

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

DANIEL F. SOARES,
Appellant

v.

D-21-037

TOWN OF LUDLOW,
Respondent

Appearance for Appellant:

Michael P. Clancy, Esq.
1299 Page Blvd.
Springfield, MA 01104

Appearance for Respondent:

Anjali S. Kumar, Esq.
Doherty, Wallace, Pillsbury, & Murphy, P.C.
1414 Main Street
Suite 1900
Springfield, MA 01144

Commissioner:

Christopher C. Bowman¹
Cynthia A. Ittleman

SUMMARY OF DECISION

The Commission allowed the Appellant's appeal and rescinded his two-day suspension as the Town failed to show, by a preponderance of the evidence, that the Appellant engaged in the alleged misconduct related to purported insubordination.

¹ Commissioner Ittleman conducted the remote full hearing regarding this appeal, but she retired from the Commission prior to drafting a decision. For that reason, the appeal was assigned to me. I have reviewed the entire record in this matter, including the audio / video recording of the full hearing and all exhibits.

DECISION

On February 19, 2021, the Appellant, Officer Daniel F. Soares (Appellant), pursuant to G.L. c. 31, § 43, filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Ludlow (Town) to suspend him for two days without pay. I held a remote pre-hearing conference on March 23, 2021, by videoconference, and Commissioner Ittleman held a full hearing also by videoconference on May 17, 2021, for which I have listened to the audio / video recording.² The hearing was recorded via Webex.³ Twelve joint exhibits, two Appellant exhibits, and seventeen Respondent exhibits were received in evidence. On June 18, 2021, the parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Town:

- Chief Daniel Valadas (Chief Valadas)
- Lieutenant David Irwin (Lt. Irwin)
- Officer Jerome Mayou (Officer Mayou)
- Officer Jacob Stokowski (Officer Stokowski)

Called by the Appellant:

- Officer Daniel F. Soares (Appellant)
- Officer Michael Whitney (Officer Whitney)

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the recording sent to the parties electronically should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

- 1) The Appellant became a police officer on July 16, 2012 with the Town of Ludlow. (Resp. Exh. 16)
- 2) The Appellant served in the United States Army from 1995 to 2003 and has been a member of the United States Air Force Reserve since 2009. (Testimony of Appellant)
- 3) During his tenure with the Ludlow Police Department, the Appellant has served as a member of the Department's Special Response Team (SWAT) and has completed many firearms training courses and qualifications. (Testimony of Appellant)
- 4) On October 16, 2020, the Appellant and other Ludlow police officers attended an annual firearms training at the Banas Range in Ludlow which is required of all police officers by the Municipal Police Training Committee (MPTC). (Testimony of Appellant, Irwin, Mayou, Stokowski and Whitney)
- 5) Three members of the Ludlow Police Department served as firearms instructors at the training: Lt. David Irwin, Officer Jerome Mayou and Officer Jacob Stokowski. (Testimony of Appellant, Irwin, Mayo and Stokowski)
- 6) Ludlow Police Lt. David Irwin, who has been a certified firearms instructor for two years, planned and implemented this particular firearms training. It was the second time that he had done so since becoming certified. (Testimony of Irwin)
- 7) The MPTC firearms training standards state in relevant part that: "Each training session shall be realistic in nature and should include, but not be limited to, the following: a. Judgmental shooting; b. Reduced light; c. Multiple target drills or scenarios; d. Shooting at

moving targets and shooting while moving; and e. Sympathetic fire drills.” (emphasis added) (Joint Exhibit 11)

- 8) The Banas Range rules state in relevant part that shooters must “ ... always use proper ear and eye protection when participating in live fire exercises.” (Joint Exhibit 10)
- 9) Unbeknownst to the police officers attending the training, Lt. Irwin decided to add an element of “surprise” to the training in an effort to ensure that it met the MPTC standards of being “realistic”. Specifically, Lt. Irwin downloaded a series of sound clips from the movie “Heat” to his iPhone that apparently involved a shootout scene regarding a bank robbery. Lt. Irwin was not certain how many shooters were in these clips, what direction the shots were coming from or what type of weapons were being shot. (Testimony of Irwin)
- 10) Lt. Irwin then secured a set of Bluetooth-enabled headphones and ensured that the clips of the soundtrack from his iPhone played on the headphones. (Testimony of Irwin)
- 11) At the outset of the training, Lt. Irwin demonstrated how the firearms training should be completed; informed the group that there would a “sound distraction” component to the training and asked the group of trainees whether any of them had any injuries or illnesses that would impact their ability to complete the firearms training. (Testimony of Irwin)
- 12) The Appellant has been diagnosed with Tinnitus in one ear, often referred to as a buzzing or ringing in the ears. The Appellant did not believe that this condition would impact his ability to conduct the training, in part because he has military-issued ear plugs that he intended on using during the training. (Testimony of Appellant)
- 13) Police officers completed the firearms training one-at-a-time. The Appellant was the second officer in line to complete the firearms training, which involved loading and unloading an

M-4 rifle and moving from barrel to barrel, shooting at a moving target for approximately 1 ½ minutes. (Testimony of Appellant and Irwin)

14) As the Appellant was about to begin the training, Lt. Irwin informed the Appellant that he must use the Bluetooth-enabled headphones which, unbeknownst to the Appellant, were being used to implement the sound distraction referenced earlier (playing the sound clips from the movie “Heat”). (Testimony of Irwin and Appellant)

15) The Appellant had never in his experience switched ear protection at the firing line as part of firearms training. With other colleagues present, he expressed concern to Lt. Irwin for his hearing due to his Tinnitus and was unsure of the level of ear protection afforded by what Irwin was offering was equivalent to the military-grade earplugs he planned to use. Lt. Irwin did not disclose that the audio distraction would be coming from the headphones. (Testimony of the Appellant)

16) While the Appellant and Lt. Irwin offered divergent testimony regarding what was said next, and how it was said, both men seem to agree that there was a verbal “back and forth” between the two of them; after which it was agreed that the Appellant would keep his own earpiece in one ear and use the headphones for the other ear. They also agree that the Appellant successfully completed the required training shortly thereafter. (Testimony of Appellant and Irwin)

17) Police Officer Jacob Stokowski, a percipient witness who was called to testify by the Town, recalls that the Appellant was “pretty calm” during the interaction, that things became somewhat “elevated” and, at one point, Lt. Irwin told the Appellant that if he didn’t wear the headphones as instructed, the Appellant would need to leave the training. (Testimony of Stokowski)

- 18) Police Officer Jerome Mayou, another percipient witness who was called to testify by the Town, recalls that the interaction between the Appellant and Lt. Irwin was “not confrontational”. Officer Mayou did not hear the entire conversation between the Appellant and Lt. Irwin, but he recalls the matter being quickly resolved when it was agreed that the Appellant would keep his own earpiece in one ear during the training. (Testimony of Mayou)
- 19) Officer Michael Whitney, another percipient witness who was called to testify by the Appellant, recalls that the Appellant was “calm” during the verbal interaction and that Lt. Irwin was “direct”, initially telling the Appellant that he would need to leave the training and risk his certification if he did not wear the Bluetooth-enabled headphones. (Testimony of Whitney)
- 20) The next day, on October 16, 2020, the Appellant filed a written complaint against Lt. Irwin, alleging that Lt. Irwin had “embarrassed and belittled” him in front of fellow police officers after he reported his medical condition to Lt. Irwin during the above-referenced verbal interaction at the firearms training the previous day. (Joint Exhibit 6)
- 21) Four days later, on October 20, 2020, Lt. Irwin filed a complaint against the Appellant regarding the same verbal interaction, describing the Appellant’s tone as “insolent and arrogant”, constituting insubordination, discourtesy and conducting unbecoming an officer.” (Joint Exhibit 9)
- 22) Ludlow Police Chief Daniel Valadas, after conducting an internal review, effectively credited the statements of Lt. Irwin and found that the Appellant had engaged in the misconduct, as alleged by Lt. Irwin and suspended the Appellant for two days. (Joint Exhibit 3; Testimony of Valadas)

23) The Appellant appealed his two-day suspension to the Ludlow Select Board. By a 3-1 vote, the Select Board denied the Appellant's appeal. (Joint Exhibit 2) This timely appeal to the Commission followed. (Joint Exhibit 1)

Applicable Civil Service Law

Section 43 of G.L. c. 31 states in relevant part:

“ ... If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority ...”.

The Commission determines just cause 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." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, rev. den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Commission also must take into account the special obligations the law imposes upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty. “[P]olice officers voluntarily undertake to adhere to a higher standard of conduct Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel

. . . [T]hey implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 801-802 (2004); Spargo v. Civil Service Comm’n, 50 Mass. App. Ct. 1106 (2000) (rescript), rev. den., 433 Mass. 1102 (2001); Police Commissioner v. Civil Service Comm’n, 39 Mass. App. Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm’n, 38 Mass. App. Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm’n, 22 Mass. App. Ct. 364, 371, rev. den. 398 Mass. 1103 (1986). See also Spargo v. Civil Service Comm’n, 50 Mass.App.Ct. 1106 (2000), rev.den., 433 Mass. 1102 (2001).

Analysis

The Commission has consistently held that police officers, as members of a paramilitary organization, must respect the chain of command, obey lawful orders and treat superior officers with respect and courtesy. Failing to do may constitute insubordination and provide just cause for discipline. Here, the Town has not shown, by a preponderance of the evidence, that the Appellant disobeyed a lawful order or that he failed to treat a superior officer with respect and courtesy.

Lt. Irwin is a professional, dedicated member of the Ludlow Police Department who takes his duties and responsibilities seriously, including his recent assignment to serve as a firearms instructor. Part of his decision-making related to this particular firearms training, however, had the unintended effect of causing the Appellant to have understandable concerns related to his safety and well-being. Only moments before the Appellant was expected to shoot multiple rounds from an M-4 rifle at a moving target as part of firearms training, Lt. Irwin handed the Appellant a set of headphones, with the expectation that the Appellant would remove

his own earpieces and use the headphones being handed to him by Lt. Irwin. To Lt. Irwin, this was a perfectly reasonable expectation, as the headphones were the means to implement the “element of surprise” that Lt. Irwin believed was consistent with MPTC guidelines that call for the firearms training to be realistic. Respectfully, I simply do not believe that the intent of the MPTC guidelines was to force police officers, with little or no notice, to surrender their own protective gear and swap it out for alternate protective gear without explanation. Importantly, there was no evidence presented regarding exactly where the headphones being handed to the Appellant came from and whether they had been sufficiently safety tested. Rather, the focus at the hearing before the Commission was that the headphones were Bluetooth-enabled and had been tested to play sound clips from an action movie involving some type of shooting.

The Appellant had a particularly valid reason to question whether swapping out his own safety gear was appropriate, having recently been diagnosed with Tinnitus in one ear. The Town faults the Appellant for failing to tell Lt. Irwin about this condition at the outset of the training. The faulty logic in that argument seems obvious. At the outset of the training, when Lt. Irwin demonstrated how the firearms training should be completed, he never informed the Appellant or any other officer that they would be required to swap their own protective gear for the headphones. Rather, Lt. Irwin simply alluded to some type of “audio distraction” that would be part of the training, waiting until the last moment to notify the Appellant of the requirement to wear the headphones.

That turns to whether the Appellant was “insolent and arrogant” to Lt. Irwin when told of the requirement to wear the headphones or, as testified to by the Appellant, whether Lt. Irwin had “embarrassed and belittled” the Appellant in front of this fellow police officers after he disclosed his medical condition. While I don’t doubt the sincerity of each person’s recollection,

which is based more on the subjective tone and tenor of the conversation rather than differences related to substance, I credit the fairly consistent testimony of the other percipient witnesses who testified before the Commission. Their testimony paints a picture of a relatively minor (and brief) “back and forth”, in which neither party was heard yelling, but rather, were heard calmly trying to work through confusion brought about by miscommunication. That does not, particularly given the valid safety concerns involved here, rise to the level of insubordination, discourtesy or conducting unbecoming a police officer by the Appellant.

For all of the above reasons, the Appellant’s appeal under Docket No. D-21-037 is hereby **allowed**; his suspension is rescinded and his disciplinary record shall be returned to the *status quo ante* without loss of compensation or other rights.

Civil Service Commission

/s/ Christopher Bowman
Christopher Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on July 28, 2022.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Michael Clancy, Esq. (for Appellant)
Anjali Kumar, Esq. (for Respondent)