

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108

VICTOR PELLOT,

Appellant

v.

D-04-179

CITY OF HAVERHILL,

Respondent

Appellant's Attorney:

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(617) 523-2500

Respondent's Attorney:

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Commissioner:

John E. Taylor

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Victor Pellot (hereafter "Pellot" or "Appellant"), is appealing the action taken by the Respondent, the City of Haverhill (hereafter "the City") suspending him for five days from his position as Police Sergeant for failing to report fit for duty on March 23, 2004. The appeal was timely

filed. A full hearing was held on June 13, 2007 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Two exhibits were entered into evidence, Exhibit 1 (pages 1 to 24) and Exhibit 2 consisting of 1 (one page). Two (2) audiotapes were made of the hearing. The Witnesses were not sequestered.

At the hearing, the Appellant submitted a Motion to preclude the City of Haverhill from introducing polygraph evidence at his Civil Service hearing. The Respondent opposed the motion. The Commission's rule is to disallow polygraph evidence, see Cignetti v City of Cambridge, Docket No. D-4868 (1996), which is in line with the Supreme Judicial Court's ruling that polygraph tests are inadmissible in court because their reliability and credibility is unproven. Accordingly, Appellant's Motion was allowed and the polygraph evidence ruled in- admissible over the Appointing Authority objection.

Cases D-04-179 and D-04-404 had been consolidated but this Commissioner separated the cases and heard case D-04- 179 on June 13, 2007.

FINDINGS OF FACT:

Based on the documents entered into evidence, Exhibits 1 (pages 1 to 24) and Exhibit 2, the testimony of Police Chief Alan DeNaro (hereafter "DeNaro") and Deputy Police Chief Donald Thompson (hereafter "Thompson") and the Appellant, I make the following findings of fact:

1. Appellant was hired as a police officer by the City of Haverhill in 1983. He was promoted to Sergeant in approximately 1999. (Testimony of Appellant)

2. Prior to the suspension that is the subject of the appeal, Appellant had no disciplinary record with the City's Police Department. (Testimony of Appellant)
3. On December 2, 2003, Appellant was placed on paid administrative leave while the City's Police Department investigated his involvement in regard to narcotics trafficking and his cousin's arrest for possession and distribution of cocaine. Appellant was present at his cousin's house when said cousin allegedly sold cocaine. (Exhibit 2 and testimony of DeNaro)
4. While on administrative leave, Appellant lost the opportunity for overtime assignments and detail work. He was required to stay home during his normal work days from 8:30 a.m. to 4:30 p.m. and to call in to the Department at 10:00 am and 2:00 pm daily on those work days. This requirement was imposed in order that Appellant be available if needed by the Respondent. Appellant complied with this requirement. (Exhibit 2 and testimony of Appellant)
5. While on administrative leave, Appellant obtained a job at Wal-Mart from 10:00 p.m. to 6:00 a.m. in order to compensate for the loss of details and overtime assignments and to support his family. (Testimony of Appellant)
6. Off-duty employment is prohibited by Rule 153(a) of the Rules and Regulations of the Haverhill Police Department if it interferes with the member's duties and responsibilities with the Department.
7. A March 9, 2004 letter from DeNaro to the Appellant required the Appellant to report to the Police Department on March 12, 2004 at 10:00 a.m. to participate in an interview followed by a polygraph test. (Exhibit 1, page 18)

8. On March 12, 2004, Appellant reported to the Police Department to undergo the polygraph examination. The administrator of the examination, Dennis Peloquin of Forensic Polygraph Associates, conducted a preliminary interview with Appellant during which Appellant informed Peloquin that he had received only 1.5 hours of sleep the night before. Peloquin determined that Appellant was not in condition to take the polygraph examination due to his lack of sleep. (Testimony of Thompson)
9. Appellant was not aware of how much sleep was required to undergo a polygraph examination as Respondent had not informed him of this. (Testimony of Appellant)
10. No disciplinary action was taken against Appellant for his inability to undergo the examination on March 12, 2004. He was ordered to return to the Police Station the following day with adequate sleep and sit for the polygraph examination. (Testimony of DeNaro)
11. On March 13, 2004, Appellant returned to the Police Station and the polygraph test was administered. (Testimony of DeNaro)
12. On March 23, 2004, Appellant was ordered to the Police Department at 5:30 p.m. to take a follow up polygraph examination. When he reported to the Police Station, he put in a slip for four hours of overtime as the time scheduled was beyond his normal working hours. (Exhibit 1, pages 9 & 21 and testimony of DeNaro)
13. Appellant testified that he did not learn of the order to take a follow up polygraph until 3:30 pm on March 23, 2004. Respondent had given this information to

Appellant's attorney, Mark Miliotis, who did not convey this information to Appellant until two hours before the test was to be administered. (Testimony of Appellant and DeNaro)

14. When Appellant arrived for the follow-up polygraph examination on March 23, 2004, he had only had 1.5 hours of sleep the night before but was willing to take the examination. Peloquin refused to administer the polygraph and Appellant was ordered to return on March 25, 2004 with adequate rest. (Testimony of Appellant and DeNaro)
15. At the time of the polygraph, Appellant was being treated for insomnia. (Testimony of Appellant and Appellant's Exhibit 1 , page 24)
16. Appellant testified that he informed Peloquin on March 12 and March 23, 2004 that he was being treated by his doctor for insomnia and also that he had a second job.
17. Thompson testified that Peloquin never informed him that Appellant was being treated for insomnia or had a second job. (Testimony of Thompson)
18. On March 25, 2004, Chief DeNaro issued Appellant a letter informing him that he was suspended from the Haverhill Police Department without pay for five days, beginning March 26, 2004. The reason for the action was violation of Police Department's Rules and Regulations, Rule 155 Fitness, which states that members shall maintain a good physical and mental condition reasonably related to said member's duties and responsibilities. (Exhibit 1, pages 7 & 9)
19. Chief DeNaro testified that Appellant's suspension was based on not being fit for duty due to sleep deprivation.

20. A March 25, 2004 a Notice of Violation and Disciplinary Action issued from Chief DeNaro to the Appellant stipulated that the Appellant had violated Rule 155 by reporting to the Police Station to take a department ordered polygraph exam without adequate sleep, stating specifically that he arrived unfit for duty and unable to take the exam. The recommended penalty for what was cited as a second offense was a five day suspension. A Reprimand Narrative, dated March 24, 2004, was attached to the Notice of Violation. (Exhibit 1 page 9)
21. Appellant's counter statement to the Reprimand Narrative, dated March 30, 2004, stated that he was not scheduled for duty on March 23, 2004 or provided with a direct order with respect to the administration of a polygraph examination but had been prepared to take the polygraph test on March 23, 2004 if so ordered. (Exhibit 1, page 23)
22. Thompson testified that if an officer was sleep deprived, he or she was not fit for duty. He stated that the two occasions on which Appellant was not able to take the polygraph due to lack of sleep led to his suspension.
23. On March 30, 2004, an Appointing Authority hearing was held pursuant to G.L. c. 31 §41 to determine whether Appellant violated Rule 155. The Hearing Officer recommended that the Mayor uphold the action taken by DeNaro, suspending Appellant for five days, and on April 12, 2004, the Mayor did so. (Exhibit 1, pages 2, 3, 5 & 5)

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).

Here, Respondent did not meet its burden to prove by a preponderance of the evidence that its action of suspending Appellant for five days was justified. It did not demonstrate adequate reasons sufficiently supported by credible evidence that Appellant was unfit for duty and in violation of Departmental Rule 155 due to sleep deprivation when he reported to the Police Station on March 23, 2004 to take a departmental ordered polygraph examination.

The evidence shows that Appellant, suffering insomnia during the time period in question, followed the City of Haverhill Police Department's orders to appear for polygraph examination on all occasions. Prior to the March 12, 2004 examination, Respondent did not inform Appellant of how much sleep was required to sit for a polygraph. With regard to the second polygraph examination, the Appellant's attorney

failed to convey the information regarding this test to him until two hours before the test was to be administered. The Appellant should not be penalized due to the Respondent's resulting determination that Appellant was not testable due to a lack of sleep and its refusal to administer the follow up polygraph.

Even conceding that the Police Department's fitness rule is reasonably related to the safe operation of the Department, it does not follow that Appellant's inadequate sleep was reasonably related to the safe operation of the Department in this particular circumstance, when he was on administrative leave and not performing his regular duties. As stated above, justification for discipline is determined by the Commission's inquiry into "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Here, the inquiry revealed that Appellant's inadequate sleep did not rise to the level of substantial misconduct.

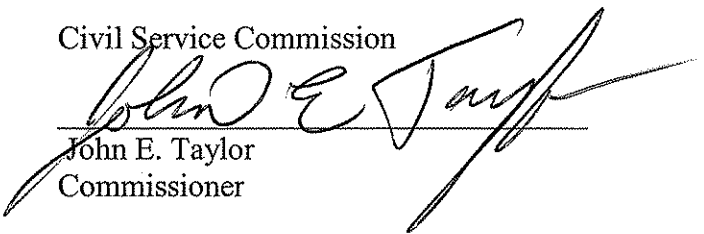
Since the disciplinary notice does not mention the Appellant's outside employment as a basis for his discipline, it is not considered an issue here.

The Respondent has not demonstrated by a preponderance of the evidence that it had just cause to suspend Appellant. If the Appointing Authority fails to prove its action was justified, the Commission "shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights...." G.L. c. 31, § 43.

The Appellant's suspension is hereby rescinded. The Appellant shall be made whole for his loss of pay and benefits for the five days of his suspension.

The appeal under Docket No. D-04-179 is hereby *allowed*.


Civil Service Commission



John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman-YES,
Henderson-YES, Taylor-YES and Marquis- NO, Commissioners) on May 1, 2008)

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 proceeding 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 commission's order or decision.

Notice to:

Bryan C. Decker, Esq.

William D. Cox, Jr. Esq.