

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

KEVIN E. ROBERTS,
Appellant

v.

Docket Number: D-05-319

DEPARTMENT OF STATE POLICE,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to the provisions of G.L. c. 31, §43 and G.L. c. 22C, §13 as amended by Chapter 43 of the Acts of 2002, the Appellant, Kevin E. Roberts (hereinafter "Appellant"), is appealing the decision of the Respondent, Massachusetts Department of State Police (hereinafter "Department"), to suspend him from his position of State Trooper for five (5) days. The appeal was timely filed and a hearing was held on March 27, 2008 at the offices of the Civil Service Commission (hereinafter "Commission"). As

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.

no written notice was received from either party, the hearing was declared private. One tape was made of the hearing. Witnesses providing sworn testimony were not sequestered. A motion by the Department to “impound all internal affairs and/or private personnel documents submitted to the Commission during the course of the proceedings” was allowed on the date of the hearing and was incorporated into the record. Proposed Decisions were submitted by the parties as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 – 3 and Appointing Authority’s Exhibits 1 – 3), the testimony of Department Captain Steven Vrona (hereinafter “Capt. Vrona”) and the testimony of the Appellant, I make the following findings of fact:

1. On or about June 16, 2004, the Appellant was fully employed as a Massachusetts State Trooper assigned to the Norwell Barracks. The Appellant was also an elected union official holding the title of “Barracks Representative” to the State Police Association of Massachusetts (hereinafter “SPAM”), a position analogous to that of a “Shop Steward.” (Testimony of Appellant)
2. Prior to June 12, 2004, a number of incidents had occurred between Police, particularly State Police, and Fire Departments regarding the protocol of sending both a fire truck and an ambulance to *every* motor vehicle accident scene. This response occurred regardless of whether there was fire apparatus requested, or whether there was present a threat of fire or hazardous material contamination. The Appellant was aware of these incidents because he had received a number of complaints from

Troopers assigned to the Norwell barracks in his capacity as a Barracks Representative. (Id.)

3. On or about June 12, 2004, while working his shift, the Appellant responded to the scene of a multi-car accident on Route 3 at the Derby Street ramp in Hingham, MA. (Testimony of Appellant and Capt. Vrona)
4. The Appellant testified at the Commission hearing that the accident occurred in the left (high-speed) lane. All the vehicles remained in the left high-speed lane and the operators involved in the crash were walking around their vehicles when the Appellant arrived at that scene. The Appellant advised the Department that there were no injuries and, therefore, Fire Department personnel and ambulances were not required at the scene. The Appellant credibly testified that he believed that same information was relayed to the Hingham Fire Department. (Testimony of Appellant)
5. However, a Hingham Fire Department truck arrived and parked in such a fashion that it blocked the lanes of moving traffic. Traffic on Route 3 came to a standstill, creating a major traffic problem and a serious public safety issue. Fire Department personnel alighted from the vehicle and remained on scene. (Appointing Authority Exhibit 2)
6. Because of the way in which the Hingham Fire Department responded to the scene, the Appellant and members of the Hingham Fire Department had a verbal interaction at the scene of the accident. The Appellant exchanged some words with a lieutenant, and a complaint was later made by the Hingham Fire Chief to the Department. (Testimony of Appellant and Capt. Vrona, Appointing Authority Exhibit 2)

7. In 2004, Capt. Vrona was a State Police Lieutenant assigned to the Troop D Middleboro Barracks. He was assigned to conduct an investigation of the complaint received from the Hingham Fire Chief. (Testimony of Capt. Vrona)
8. Capt. Vrona testified at the Commission hearing that he had performed numerous such investigations while he served as both a Sergeant and a Lieutenant with the Department. At the time of the hearing, Capt. Vrona had been with the Department for approximately 25 years. (Id.)
9. Capt. Vrona testified that the investigation was completed in three (3) months. He interviewed the complainant (Hingham Fire Chief William Johnson), 2 – 3 firefighters and 5 – 6 civilian witnesses. He then instructed the Appellant to write an incident report which he reviewed. However, he did not interview the Appellant. Capt. Vrona testified that he relied on the Appellant's report to serve as the Appellant's version of the incident. (Id.)
10. During the investigation, Hingham Deputy Fire Chief Levenson provided Capt. Vrona with a memorandum dated 6 June 2004 which read: "To: Chief William Johnson, Hingham Fire Department From: Trooper K.E. Roberts, D-1, Norwell." The memorandum bears the heading "Commonwealth of Massachusetts, Department of State Police" and contains the names of the Governor, Lieutenant Governor, Secretary of Public Safety and the Colonel of the State Police. The document was an illegible facsimile transmission of a two page letter authored by the Appellant and addressed to the Hingham Fire Chief relative to the June 12, 2004 incident on Route 3. The letter, by the Appellant's own admission at the Commission hearing, was one of several that the Appellant had authored, complaining about the Fire Department

protocol and practice of sending fire trucks to accident scenes when unnecessary.

(Testimony of Appellant and Capt. Vrona & AA 3)

11. The Appellant credibly testified that upon completion of his motor vehicle accident report, he placed the accident report, along with the original (not in evidence) two-page letter of his complaint to the Hingham Fire Department, a previous letter of complaint about the Fire Department from May 2004 and another Trooper's complaint about the dangerousness of the fire protocol, all in a packet in his Lieutenant's in-box. (Testimony of Appellant)

12. The Appellant testified that he submitted a second copy to his Troop Representative from the SPAM. The complaint was addressed directly to the Hingham Fire Chief. The Appellant credibly testified that he fully intended for the complaint to be forwarded to the Fire Chief and acted under the impression that the complaint had been forwarded. (Id.)

13. On or about August 24, 2004, in response to the above mentioned request from Capt. Vrona (see Fact #9), the Appellant submitted an eight (8) page written memorandum to both Department Major Michael Crisp and Capt. Vrona relative to the events of June 12, 2004 involving members of the Hingham Fire Department. (Testimony of Appellant and Appointing Authority Exhibit 2)

14. In response to a question in regard to the June 12, 2004 incident, the Appellant wrote:

... "I have no doubt that this citizen response and the actions of Mr. Levenson and his colleagues on the 12th of June were retaliatory and calculated based on a report I had *submitted* on 18 May 2004 which *was passed through my chain of command* in which I detailed the actions of members of Hingham Fire which were to say the least outrageous. ***I also submitted a written complaint directly to the Hingham Fire Chief with realtion (sic) to the incidents on 12 June 2004.*** (Emphasis added.)

The Appellant testified that the word “submit” as used in his response to Lt. Vrona’s questions refers to the Department practice when one is to submit a report it is placed in an in-box for approval by a supervisor. This occurs in nearly all reports and in all cases. (Id.)

15. The Appellant testified that he never personally sent the June 16, 2004 document by facsimile to the Hingham Fire Department. However, he was under the belief that his lieutenant would forward the original hard copy and his report, subject to approval. In his response to questions posed by Capt. Vrona, the Appellant states that he believed that the reports were all forwarded to the Hingham Fire Chief. (Testimony of Appellant)

16. I found the Appellant to be extremely credible in his testimony on this subject. He was unhesitant when answering questions relative to the dissemination of information from Troopers in a barracks to outside parties. He demonstrated that he was fully aware of the rules governing communications. The Appellant retired from the Department in January 2007. He was at ease and confident in his tone of voice when testifying. He had excellent recall of details and was very forthright. He was most frank about authoring the complaint about firefighter response to accidents and was clear that he wished the letter to reach the Hingham Fire Chief. He was equally clear as to how that communication should have been sent according to Department protocols. (Demeanor of Appellant)

17. The Appellant denied sending the June 16, 2004 complaint by fax. He testified that it could have been done by 5 or 6 other people who had access to the Lieutenant’s in-box. Capt. Vrona testified that he did not ask anyone who was on duty at the time if

they had sent the fax. In fact, Capt. Vrona testified that he never asked the Appellant if he had sent the fax. Instead, he relied on the wording in the Appellant's report that the Appellant had "submitted a written complaint directly to the Hingham Fire Chief" as being "good enough for him." (Testimony of Capt. Vrona)

18. Additionally, although Capt. Vrona never requested an original of the faxed copy of the letter to the Hingham fire Chief, he stated at hearing that he was "absolutely sure" that the Appellant had faxed the letter because he (the Appellant) "was the only one who would have." Capt. Vrona further testified that he was not sure if the Appellant had authorization to send the fax or not. The manner in which Capt. Vrona reached this conclusion that the Appellant had violated Department Rules and Regulations was disappointing, and not what should be reasonably expected from an individual with lengthy investigative experience. While I do not find that Capt. Vrona harbored any animus toward the Appellant², neither did I find that he afforded the Appellant a sufficiently thorough review of the alleged misconduct. (Testimony and Demeanor of Capt. Vrona)

19. The fax was sent to the Hingham Fire Department on June 18, 2004 at 21:10 hours (9:10 p.m.). The Appellant asserted that he would not have been in the Norwell barracks at that time as he was on road patrol all that summer in a sector that stretched from Braintree to Cape Cod. He credibly testified that his routine was to be in the barracks for no more than one hour, total, per day. He said that he avoided being in the barracks because, as the Union Representative, he was constantly besieged by Trooper's complaints. He offered that the Norwell barracks had the most

² Indeed, Capt. Vrona testified that he "sympathized" with the Appellant's frustrations with dealing with local Fire Departments. "We've all been through it," he stated.

Union complaints in the state and referred to the station as the “Barracks from Hell” to emphasize his point. (testimony of Appellant and Appointing Authority Exhibit 3)

20. Department Rules and Regulations, Article 5.28.1 states that State Police “[m]embers must transact all their official correspondence and official business through their Commanding Officer.” (Joint Exhibit 2)

21. Department Personnel Order Number 05PER395, issued on August 29, 2005 by a Department Trial Board, found the Appellant guilty of one violation of Article 5.28.1 of the Department Rules and Regulations. The Appellant was suspended without pay for five (5) days, which he served from September 4, 2005 through September 8, 2005. (Joint Exhibit 1)

22. In its Proposed Decision, the Department asserted that despite his testimony that he placed the June 16, 2004 memorandum directed to the Hingham Fire Chief in his Lieutenant’s mailbox at the Norwell barracks, the Appellant did not call any commanding officer(s) to corroborate this testimony. The Department also argued that, in his August 24, 2004 memorandum, the Appellant makes no mention of ever placing the June 16, 2004 letter in his Lieutenant’s mailbox at the Norwell barracks. I find that the Department’s own internal investigation failed to ask these questions. Consequently, the Commission is left with a decided lack of evidence as to whether the Appellant violated Article 5.28.1 or not. Rather than rest its conclusion that the Appellant was guilty of misconduct on assumptions made in the reading of a memo, the Department could have asked the supervisor on duty (1) when the letter was faxed, and (2) if it were authorized. It is demonstrated by a preponderance of the

evidence that *no one* who had access to the Norwell barracks at 9:10 p.m. on June 18, 2004 was asked that simple question. (Department's Proposed Decision)

23. The Commission's jurisdiction over this matter is governed by G.L. c. 22C, § 13, which grants any person aggrieved by the "finding" of a State Police Trial Board a right of appeal under §§ 41-45 of Massachusetts General Laws, Chapter 31.

24. The Appellant filed this appeal with the Commission on September 8, 2005.

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).

The Department failed to show, by a preponderance of the evidence presented in this matter, that it had just cause to suspend the Appellant from employment for five (5) days. The only evidence presented before the Commission in support of the Department's position is the one line in the Appellant's August 24, 2004 report indicating that he submitted a complaint "directly" to the Hingham Fire Chief. However, the Appellant credibly explained that the use of the word "directly" referred to his addressing a letter of complaint to the Chief personally, rather than to his own Superior officers. He further testified that his complaint, addressed to the Chief directly, was included in a packet containing (1) his accident report; (2) a previous complaint about the Fire Department authored by him; and (3) a previous complaint about the Fire Department authored by another Trooper. This packet was left in his supervisor's "inbox", with a copy to his union representative. The Appellant denied faxing anything to the Hingham Fire Department (the basis for the charge), but believed that his supervisor approved and forwarded his complaint, as he had not been informed of any denial of approval.

Most troubling in this matter is that in the presence of a contradiction, the investigating officer took no steps to obtain any further evidence that could support his allegation that the Appellant, without authorization, personally faxed this document to the Hingham Fire Department.

Capt. Vrona acknowledged that the Fire Department's practice was a source of ongoing dispute with many Troopers whom the Appellant represented as an elected Union official. He admitted that many Troopers had access to the supervisor's inbox in which the Appellant placed the complaint. However, he admitted asking no other Trooper whether they had sent the document in question. The Appellant testified that he

could identify “five or six people” who would have been motivated to fax the document. The Appellant was found to be credible in his explanation. In the absence of credible evidence to substantiate its position, the Department has not met its burden of proving just cause for suspending the Appellant.

Therefore, for all the reasons stated herein, the appeal on Docket Number D-05-319 is hereby *allowed* and it is ordered, pursuant to G.L. c. 31, § 43 that the Appellant be made whole for any loss of compensation or other rights resulting from the five (5) day suspension imposed on him by the Department in September 2005.

John J. Guerin
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on July 24, 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:

Scott W. Dunlap, Esq. (for Appellant)

Sean W. Farrell, Esq. (for Department of State Police)