

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

BRIAN SWEET,
Appellant

v.

D-08-209

DEPARTMENT OF STATE POLICE,

Respondent

Appellant's Attorney:

Timothy M. Burke, Esq.
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Needham, MA 02494

Respondent's Attorney:

Michael B. Halpin, Esq.
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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43 and G.L. c. 22C, § 13 as amended by Chapter 43 of the Acts of 2002, the Appellant, Brian Sweet (hereinafter "Sweet" or "Appellant"), is appealing the decision of the Department of State Police (hereinafter "State Police") to suspend him for fifteen (15) days as a result of his actions on March 10, 2007. The appeal was timely filed with the Civil Service Commission (hereinafter "Commission") on September 2, 2008. A pre-hearing conference was conducted on

September 25, 2008 and a full hearing was held on October 2, 2009 at the offices of the Commission.¹ All witnesses who testified, other than the Appellant, were sequestered. The hearing was digitally recorded. Both parties submitted post hearing briefs on November 23, 2009.

FINDINGS OF FACT:

Twenty-three (23) Exhibits were accepted into evidence during the hearing. Based upon the documents entered into evidence and the testimony of:

For the Massachusetts State Police:

- Sergeant Richard Chase; Massachusetts State Police;
- Citizen complainant (hereinafter “private citizen”)
- Citizen complainant’s vehicle passenger (hereinafter “passenger”)

For the Appellant:

- Trooper Justin Peledge; Massachusetts State Police;
- Trooper Jeffrey Boutwell, Massachusetts State Police;
- Trooper Brian Sweet, Appellant;

I make the following findings of fact:

1. The Appellant, Brian Sweet, is a Trooper employed by the Massachusetts State Police, a position and rank he has held for approximately nine (9) years. (Stipulated Fact)

¹ A full hearing was initially scheduled for December 4, 2008 at the Division of Administrative Law Appeals (DALA). This was converted to a motion hearing after the Appellant filed a Motion for Summary Decision. The DALA magistrate recommended that the Appellant’s Motion be denied and the matter scheduled for a full evidentiary hearing. As part of this decision, the Commission adopts the DALA recommended decision regarding the Motion for Summary Decision.

2. In regard to prior discipline, the Appellant received a letter of counseling in 2004 and was required to forfeit three (3) days of vacation time in 2005 for violation of Article 5.1 (Violation of Rules); Article 5.2 (Unbecoming Conduct) and Article 5.17 (Identification). (Stipulated Fact and Exhibits 11 and 12)
3. The discipline that is the subject of the instant appeal involves a 2007 citizen complaint regarding an incident on March 10, 2007 that was investigated by the State Police. The State Police Trial Board proceedings regarding this matter, at which the Appellant testified, did not take place until August 26, 2008. (Stipulated Fact and Exhibit 5)
4. The State Police Trial Board, whose findings were adopted by the Superintendent / Colonel of the State Police, concluded that the Appellant violated Article 5.2 of the rules and regulations (hereinafter “the rules”) of the State Police. (Exhibit 6)
5. The State Police Trial Board found that the Appellant violated Article 5.2 of the rules by conducting himself in such a manner that brought the State Police into disrepute and reflected discredit upon himself. Specifically, the Trial Board found that the Appellant kicked the side of the private citizen’s vehicle...[with] no viable excuse...” (Exhibit 6)
6. The private citizen who filed the complaint regarding the Appellant testified before the Commission. He is 23 years old and resides in Woburn. In regard to the events that are relevant to this appeal, I found him to be credible and I credit his testimony. He offered the most plausible explanation regarding the most relevant events and his testimony rang true to me. (Testimony, demeanor of private citizen)

7. I do not credit the testimony of the passenger that was in the private citizen's vehicle on the night in question. He had a sketchy recollection of events and his answers were geared more toward giving what he thought were the "right answers" as opposed to an honest recollection of the events as they occurred. (Testimony, demeanor of passenger)
8. On or about March 10, 2007, the Appellant was assigned to and worked an evening patrol assignment for the State Police out of the "Troop A" Medford barracks. (Testimony of Appellant)
9. At approximately 11:30 P.M. on March 10, 2007, the Appellant, responding to a radio call for assistance from Trooper Justin Peledge, traveled to the Super Stop & Shop parking lot located on Route 16 in Chelsea. (Testimony of Appellant and Trooper Peledge and Exhibit 10)
10. According to Trooper Peledge, the above-referenced parking lot was known as a meeting spot for operators who drag race using "low-rider" vehicles. As such, Trooper Peledge routinely checks this parking lot. If he sees a number of low-rider vehicles, he seeks to disperse them. (Testimony of Peledge)
11. On the night in question, Trooper Peledge saw 30-40 low-rider vehicles in the Super Stop & Shop parking lot. Prior to driving into the parking lot, he radioed the Medford barracks for assistance, which resulted in the dispatch of the Appellant. Trooper Peledge also notified the local police departments regarding the parking lot activity. (Testimony of Trooper Peledge)
12. Upon his arrival, the Appellant saw a number of vehicles exiting the parking lot via a roadway that was designated as an entrance only. To the surprise of Trooper Peledge,

the Appellant blocked the roadway where the cars were exiting. (Testimony of Trooper Peledge)

13. Ultimately, as a result of the Appellant blocking the roadway in question, approximately 10 -15 vehicles were now trapped or blocked from leaving -- with the Appellant's cruiser in the front and Trooper Peledge's cruiser in the rear, closer to the Stop & Shop. (Testimony of Appellant and Trooper Peledge)
14. One of the vehicles stopped in the access road was, at that time, owned and operated by the private citizen. (Testimony of Appellant and Trooper Peledge and private citizen)
15. After the vehicles were blocked, the Appellant and Trooper Peledge exited their cruisers and, from opposing directions, approached the area where the private citizen's vehicle was stopped in the access road. (Testimony of Appellant and Trooper Peledge and private citizen)
16. It is undisputed that, at some point during the stop, the Appellant kicked the driver's-side door of the private citizen's car with his right foot, causing damage. (Testimony of Appellant and private citizen)
17. The Appellant claims that he kicked the private citizen's car to gain compliance with his verbal commands to stop and, ultimately, to prevent the private citizen from backing the vehicle into Trooper Peledge. The Appellant testified before the Commission that when he approached the private citizen's car, it was not stopped and he (the Appellant) ordered the private citizen to stop. According to the Appellant, the private citizen then looked down, turned his head back, put his car in reverse and began moving backward while Trooper Peledge was standing behind the vehicle. It

was at this point, according to the Appellant, that he kicked the private citizen's car.

(Testimony of Appellant)

18. I do not credit the Appellant's testimony regarding the above-referenced incident.

For the reasons outlined in the findings below, I find that the Appellant has fabricated almost every detail related to his encounter with the private citizen. (Testimony, demeanor of Appellant)

19. The Appellant's testimony is not consistent with that of Trooper Peledge. Trooper Peledge testified that at some point, he stood in between the private citizen's vehicle and another vehicle, with his back to the private citizen's vehicle. Trooper Peledge testified that prior to standing in between the vehicles, he gave a general order to motorists to stop their cars, shut them off and throw the keys out the window and the motorists complied. While standing between the two vehicles in an area he estimates was a mere 10-15 feet, Trooper Peledge testified that he never heard or saw the private citizen's car start up or back up toward him. (Testimony of Trooper Peledge)

20. The Appellant's testimony is not consistent with that of the private citizen. The private citizen credibly testified that when the Appellant approached his car, his car was off and he had already taken his keys out of the ignition, in compliance with Trooper Peledge's verbal order. (Testimony of the Appellant)

21. After approaching the private citizen's vehicle, which was off and not moving, the Appellant kicked the driver's-side door of the private citizen's door, causing damage to the door. (Testimony of Appellant and Exhibit 1)

22. After the Appellant kicked his car, the private citizen asked Trooper Peledge who he should talk to about the damage that the Appellant caused to his car. (Testimony of

Trooper Peledge and private citizen) After learning that the private citizen wanted to file a complaint against him regarding the damaged door, the Appellant walked back to the private citizen's car and told the private citizen he could be arrested if he wanted to "raise a stink". (Testimony of Appellant)

23. The Appellant has previously been required to attend anger management training.
(Testimony of Appellant)

24. Trooper Peledge was told by a sergeant investigating this matter "there are people on this job we protect and he [Sweet] is not one of them." (Testimony of Trooper Peledge)

25. I find that the Appellant violated Article 5.2 of the rules by conducting himself in a manner that brought the State Police into disrepute and reflected discredit upon himself when he kicked the private citizen's vehicle with no viable excuse.

CONCLUSION:

G.L. c. 31, § 43, provides:

"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."

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the 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 Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). 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." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "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, 133 N.E.2d 489 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

For all of the reasons cited in the findings above, I conclude that the State Police, by a preponderance of the evidence, has shown that the Appellant violated State Police rules by conducting himself in a manner that brought the State Police into disrepute and reflected discredit upon himself when he kicked the private citizen's vehicle with no viable excuse.

I base this primarily on the credible testimony of the private citizen and Trooper Peledge. For the reasons cited in the findings, I do not credit the Appellant's testimony that he kicked the private citizen's door to protect the safety of Trooper Peledge. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141

(1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Having determined that it was appropriate to discipline the Appellant for violating the rule in question, the Commission must determine if the State Police was justified in the level of discipline imposed, which, in this case is a 15-day suspension.

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited.

“The ‘power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.’ ” Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 659 N.E.2d 1190 (1996) Unless the Commission’s findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to “substitute its judgment” for that of the appointing authority, and “cannot modify a penalty on the basis of essentially

similar fact finding without an adequate explanation” E.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

As referenced above, the Commission, if it reaches the same findings as the Appointing Authority, as it has in this case, can not modify the penalty imposed without an adequate explanation. Here, I have reached the same finding as the State Police in that the Appellant kicked the private citizen’s door with no viable excuse. For this reason, and in consideration of the Appellant’s prior disciplinary record, I conclude that that the penalty imposed is appropriate and the Commission’s intervention is not warranted regarding a modified penalty.

While I do credit Trooper Peledge’s testimony that he was told by a sergeant investigating this matter that Trooper Sweet is not someone that the State Police “protects”, that does not change my conclusion regarding the appropriateness of the discipline imposed here.

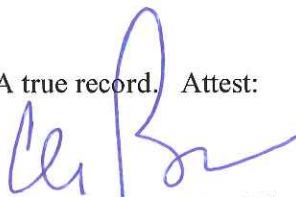
Civil Service Commission



Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on December 10, 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. 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 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:

Timothy Burke, Esq. (for Appellant)

Michael Halpin, Esq. (for Appointing Authority)