

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

DENNIS PERKINS,
Appellant

v.

CASE NO: D-09-373

CITY OF ATTLEBORO,
Respondent

PROCEDURAL ORDER

The Appellant, Dennis Perkins, appealed to the Civil Service Commission, (Commission) pursuant to G.L.c.31,§41-§43), from discipline imposed by the City of Attleboro Fire Department (Attleboro). The Commission convened a hearing of the appeal on March 12, 2010, and recessed to a second day to be established.

Prior to the first hearing day, the Appellant caused 11 subpoenas to be served upon various witnesses, all of whom are firefighters or other personnel of the Attleboro Fire Department. As the subpoenas had not been submitted for approval in advance to the Commission, with notice to the Respondent as prescribed by Commission Rule In Accordance with M.G.L.c 31,§72 Subpoenas (Approved October 11, 2001), the witnesses were excused from attendance at the March 12, 2010 hearing, pending a determination of the justification for those subpoenas.

On March 19, 2010 the Appellant submitted a list of the witnesses who had been subpoenaed with an explanation for the action taken.

On March 26, 2010, Attleboro replied, contending that none of the subpoenas were properly issued. In addition, Attleboro objected to the subpoenas issued to six of the proposed witnesses whom the Appellant claimed "was involved in the investigation

regarding the Appellant and wrote a letter about the Appellant resulting in discipline”, tendering an offer of proof consisting of the letters each had written, all of which are adverse to the Appellant. Attleboro also objected to two other witnesses as lacking any percipient knowledge of facts relevant to the incidents for which the Appellant was disciplined. Attleboro indicated it had no objection to the subpoenas issued to three of the potential witnesses.

On March 29, 2010, the Appellant responded, stating that G.L.c.30A, §12(3) and 801 CMR 1.02(g) authorize the Appellant “as of right” to subpoena witnesses without prior Commission approval. Appellant also claims that, by submitting letters written by six alleged “percipient” witnesses, Attleboro made them fair game. Finally, Appellant claims that three “non-percipient” witnesses do actually have knowledge of the Appellant’s work habits and interaction with subordinates he is supposed to have harassed.

Authority of Commission To Require Pre-Approval of Subpoenas

G.L.c.31, §72 prescribes how a party may obtain a subpoena to compel attendance of witnesses at a Commission hearing, and provides in relevant part:

The commission or the administrator or any authorized representatives of either, may summon witnesses, administer oaths and take testimony for any hearing, investigation or inquiry conducted pursuant to the civil service law and rules. Fees for such witnesses shall be the same as for witnesses before the courts in civil actions and shall be paid from the appropriation for incidental expenses.

A subpoena may be issued at the request of a complainant, respondent, or any other party to any proceeding before the commission under such rules as the commission shall establish. In the case of a subpoena issued by such request, the cost of service and of the fees of the witnesses shall be borne by the party who made the request and such fees shall also be the same as for witnesses before the superior court in civil actions. (*emphasis added*)

By motion adopted by the Commission on October 11, 2001, the Commission promulgated the following rule regarding Subpoenas:

Pursuant to M.G.L.c.31,§72, parties may request the authority to issue subpoenas from the Commission by motion filed at least ten (10) days prior to the scheduled hearing. Such

request shall identify the individuals or documents sought and describe its relevance to the proceedings. Within seven (7) days [sic] of the request for subpoenas, a party may object to the issuance of subpoenas.

The Appellant correctly asserts that the Massachusetts Administrative Procedures Act, G.L.c.30A, states that “any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency” and that such subpoenas may be issued either “by a notary public or justice of the peace” or by “written application to the agency which shall forthwith issue the subpoenas requested.”. G.L.c.30,§12.

The Commission is exempted from the general purview of the Massachusetts APA, Chapter 30A. See G.L.c. 30A,§1(2). The Appellant asserts, however, that, when the Commission adopted the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.00 et seq (SARPP), it incorporated by reference the provisions of G.L.c.30A, §12 concerning subpoenas quoted above. Specifically, in the SARPP “Formal Rules”, 801 CMR 1.01(10)(g) provides:

The Agency or Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of M.G.L. c. 30A, § 12.

A different version of this rule is provided in the SARPP “Informal Rules”, 801 CMR 1.02(10(i):

The Agency or the Presiding Officer may issue, vacate or modify subpoenas in accordance with M.G.L. c. 30A, § 12. Parties may issue subpoenas in accordance with M.G.L. c. 30A, § 12(3). Witnesses may petition the Agency to vacate or modify subpoenas in accordance with M.G.L. c. 30A, § 12(4). (*emphasis added*)

Examination of the Commission’s orders makes quite clear that the Commission has chosen to invoke its authority under Chapter 31 to require that requests to issue witness subpoenas must be submitted for approval to the Commission in advance. When the Commission adopted the SARPP, by motion approved September 2, 1999 (copy

attached), the Commission expressly limited its adoption to the “Formal Rules”, and did not adopt the “Informal Rules”.

The Commission’s September 1999 motion adopting the SARPP also expressly stated: “The Commission notes that provisions of M.G.L.c.31 take precedent over conflicting [SARPP] rules.” Thereafter, in November 2001, pursuant to the specific controlling authority granted to the Commission to prescribe its own requirements for subpoenas under Chapter 31, Section 72, the current Subpoena Rule was promulgated.

The Commission’s practice to require that witness subpoenas be pre-approved in advance of the hearing stems from the Commission’s interest in promoting a fair and efficient hearing process. The limited resources available to the Commission, and the volume of its work, impels the need to have a reliable degree of certainty that hearings will proceed as scheduled and that they will be completed in an orderly and timely manner. By requiring parties to disclose witnesses and settle disputes over who may testify in advance is essential to the process. While the bulk of appeals do not involve procedural conflicts, the Commission’s rule is important to minimize the potential for inconveniencing witnesses (especially in cases involving public safety personnel) and unnecessarily devoting scheduled hearing time to address procedural issues.

The Commission appreciates that cutting through the administrative and statutory technical thicket that surrounds this subject can be difficult. However, while perhaps not easy to see, the Commission’s intent is clear and consistent, and the Commission will continue to apply the pre-approval process embodied in Chapter 31 and the Commission’s November 2001 rule on Subpoenas. Hopefully, this guidance will resolve any lingering confusion on the subject.

The Appellant's Subpoenas

In the case of this particular appeal, the Commission will treat the submissions of the parties as complementary and timely requests for nunc pro tunc approval of the subpoenas already issued (on the part of the Appellant), and for an order vacating those subpoenas to which there is objection (on the part of Attleboro). For the reasons explained, the Commission grants each party relief, in part, on the merits.

First, the Commission understands that Attleboro does not object to the issuance of subpoenas to Deputy Chief Livesey, Captain Hardman and Firefighter Moore. Accordingly, the Commission approves these subpoenas, nunc pro tunc. These witnesses should be advised that their attendance is required at the next scheduled hearing date, unless the parties make other arrangements.

Second, I have reviewed the request to subpoena six Attleboro firefighters whom the Appellant represents were "involved in the investigation involving the Appellant and wrote a letter about the Appellant resulting in discipline" and Attleboro's "offer of proof", which appears to include the letters to which the Appellant refers. Based on this review, I am not satisfied that the Appellant has demonstrated good cause to require the testimony of these witnesses. The written letters appear to contain virtually nothing to suggest percipient knowledge about the incidents for which the Appellant was disciplined (in contrast to Firefighter Moore and Glenn Livesey), and are largely devoted to generalized, largely negative, opinions of the Appellant. After hearing the testimony on the first day of hearing, the Appellant should be in a position to identify with some particularity what important, non-cumulative testimony any of these witnesses could be expected to provide. Absent that showing, I have determined that the Appellant's request

for subpoenas of Firefighters Washington, Wilson, Guertin, Parham, Marcotte, and Hasslehurst, ought not be approved at this time. To the extent that any subpoenas have been issued and served on those individuals, those subpoenas are hereby quashed. I will note the Appellant's objection to this ruling and will afford the Appellant an opportunity to make an offer of proof as to the expected testimony of any of these proposed witnesses.

I also note the Appellant's concern that, Attleboro's own "offer of proof" has put these witnesses in play. I respectfully disagree. The letters written by these potential witnesses were fairly provided by Attleboro in support of its argument that the inconvenience of calling these six firefighters significantly outweighed any possible relevant and non-cumulative testimony they could offer. The information has been taken for no other purpose at this time. In particular, I take none of the information in those letters as the truth, none of them are in evidence and nothing contained in those letters shall be given any weight by the Commission.. Obviously, if Attleboro proffers any of this information, either directly or through another witness, I may exclude it, or, alternatively, allow the Appellant an opportunity to meet that evidence, either through calling one or more of these witnesses or by other appropriate means.

Third, as to the two remaining firefighter witnesses (Ventura & Larocque), Attleboro makes a valid point that, after hearing the Appellant's numerous "character" witnesses during the first hearing day, there is limited utility to witnesses solely to add to that already cumulative testimony. If that were to be the only testimony adduced from these witnesses, I must say I am not inclined to give that cumulative testimony much weight. However, I cannot pre-determine that the testimony of these additional witnesses will

carry no weight. These two firefighters, unlike those who have testified, appear to have direct knowledge of the Appellant's work during the relevant time as a Captain in the Attleboro Fire Department. I understand how the Appellant could reasonably expect, therefore, that these witnesses have percipient knowledge of facts germane to events in issue as well as evidence that bears on the credibility of the testimony of the Appellant or other witnesses. The Appellant may not succeed in prying useful information from them, but I will not preclude him the opportunity to try. Indeed, these two witnesses may happen to be more candid and credible than others whom Attleboro has or may proffer; Attleboro should not be allowed cherry-pick which of the Appellant's colleagues will appear before this Commission, so long as the Appellant's requests remain within reasonable bounds. Accordingly, the subpoenas to Firefighter Ventura and Laroque are approved, nunc pro tunc. These witnesses should be advised that their attendance is required at the next scheduled hearing date, unless the parties make other arrangements.

Civil Service Commission

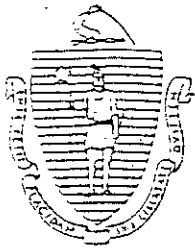
Paul M. Stein
Commissioner

Date: **April 7, 2010**

Notice to:

Kathryn M. Fallon, Esq. (for Appellant)

Scott E. Bettencourt, Esq. (for Respondent)



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MARY J. LECLAIR
CHAIRMAN

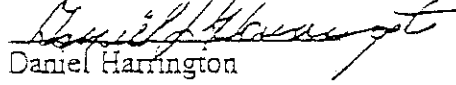
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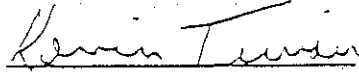
September 2, 1999

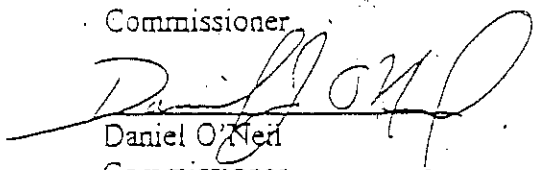
MOTION BY COMMISSION TIERNEY


The Commission votes to adopt the Standard Adjudicatory Rules of Practice and Procedure 801 CMR 1.00. (Formal Rules) as its Rules of Practice and Procedure. The use of the rules is to take effect on December 1, 1999. Notice of the rule change is to be sent to all parties with the acknowledgement of the appeal and with all notices of hearing. The Commission notes that provisions of M.G.L. c.31 take precedent over conflicting rules.

The motion carried on a vote of 4 to 0


Daniel Harrington
Commissioner


Kevin Tivnan
Commissioner


Daniel O'Neil
Commissioner


Robert E. Tierney
Commissioner