COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RAFAEL RIJOS,
Appellant

v.

D-07-169

CITY OF CHELSEA,
Respondent

Attorney for Appellant:

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Attorney for Respondent:

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Commissioner:

John E. Taylor[1]

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Rafael Rijos, (hereinafter "Appellant" or "Officer Rijos"), is appealing the decision of the Chelsea Police Department (hereinafter "Department" or "Appointing Authority") to suspend him for five (5) days for sending an offensive email to then Police Chief Frank Garvin (hereinafter "Chief Garvin"). The appeal was timely filed, and a hearing was held on January 22, 2008 at the offices of the Civil

[1] The Commission gratefully acknowledges the assistance of legal intern Kelly Deegan.

Service Commission (hereinafter "Commission"). Two (2) tapes were made of the hearing and are retained at the Commission Office.

FINDINGS OF FACT:

Twelve (12) Exhibits were entered into evidence on the date of the hearing. On November 19, 2009, the record was reopened to admit the Appellant notice of suspension. That exhibit was marked as Exhibit 13, and the record was again closed.

Based on the documents submitted, and the testimony of witnesses

For the Appointing Authority

- Edward Noseworthy, Lieutenant, Chelsea Police Department

For the Appellant

- Anthony Ortiz, Chelsea Police Officers Patrolman's Union President
- Raphael Rios, Appellant

I make the following findings of fact:

1. The Appellant has served as a police officer in the Department for approximately fifteen (15) years. (Testimony of Appellant)
2. The Appellant has served as the vice-president of the Chelsea Police Officer's Association for the last six (6) years. (Testimony of Appellant)

Prior Disciplinary Actions

3. On or about September 13, 2002, Chief Garvin issued the Appellant a four (4) day suspension for insubordination. On the same day, the Appellant requested a just cause hearing. (Exhibit 11; Testimony of Appellant)
4. On or about December 22, 2002, the Appellant received yet another suspension for insubordination, this time issued by Captain Houghton. This suspension was for five (5)

5. On or about February 20, 2003, the City Manager upheld the four (4) day suspension issued on September 13, 2002. (Exhibit 4)

6. On or about April 29, 2003, the City Manager upheld the five (5) day suspension issued on December 22, 2002, and added an additional seven (7) days. (Exhibit 4)

7. The Appellant appealed each of the three (3) aforementioned disciplinary actions to the Commission. These were docketed under Docket Numbers 03-140, 03-283, and 03-284, for the four (4) day, five (5) day, and seven (7) day suspensions, respectively. (Exhibit 4)

8. On June 7, 2006 at the Commission hearing on the three (3) appeals, the parties settled. (Exhibit 4; Testimony of Lt. Edward Noseworthy)

9. The settlement agreement contained the following provisions:
   a. The City will place a written reprimand for insubordination in Officer Rijos' personnel file.
   b. The City will compensate him for lost back-pay for the sixteen (16) suspension days served.
   c. Officer Rijos filed a withdrawal with the Commission for Docket Numbers 03-140, 03-283, and 03-284.

   (Exhibit 4)

Current Disciplinary Action

10. On February 14, 2007, Chelsea Police Captain Edward Martin (hereinafter "Capt. Martin") sent an email message to all Police Superior Officers and Police Patrol Officers, notifying them that:

> "Under no circumstances are you to park the marked cruisers in the side lot, the point, or on the hydrant. If spaces are unavailable due to unmarked cars, either our own or outside agencies, parked in the spaces reserved for the Patrol units contact the OIC who will have the offending units moved."
> (Exhibit 8)

11. On February 15, 2007, Chief Garvin sent an email to Capt. Martin, and to all Police Superior Officers and Police Patrol Officers, that reaffirmed Capt. Martin's message. Said email stated:

> "To all, let me also add to this that the Parking Policy applies to everyone. I have seen unmarked cars parked near the garage and at the end of the island near Winnissimmett St. They should not be left there. This policy applies to everyone and should be enforced that way! Thanks!" (Exhibit 8)

12. On February 16, 2007, the Appellant replied to the above emails by sending a message directly to Chief Garvin, which stated: "Same old song?" (Exhibit 8)
13. On February 17, 2007, Chief Garvin contacted Lieutenant Edward Noseworthy (hereinafter "Lt. Noseworthy"), informing him that the Appellant's email came across as offensive and insubordinate. Chief Garvin also stated that he wanted the situation to be investigated by the City of Chelsea Internal Affairs. (Exhibit 5; Testimony of Lt. Noseworthy)
14. Later that day, Lt. Noseworthy sent an email to the Appellant, instructing him to give an explanation of his actions with regard to his February 16, 2007 email to Chief Garvin. Lt. Noseworthy requested that the Appellant respond via e-mail before the end of his shift that day. (Exhibit 10, Page 2)
15. On February 18, 2007 at 2:37 a.m., in timely compliance with Lt. Noseworthy's request, the Appellant sent a detailed explanation of his February 16, 2007 email to Chief Garvin. In his explanation, the Appellant made the following points:

    a. Chief Garvin and the Department have harassed Police Officer Union Officials on several occasions, and no proper investigation has been conducted into whether disparate treatment truly exists.
    b. Even though Chief Garvin has expressed parking violations would not be tolerated, there have been multiple parking violations at the Department, and yet the Appellant has been the only employee to be disciplined for a parking violation.
    c. The email in question used the same words Chief Garvin used in an email sent on August 28, 2006, to Sergeant James Atkins (hereinafter "Sgt. Atkins") after Sgt. Atkins requested information on whether the Appellant had made a rightful complaint against Sgt. Atkins

> "Recently we received a complaint or 'grievance' from Rijos that things was not done fairly across the board. I believe a large part of that is just the *same old song* with the same old words but we should be very careful as to certain things. We must make sure that we go by the book on everything because clearly, the troops are watching as well they should be. When we say that everyone must comply with the detail policy that has to mean EVERYONE!" (Exhibit 9)

d. The Appellant did not intend to be insubordinate in sending the email, "Same old song?", and viewed it as asking Chief Garvin a question. The Appellant thought he was justified in asking such a question since Sgt. Atkins did not receive a disciplinary action for parking in an unauthorized space, unlike the suspensions issued against the Appellant for committing similar parking violations.
(Exhibit 10, Page 1; Testimony of Appellant)

16. On February 21, 2007, Lt. Noseworthy phoned Lieutenant Nancy Haumann (hereinafter "Lt. Haumann"), Officer in Charge of the Daywatch Shift at the Department. Lt. Noseworthy asked Lt. Haumann if she recalled the Appellant's complaint of Sgt. Atkins using an unauthorized parking space. Lt. Haumann said that she did remember the incident, and that Sgt. Atkins moved his vehicle when she asked him to. (Exhibit 5, Page 2; Testimony of Lt. Noseworthy)

17. Also on February 21, 2007, Lt. Noseworthy phoned Sgt. Atkins and asked him if he had been told to move his vehicle from an unauthorized location. Sgt. Atkins said that he had, and once Lt. Haumann told him to move his car, he immediately did. (Exhibit 5, Page 2; Testimony of Lt. Noseworthy)

18. On February 22, 2007, Lt. Noseworthy reported in his Internal Affairs Investigation that Officer Rijos had violated the Chelsea Police Department's Rules and Regulations, Rule 7.01 for Insubordination. (Exhibit 5, Page 2)

19. Rule 7.01 – Insubordination states:

> Officers shall not be insubordinate. Insubordination shall include: *any failure or deliberate refusal to obey a lawful order* (written or oral) given by a Superior Officer

> or as otherwise specified above. It shall also include any *disrespectful*, mutinous, insolent, or abusive language or action toward a superior whether *in or out of the presence* of the superior.
> (Exhibit 1)

20. Lt. Noseworthy stated the reasoning behind his decision was that Officer Rijos' three word email "was meant to be *disrespectful* and *insolent* and to throw the chiefs own words back in his face even though Officer Rijos admits that Chief Garvin's alleged email was not sent to him (Officer Rijos)." (Exhibit 5, Page 2)

21. Lt. Noseworthy stated further that at the time of this incident, Officer Rijos and other Department employees were asked by Sgt. Atkins to move their vehicles. Officer Rijos refused to move his vehicle, although the other Department employees complied. Lt. Noseworthy stated in his report:

> "Whenever there is an occasional parking violation at Chelsea Police Headquarters the employee is told to move the vehicle by a superior officer and he/she always complies. Since the inception of the CPD parking policy in approximately 2002 only Officer Rijos, who happens to be a union official, has refused to move his vehicle when he was requested to do so and after being offered the same courtesy as everyone else. Officer Rijos incorrectly views this as harassment and disparity of treatment…" (Exhibit 5, Page 3)

22. On February 23, 2007, Chief Garvin sent a memorandum to Mr. Jay Ash, City Manager of the City of Chelsea (hereinafter "Mr. Ash"), stating he (Chief Garvin) concurred with the findings of Lt. Noseworthy and that there was just cause to sustain the charges against Officer Rijos for violating Rule 7.01- Insubordination. (Exhibit 6)

23. Chief Garvin also stated he was suspending Officer Rijos for five (5) days and recommended that he "receive additional discipline up to and including termination from his employment with the City of Chelsea." (Exhibit 6)

24. On Friday February 23, 2007 at 11:30pm, the Appellant received notice of his suspension. (Exhibit 13)

25. On February 27, 2007, the Union President requested an appeal of the Appellant's five (5) day suspension. (Exhibit 7, Page 2)
26. On April 10, 2007, a hearing was held on the matter, and Hearing Officer Thomas Durkin upheld the Department's five (5) day suspension of the Appellant. (Exhibit 7, Page 3)
27. On April 25, 2007, Mr. Ash sent a written notification to the Appellant, stating he accepted the Hearing Officer's decision, and upheld the five (5) day suspension.
28. On or about May 1, 2007, the Appellant filed an appeal of the Appointing Authority's decision with the Commission.
29. At the hearing, Lt. Noseworthy testified that the Appellant's past suspensions for insubordination were issued for the Appellant parking in unauthorized areas. (Testimony of Lt. Noseworthy)
30. The Appellant testified that he thought he had a positive relationship with the Chief, and that he believed their prior differences were over. (Testimony of Appellant)
31. The Appellant testified further that he and the Chief often spoke with one another in a less than formal manner, and that he had no intention of being insubordinate in his email. (Testimony of Appellant)
32. Officer Anthony Ortiz, President of the Police Officer's Union, testified that he also had informal discussions with the Chief, and that other Officers in the Department had not been disciplined for parking violations. (Testimony of Anthony Ortiz)

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." Cambridge *v.* Civil Serv. Comm'n, 43 Mass. App. Ct. 300,304 (1997).

See Watertown *v.* Arria, 16 Mass. App. Ct. 331 (1983); McIsaac *v.* Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 477 (1995); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); 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); *See also* Commissioners of Civ. Serv. *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 Comm. of Brockton *v.* Civil Serv. Comm'n, 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. Falmouth *v.* Civil Serv. Comm'n, 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 Civ. Serv. *v.* Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Both parties have raised the issue of timeliness. The Respondent argues that the Appellant did not file his appeal within the time as required by G.L. c.31 §41. The letter to the Appellant is dated February 23, 2007, and the appeal was filed on Tuesday February 27, 2007. c. 41 requires that the appeal be filed with 48 hours, excluding Saturdays, Sundays and legal holidays. The Appellant's appeal is timely.

The Appellant argues that the Respondent did not give him a hearing within 5 days as required by G.L. c.31 §41. Although the Commission acknowledges that the hearing was not held within that time, the Appellant suffered no prejudice nor harm due to the delay. Absent refusing to hold any hearing whatsoever or other flagrant violation of Section 41, most appellants generally face a significant burden to establish that they have suffered harm as a result of any procedural misstep, which the statute specifically requires to justify a Section 42 appeal. See, e.g., Rizzo v. Lexington, 21 MCSR 70 (2008) (discharge; §42 appeal denied); Coronella v. Mashpee, 19 MSCR 67 (2006) (discharge; §42 appeal denied); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (discharge; §42 appeal denied); Fopiano v. Scituate, 12 MCSR 154 (1999) discharge; §42 appeal denied); Dodge v. Athol Police Dep't, 11 MSCR 207 (1998) (discharge; §42 appeal denied); Carey v. Nahant, 6 MCSR 149 (1993) (discharge; §42 appeal denied). In the case of a suspension of five days or less, when a prior Appointing Authority hearing is not required, the Commission is hard-pressed to envision how any appellant could establish the necessary prejudice that would justify a Section 42 appeal in such a situation. See Burke v. Quincy, 19 MCSR 86 (five day suspension; §42 appeal denied); Meaney v. Woburn, 12

MCSR 253 (1999) (two day suspension; §42 appeal denied); Stanton v. Boston Police Dep't, 8 MCSR 33 (1995) (five day suspension; §42 appeal denied)

The Commission believes that the overall intent of the Civil Service Law is best accomplished by encouraging public employees and appointing authorities to make an honest, good faith use of the hearing at the Appointing Authority level as a means of expeditiously resolving disputes whenever possible, including those cases involving a suspension of five days or less. Even when the case is not resolved at the Appointing Authority level, a hearing can be useful to the parties and to the Commission to narrow the issues and produce a more efficient appeal process at the Commission level.

Accordingly, in order to facilitate this objective, the Commission construes that a tenured employee who is suspended for five days or less, as a practical matter, is given two options: (1) Forego the Appointing Authority level hearing and take an immediate appeal from the discipline under Section 43 within 10 days of the notice of the discipline. From the Commission's perspective, this is a disfavored option, but one that any such employee is lawfully entitled to exercise. (2) Request an Appointing Authority level hearing and appeal to the Commission within 10 days after the decision of the Appointing Authority in the same manner as an appeal could be taken from the decision of a pre-disciplinary hearing. In other words, by requesting a hearing at the Appointing Authority level, the time for filing a "just cause" appeal under Section 43 is suspended until such time as the Appointing Authority issues a final decision regarding the employee's appeal, even if the hearing and decision are made outside the statutory time frames specified in Section 41.

In this case, the Commission finds that Mr. Rijos has suffered no prejudice from Chelsea's failure to provide him with a timely hearing. The Commission, therefore, will deny the Section 42 claim and will treat this appeal as a "just cause" appeal under Section 43.

The Appellant's reply of "same old song?" to the Chief's email does not amount to insubordination. According to the Rules and Regulations for the City of Chelsea, insubordination is defined as:

> "any failure or deliberate refusal to obey a lawful order (written or oral) given by a superior officer or as otherwise specified above. It shall also include any disrespectful, mutinous, insolent, or abusive language or action toward a superior whether in or out of the presence of the superior."

While the Appellant admits that the email could have been more formal, he states that he never intended his words to amount to disrespectful, mutinous, insolent, or abusive language. The Appointing Authority concluded that the Appellant was disrespectful and insolent by replying to the Chief's email with the words "same old song?" The Appellant credibility testified that he was comfortable making this statement because of what he perceived to be his good relationship with the chief. He thought that all previous issues were resolved, he had the utmost respect for the Chief, and never intended to offend him. Additionally, both the Appellant and Officer Ortiz testified that it was common behavior for the officers to send quick emails to the Chief. There was testimony that the Chief also communicated informally to officers.

The Appellant's lack of intent to be disrespectful, insolent, or insubordinate in any way, as well as his belief that an informal email was an acceptable form of communication to the Chief supports the finding that there was no just cause to suspend him. By quoting the words the Chief used to minimize his complaints, the Appellant was not being disrespectful, but trying to address an issue that he thought was problematic and could cause trouble in the future. He was hoping the email would elicit a discussion to resolve the issue, not offend the Chief.

Therefore, the Appointing Authority did not have just cause to suspend the Appellant.

The evidence suggests that the Appellant was disciplined more harshly than other officers who performed the same actions. For example, Officer Ortiz questioned the Chief's authority when he suggested that Sgt. Atkins, rather than the chief, ran the Department. He was not disciplined for that comment. Officer Leon also refused a direct order from the chief to serve as a translator in a neighboring community. He received only a one day punishment duty. Lt. Noseworthy testified that Sgt. Atkins repeatedly violated the parking policy of the Department, but was never disciplined for it. These offenses are all more serious than the act committed by the Appellant that is the subject of the instant appeal.

The Appointing Authority has not demonstrated by a preponderance of the evidence that there was reasonable justification for the Appellant's five (5) suspension. While the e-mail in this case does not rise to the level of insubordination, the Commission wishes to remind the Appellant that he is part of a para- military organization and as such his Superior Officers shall be treated with respect at all times

For all of the above reasons, the Appellant's appeal filed under Docket Number D-07-169 is hereby ***allowed*** and he shall receive five (5) days pay plus benefits.

Civil Service Commission

_____

John E. Taylor
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor [Bowman, Chairman – absent], Commissioners) on December 3, 2009.

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. 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:
Regina Ryan, Esq. (for the Appellant)
Mary A. Maslowski, Esq. (for the Appointing Authority)