

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

BRIAN J. PALMER,

Appellant

v.

D1-07-172

TOWN OF MARBLEHEAD,

Respondent

Appellant's Attorneys:

Neil Rossman, Esq.
Robert H. Clewell, Esq.
Rossman & Rossman
Marketplace Center – North
200 State Street
Boston, MA 02109

Respondent's Attorney:

Marc J. Miller, Esq.
Assistant Town Counsel
Bernstein & Miller, P.A.
220 Broadway, Suite 205
Lynnfield, MA 01940

Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, §43, the Appellant, Brian J. Palmer (hereinafter "Appellant"), is appealing the decision of the Respondent, Town of Marblehead (hereinafter "Town") as Appointing Authority, to terminate him from the position of permanent intermittent police officer for the Marblehead Police Department (hereinafter "Department"). The

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

appeal was timely filed. A hearing was held on January 25, 2008 at the offices of the Civil Service Commission (hereinafter “Commission”). Two (2) audiotapes and a written transcription were made of the hearing. Witnesses were not ordered to be sequestered. A motion by the Appellant to conduct a public hearing was allowed. Proposed Decisions were submitted to the Commission.

FINDINGS OF FACT

Based on the evidence presented, Joint Exhibits 1 – 9, and the testimony of the following:

For the Appointing Authority

Retired Department Chief James R. Carney (hereinafter “Chief Carney”),

Kimberly J. Mackey (hereinafter Ms. Mackey”),

Retired Department Captain Robert K. Coyne (hereinafter “Capt. Coyne”),

Town Administrator Anthony M. Sasso (hereinafter “T.A. Sasso);

For the Appellant

The Appellant;

I make the following findings of fact:

1. On March 10, 1999, the Appellant was appointed as a permanent intermittent police officer for the Town (Stipulated Fact).
2. On March 27, 2000, the Appellant was appointed as a provisional employee (corrections officer) with the Essex County Sheriff’s Department (hereinafter “Sheriff’s Department”) (Stipulated Fact).
3. On May 15, 2000, the Appellant was appointed as a permanent corrections officer with the Sheriff’s Department (Stipulated Fact).

4. By letter dated December 27, 2000, the Essex County Sheriff (hereinafter "Sheriff") exercised his right to terminate the Appellant during the Appellant's one-year probationary period (Stipulated Fact).
5. On May 29, 2002, the Town appointed three (3) candidates to the position of permanent full-time police officer thereby bypassing the Appellant whose name was placed first on Civil Service Certification List No. 20380 (Stipulated Fact).
6. By decision dated August 11, 2005, the Commission upheld the bypass of the Appellant for appointment to the Department as a permanent full-time police officer. (Commission Docket No. G-02-404) (Stipulated Fact)
7. By notice dated April 11, 2007, the Town Board of Selectmen (hereinafter B.O.S.) notified the Appellant that it would hold a hearing to determine whether or not the Town would terminate the Appellant's employment as a permanent intermittent police officer with the Town (Stipulated Fact).
8. A hearing was held by the designated hearing officer, T.A. Sasso, on April 18, 2007.
9. On April 25, 2007, the Town, acting through its B.O.S., voted to terminate the Appellant's employment as a permanent intermittent police officer on the grounds that (1) the Appellant was terminated from employment with the Sheriff's Department due to his unsatisfactory employment history, and (2) on two separate occasions the Appellant submitted resumes to the Town containing misleading information or misrepresentations of his employment history (Stipulated Fact).
10. The Appellant filed a timely notice of appeal to the Commission (Stipulated Fact).
11. The findings of fact, conclusions of law and the resulting decision issued by the Commission in the matter of Palmer v. Town of Marblehead, Docket No. G-02-404,

are hereby adopted and incorporated herein for the purpose of the instant decision (Unanimous vote on August 11, 2005). (Exhibit 9)

12. The Findings of Fact and Recommendation of the hearing officer designated by the Appointing Authority, T.A. Sasso, were as follows:

(1) On or about December 27, 2000, Brian Palmer was terminated from his employment as a correction officer with the Essex County Sheriff's Department.

(2) The Civil Service Commission Decision dated August 11, 2005, Brian J. Palmer, Appellant v. Town of Marblehead, Respondent, G-02-404, upheld the Town of Marblehead's bypass appointment of Brian Palmer, for reasons of Palmer's cause termination from employment as a correctional officer with the Essex County Sheriff's Department.

(3) Brian Palmer submitted resumes to the Town of Marblehead in support of his candidacy for appointment as a Permanent Full Time Police Officer with the Town of Marblehead.

(4) On at least two (2) occasions, Brian Palmer submitted resumes to the Town of Marblehead in support of his candidacy for appointment as a Permanent Full Time Police Officer with the Town of Marblehead which were misleading and/or misrepresentations of his employment history.

(5) Between the period of time from on or in January, 2001, through and including January, 2007, Brian Palmer's employment history was unsatisfactory, and in instances could not be verified. (Exhibit 2)

13. After the January 2001 meeting between Chief Carney, the Appellant, and the Appellant's father, former Police Chief John Palmer, and up until the Appellant's termination from employment with the Town, the Town on three and possibly four occasions requested a certified list from Civil Service for the appointment to the position of permanent full-time police officer. Each time the Town called for a certified list, Chief Carney recommended that the B.O.S. not appoint the Appellant.

On each occasion, the B.O.S. bypassed the Appellant for appointment. (Testimony of Chief Carney and Exhibit 9 Fact #'s 18 & 27)

14. Chief Carney credibly testified at hearing that he met with the Appellant several times after the January 2001 meeting to discuss the importance of the Appellant “establishing a verifiable employment history” if he hoped to ever become full-time police officer in the future. The Chief related his concern that the Appellant had an inability to retain employment. (Testimony of Chief Carney)
15. Permanent intermittent police officers who desire to become permanent full-time police officers are required to submit updated and accurate resumes. The Department also conducts a background investigation, resume review and interviews employers, past and present. (Testimony of Chief Carney)
16. Untruthfulness in the Department application process is grounds for non-appointment or termination of employment by the Town. The Appellant completed and signed a Department application. (Id.)
17. Chief Carney was appointed to the position of Acting Police Chief in July of 2000, and to the position of Police Chief from September 2000 until February 2007. The Appellant’s tenure as a permanent intermittent police officer was limited to several details and “ride-alongs.” While ride-alongs were of several hours duration, they did not amount to a full shift. The Appellant performed the ride-alongs before the appointment of Chief Carney in July 2000. (Testimony of Appellant and Chief Carney)
18. Chief Carney credibly testified at a previous Commission hearing that he enjoyed a “very cordial relationship” with former Chief Palmer, the Appellant’s father. Capt.

Coyne c testified before the Commission that he harbored no personal animus to either the the Appellant or his father. (Testimony of Capt. Coyne and Exhibit 9 Fact # 28)

19. When the infrequent opportunity arose to work a police shift, Chief Carney denied this chance to the Appellant because he had “serious reservations about putting him out on the street.” Chief Carney verbally recommended the Appellant’s termination to the Town Administrator on three or four times between 2003 and his subsequent retirement from the Department. (Testimony of Chief Carney)
20. On at least two occasions, the Appellant submitted a resume in support of his candidacy for appointment to the position of permanent full-time police officer. (Exhibits 6 and 7)
21. Both times, Chief Carney directed Capt. Coyne to conduct a background check of the Appellant’s employment in order to verify the information contained in his resumes. Capt. Coyne submitted two individual background check reports on the Appellant to Chief Carney. (Exhibits 4 and 5)
22. The information Capt. Coyne received from the Appellant’s former employers was inconsistent from that provided in the Appellant’s resumes. Capt. Coyne did not ask the Appellant for an explanation. Capt. Coyne’s reports suggested that the Appellant’s resume contained incorrect information. (Testimony of Capt. Coyne and Exhibits 4 and 5)
23. Capt. Coyne testified that he did not ask the Appellant to explain because he believed that all applications required truthful answers. Capt. Coyne’s credibility was further enhanced by his 37 years of service with the Department and his professional,

confident answers and excellent recall. He rarely referred to exhibits to assist him with his testimony. (Testimony of Capt. Coyne)

24. Chief Carney accepted and believed Capt. Coyne's reports. Chief Carney never questioned the Appellant in regard to the discrepancies. Chief Carney also had the opportunity over the years to speak with the former employers of the Appellant who had given negative reports to Capt. Coyne. (Testimony of Chief Carney)

25. Chief Carney was forthright in stating that he had, by at least 2003, formed a "mental equation" that was negative toward the Appellant's future success as a full-time police officer, due to the enormous responsibilities incumbent on a police officer. Chief Carney did offer that he had heard the Appellant's explanation regarding his termination from the Sheriff's Department in 2001. This was consistent with his credible testimony at the August 25, 2004 bypass hearing at the Commission when he said he "gave the Appellant several opportunities to explain and defend his position." At that point in time, Chief Carney abandoned any thought of supporting the Appellant's future candidacies to become a full-time police officer for the Town. He further testified that he did not know why his recommendations for the Appellant's termination went unheeded each time it was necessary to bypass the Appellant for hire. (Testimony and Demeanor of Chief Carney)

26. One resume provided by the Appellant, dated June 14, 2004, appeared to misrepresent the Appellant's length of employment at the Hotel Marlowe: he stated that he began working there in March 2002 as opposed to the correct date, March 2003. (Exhibit 6)

27. Another undated resume, covering the period of time from November 1992 to present, appeared to misrepresent the Appellant's length of employment at Signature Mortgage. The second resume showed a start date of April 23, 2004, instead of the actual start date of May of 2005. (Testimony of Capt. Carney and Exhibit 7)
28. Chief Carney testified at hearing that he had received an unsolicited phone call from a man, whose name he did not recall, purporting to be a former employer of the Appellant. The man said he owned the North Shore Vault Company in Peabody. The man told the Chief that he heard that the Appellant was up for a police officer position and hoped that he wasn't hired as he had left the man's business on adverse terms. The undated resume specifically failed to include the Appellant's employment at this particular business. (Testimony of Chief Carney)
29. On his resume dated June 14, 2004, the Appellant noted that he was employed by the C & M Construction Company (hereinafter "C & M") from May 2001 until March 2002. From March 2002 until May 2003, he was employed by the Hotel Marlowe. The Appellant insisted in his testimony that the March 2002 start date at the Hotel Marlowe was a typographical error and should have read: March 2003. I find that the possibility certainly exists that this may have been caused by an error. However, assuming that it was caused by an error, the reader of the resume is left with an unexplained, one-year gap in employment between C & M and the Hotel Marlowe. Either there is yet another typographical error, or the veracity of the Appellant's self-reported work history is further eroded. (Exhibit 6)
30. In the Appellant's undated resume, submitted at some point after the June 14, 2004 resume, he lists that he worked as a Senior Account Executive for Global Home

Loans & Finance in Beverly from August 20, 2003 until April 4, 2004. On his June 14, 2004 resume, the Appellant claims that he worked for Masterson Construction Company from June 2003 until December 2003 and for Wolf Hill Landscaping and Construction from March 2004 to present (June 14, 2004). I find by administrative notice that the Appellant failed to include his employment at Global Home Loans & Finance on his June 2004 resume. The omission is inexplicable. (Exhibits 6 and 7 and Administrative Notice)

31. The Appellant testified that he never worked for the North Shore Vault Company full-time. He stated that he worked for that company for several days (maximum four days) on a try out basis, and was never carried as an employee on the company's payroll. He was paid in cash and he and the business parted ways. I find that this employment was so casual as to be forgiven from inclusion on one's resume and this discrepancy is not a sustainable reason for termination. (Testimony of Appellant)
32. Ms. Mackey was a credible witness of behalf of the Appellant. She stated that she had been a co-worker of the Appellant's at Signature Mortgage. I assign great weight to the fact that she took the time and effort to appear at the Commission hearing. Her testimony was consistent, confident and professional. Ms. Mackey provided a specific description of the Appellant's duties and, perhaps more importantly, of the time period she was a co-worker with the Appellant. Ms. Mackey accurately corroborated the time period of employment that the Appellant provided on his second resume. I find that the alleged inaccuracies regarding the Appellant's time of employment and job duties at Signature Mortgage are not a sustainable reason for termination. (Testimony of Ms. Mackey and Exhibit 7)

33. This hearing officer asked the Respondent why [Chief Carney](#)'s earlier recommendations to the Town Administrator to terminate the Appellant had gone unheeded. The Town Counsel said that the B.O.S. failed to take such action, hoping that the Appellant would voluntarily resign and so avoid another negative mark on his resume and career. This answer came after the parties caucused and stipulated that that was the answer T.A. Sasso would have given had he not left the hearing and was still available to testify.
34. After a hearing conducted in full accordance with G.L. c. 31, § 41 on April 18, 2007, the Town terminated the Appellant on April 25, 2007 and the Appellant filed this timely appeal with the Commission. (Stipulated)

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).

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. “Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities.” Police Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986).

Police officers are granted their authority by the Commonwealth in order to maintain an orderly society and to protect the rights of citizens. The power granted to police officers is immense and requires adherence to the highest ethics of office and commitment to follow the principles of law. Both sworn and civilian members of the Department are expected to abide by standards of behavior that are professional and appropriate to the mission of the Department and the integrity of the organization.

It is undisputed that the Appellant was previously terminated from the Sheriff’s Department. The facts of that matter were fully heard by this Commission during the Appellant’s bypass hearing on August 25, 2004 and a decision was issued dismissing the Appellant’s bypass appeal on August 16, 2005. (Palmer, G-02-404) For this reason, for termination must be sustained. The risk inherent in employing an individual who has clearly demonstrated misconduct in a separate but similarly situated position of such authority and responsibility is not to be discounted.

While the Appellant was able to explain away two discrepancies regarding previous employment – his employment at the North Shore Vault Company and the length of his employment at Signature Mortgage - several others remain. The Appellant’s

employment history is so unstable and disjointed, it is understandable that employers and investigators for a police agency would have concerns. The Appellant has been less than forthcoming in his accounts of his previous employment. An Appointing Authority is well within its rights to take disciplinary action when a police officer has “a demonstrated willingness to fudge the truth in exigent circumstances” because “[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer.” See Falmouth, (2004); citing City of Cambridge, supra at 303. The Appellant was aware that the Town’s application to become a police officer requires truthfulness and accuracy and to prepare an application or resume otherwise is grounds for termination.

The Appointing Authority and the Town Manager were reluctant to terminate the Appellant - in the hope that he would eventually realize the futility of his effort to become a full-time police officer - and voluntarily resign. This reluctance and patience by the Town demonstrate that there was a lack of political influence or any reason unrelated to merit principles. It is unfortunate that Chief Carney’s recommendations went unheeded for so long and simply prolonged the inevitable.

The Appellant had little or no possibility to become a permanent, full-time police officer. His myriad employment problems, employment performance issues, and his lack of straightforwardness provide just cause for termination from his position as a permanent intermittent police officer.

By a preponderance of the credible evidence presented in this matter, it is found that the Town has sustained its burden of proving just cause for the termination of the

Appellant. Therefore, for all the reasons stated herein, the appeal filed under Docket No. D1-07-172 is hereby *dismissed*.

|

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on July 10, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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 to:

Neil Rossman, Esq. (for Appellant)

Robert Clewell, Esq. (for Appellant)

Marc J. Miller, Esq. (for Appointing Authority)