Two tapes were made of the hearing.

FINDINGS OF FACT:

11 Exhibits were entered into evidence (Joint: 1-3; Appointing Authority: 4-11).

Based upon the documents entered into evidence and the testimony of:

For the State Police:

- State Police Trooper Laura Fogarty, the Appellant's former wife;
- State Police Lieutenant David Ott;

For the Appellant:

- Appellant, State Police Trooper Scott O'Malley;

I make the following findings of fact:

1. The Appellant, Scott O'Malley, is an employee of the Massachusetts State Police in the position of State Trooper. He had been employed by the State Police for 16 years prior to being suspended for 10 days on December 6, 2005 for an incident that occurred on August 22, 2004. (Exhibit 1)
2. Laura Fogarty, the Appellant's former wife, is also an employee of the Massachusetts State Police in the position of State Trooper. She had been employed by the State Police for approximately eight (8) years as of August 22, 2004. The divorce agreement between the Appellant and Trooper Fogarty became final in October 2003. O'Malley and Fogarty have a seven year-old son and the Appellant has visitation rights with his son. (Testimony of Fogarty)

3. The Appellant and Trooper Fogarty separated in March 2001 and the Appellant vacated the house they shared on Blueberry Lane in Sterling, MA shortly thereafter. (Testimony of Appellant and Fogarty)
4. Sometime after their separation in 2001, Trooper Fogarty asked Trooper O'Malley to return his keys to the home in Sterling to her. After the Appellant failed to return the keys, Trooper Fogarty arranged for the locks of the home to be changed. (Testimony of Fogarty)
5. After their separation in 2001, but before the execution of a formal separation agreement in 2003, the Appellant was allowed in the home by Trooper Fogarty to visit and watch their then-infant son. (Testimony of Appellant and Fogarty)
6. The relationship between the Appellant and Trooper Fogarty deteriorated over time and the two became increasingly estranged by the time they executed a formal separation agreement, as part of their divorce decree, in October 2003. (Testimony of Fogarty)
7. As a result of the written agreement entered into by the Appellant and Trooper Fogarty, Trooper Fogarty became the sole legal owner of the home on Blueberry Lane in Sterling, Massachusetts in or around November 2003. (Testimony of Fogarty)
8. Trooper Fogarty testified that, after their divorce, she was concerned that the Appellant was looking into her personal life, including her relationship with a new boyfriend and that the Appellant was not allowed in her house without her permission. (Testimony of Fogarty)
9. In a certified letter dated February 10, 2004, Trooper Fogarty, believing that she had seen the Appellant drive by her home on a recent evening, wrote to the Appellant

stating in part, “I don’t want to have this go any further so I am asking you quite simply to just respect my privacy as I do yours.” (Exhibit 6)

10. One day after receiving the certified letter from Trooper Fogarty which stated her concerns about the Appellant allegedly being in her neighborhood without any reason, the Appellant drove down Blueberry Lane with his new girlfriend. According to the Appellant, there was a house for sale on Blueberry Lane he wanted to drive by. Further, he wanted his new girlfriend to see the house “I built” and see if his girlfriend might like the same type of house. (Testimony of Appellant)
11. In July 2004, the Appellant purchased a new home. As a result, the Appellant asked Trooper Fogarty if he could do a “walk-through” of the home on Blueberry Lane to look for any of his tools that he may have left at the house. Trooper Fogarty refused the Appellant’s request for a walk-through of her home and said she would look for the tools herself and return them to him. (Testimony of Fogarty)
12. On August 15, 2004, the Appellant wrote a letter to Trooper Fogarty stating in part, “I was not happy with the condition of my tools that you returned. As you well know, when I left the house all my tools were on the pegboard in a neat condition, no rust, and well organized. The boxes you returned contained a conglomeration of nuts, screws, and nails, which were previously in containers.” The Appellant went on to list a number of tools he believed were missing and stated, “I think it would be easiest to just do one last walk through of the house.” (Exhibit 7)
13. In a letter dated August 19, 2004, Trooper Fogarty replied to the Appellant stating in part, “There is no need to do a “walk through” of the house at this point as all (sic) there is nothing left in it that is yours.” (Exhibit 8)

14. In an undated, hand-written reply to Trooper Fogarty, the Appellant wrote in part, “I don’t think I’m asking to (sic) much to do a walkthrough with you. (emphasis in original) Please be fair about this. Lets just get it over with.” (Exhibit 8)
15. On August 22, 2004, only three days after Trooper Fogarty had refused the Appellant’s request for a walk-through of the house on Blueberry Lane, Trooper Fogarty left her home with her son and some other relatives for a day-trip.
(Testimony of Fogarty)
16. It is undisputed that at some point during the afternoon of August 22, 2004, the Appellant drove to the house of his former wife, opened the unlocked front door and placed their son’s lunchbox and a poster inside Trooper Fogarty’s house.
17. A point of contention at the Commission hearing was whether or not the Appellant was on duty at the time he entered Trooper Fogarty’s house.
18. The Appellant was assigned to work the 3:00 P.M. – 11:30 P.M. shift patrolling Routes 2 & 190 on the day in question, August 22, 2004. (Testimony of Appellant)
19. The Appellant testified that he drove to Trooper Fogarty’s house on his way to work that day (sometime before 3:00 P.M.), after calling ahead and leaving a message on Trooper Fogarty’s answering machine. According to the Appellant, he then made one follow-up phone call sometime after 3:00 P.M. that day to leave a message on Trooper Fogarty’s answering machine confirming that he had been to the house and had left the lunchbox and poster. (Testimony of Appellant)
20. Trooper Fogarty testified that the Appellant left two messages on her answering machine that day. According to the Trooper Fogarty, in the first message left by the Appellant, he stated, “It’s me; its 4:15; I have a few items to drop off”. Trooper

Fogarty testified that there was then a later message from the Appellant confirming that he had dropped off the items in question. (Testimony of Trooper Fogarty)

21. State Police Rules and Regulations 5.6 state that employees of the State Police, “shall not engage in any activities or conduct any personal business or affairs which would cause them to neglect or be inattentive to duty.” (Exhibit 2)

22. The Appellant testified that her concern was not whether the Appellant was on duty at the time he stopped by house, but, rather, the fact that the Appellant entered her home without her permission while she was not home. (Testimony of Appellant)

23. State Police Rules and Regulations 5.3 state in part, “Members shall maintain a level of conduct in their personal and business affairs which is in keeping with the highest standards of the law enforcement profession. (Exhibit 2)

24. The State Police Trial Board sustained charges against the Appellant for violating Regulation 5.6 (neglect of duty) and Regulation 5.3 (failing to maintain a level of conduct in his personal affairs in keeping with the standards of the State Police) and suspended him for ten days for each violation, to be served concurrently. (Exhibits 1 and 9)

25. In regard to violating Regulation 5.6 (neglect of duty), the State Police subpoenaed the cell phone records of the Appellant from Sprint Nextel in preparation for the hearing before the Commission. As of the date of the hearing, those records had not been received. At the request of the State Police – and over the objection of the Appellant – the Commission record was kept open to accept the phone records in question after the close of the hearing. (Exhibits 4 and 11)

26. The Appellant's Sprint Nextel cell phone records were subsequently received by the Commission and entered as Exhibit 11. According to the phone records, the Appellant made three telephone calls to Trooper Fogarty's home on August 22, 2004. (The Appellant had testified that he called and left two message that day: one message before 3:00 P.M. on his way to work and one message after 3:00 P.M. after he arrived at work) (Exhibit 11)
27. According to the Appellant's phone records received by the Commission, the Appellant made his first telephone call from his cell phone to the home telephone of Laura Fogarty at 2:17 P.M. on the day in question that lasted one minute or less. (Exhibit 11)
28. The phone records indicate that the Appellant made his second call at approximately 4:11 P.M. that lasted one minute or less and then a third call at approximately 4:27 P.M. that lasted a minute or less. (Exhibit 11)
29. Not surprisingly, counsel for the Appellant and the State Police have drawn opposite conclusions from these phone records in their post-hearing briefs submitted to the Commission. The State Police argues that the records buttress the testimony of Trooper Fogarty -- who testified that the Appellant left the first message on her answering machine at approximately 4:15 P.M. --stating that he was on his way over to the house and then left a follow-up message sometime after that. In regard to the 2:17 P.M. call, the State Police argues that the Appellant simply didn't leave a message when he called at 2:17 P.M. Rather, getting no answer, he surmised nobody was home, and decided to stop by the house while on duty -- at 4:15 P.M. Counsel for the Appellant reaches the opposite conclusion, arguing that the phone records confirm

the Appellant's account that he called and left a message that he was on his way over at approximately 2:15 P.M. – while on his way to work. Counsel for the Appellant does not address the discrepancy of there being two calls – not one – after 4:00 P.M., simply stating that the purpose of both of these two calls was to confirm the pre-3:00 P.M. visit to the house. (Exhibit 11; Post-Hearing Briefs)

30. Based on the phone records, coupled with the credible testimony of Trooper Fogarty, who was calm, direct and consistent in her appearance before the Commission, the most plausible explanation is that the Appellant did indeed leave the first message on Trooper Fogarty's answering machine at 4:11 P.M. (while on duty) indicating that he was on his way over to the house. Consistent with the Appellant's own testimony, he then made a follow-up call afterward to confirm that he had been to the house.
31. The State Police Trial Board found the Appellant guilty of violating Rule 5.3 (failing to maintain a level of conduct in personal affairs which is keeping with the highest standards of the law enforcement profession) by entering Laura Fogarty's home, without permission, while on-duty and violating Rule 5.6 (neglect of duty) for leaving his assigned patrol area (Routes 2 & 190) and being inattentive to his assigned duties. (Exhibits 1 & 9)
32. The State Police Trial Board found the Appellant's past history of misconduct (violations of Rules 5.2 – "Unbecoming Conduct", 5.27 – "Truthfulness", 5.10 – "Alcoholic Beverages and Drugs" & 5.6 "Neglect of Duty"), for which he was previously disciplined, to be a relevant aggravating factor and, in accordance with the Department's "Discipline Guidelines" recommended concurrent 10-day suspensions for the violations. (Exhibits 1 & 9)

33. The Appellant filed a timely appeal of the decision to the Civil Service Commission.
(Exhibit 1)

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).

There is no dispute that the Appellant entered the home of his former wife, State Trooper Laura Fogarty, without her permission on August 22, 2004. The Appellant chalked this up as a minor transgression to which his former wife has overreacted. Further, the Appellant sought to establish his own peculiar standard of what should constitute wrongdoing in this case, stating (twice) at the Commission hearing, "I don't concede it was a violation of her (Fogarty's) trust". The Appellant need not concede anything for the Commission to determine whether or not his actions warranted the 10-day suspension imposed by the State Police. Rather, we simply need to examine the irrefutable facts in this case.

As of November 2003, Laura Fogarty was the sole owner of the house at 5 Blueberry Lane in Sterling, Massachusetts. Three months after she became the full owner, Trooper

Fogarty felt the need to send the Appellant a certified letter asking him to respect her privacy. In response, the Appellant decided to go out of his way the day after receiving the letter and drive by Trooper Fogarty's house with his new girlfriend partly so she could "see the house I built". The timing of the "drive-by" was not a coincidence. Scott O'Malley, contrary to his testimony before the Commission, was making it clear that he had no intention of respecting his former wife's wishes. A few months later, the Appellant made it clear that he now wanted to do a "walk-through" of the house to retrieve tools he may have left behind. Trooper Fogarty, clearly not wanting the Appellant in her house, told the Appellant a walk-through was not necessary and arranged to have any tools delivered to the Appellant. That obviously didn't sit well with Scott O'Malley, prompting him to write a letter to Trooper Fogarty again requesting a walk-through, in part complaining that some of his "nuts, screws and nails" which she returned were not in the containers he had placed them in years earlier. Three days after Trooper Fogarty denied the Appellant's request for a walk-through, the Appellant, fully aware that Trooper Fogarty was not home, decided it was necessary to drive out of his way and enter Trooper Fogarty's home(despite her repeated written intent to deny him access) to leave a lunch box and poster. Much like the drive-by months earlier, the Appellant was making it crystal clear to his former wife that he would decide if and when he would drive by, and in this case, enter the house he built.

Whether or not this conduct occurred on-duty, which the Commission concludes it did, or off-duty, which the Appellant alleges, the State Police, has shown, by a preponderance of the evidence that it had reasonable justification to suspend the Appellant for ten days. Further, there is no evidence of inappropriate motivations or

objectives that would warrant the Commission reducing the 10-day suspension imposed upon Mr. O'Malley.

For all of the above reasons, the appeal under Docket No. D-05-426 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, and Marquis, Commissioners [Taylor – Absent]) on November 2, 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:

Michael B. Halpin, Esq.
Timothy M. Burke, Esq.