

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DAVID WETTELAND,
Appellant

Docket No. D-09-221

v.

DEPARTMENT OF STATE POLICE,
Respondent

Appellant's Attorney:

Joseph P. Kittredge, Atty.
Rafanelli & Kittredge
1 Keefe Road
Acton, MA 01720

Respondent's Attorney:

Michael B. Halpin, Atty.
Office of the Chief Legal Counsel
Department of State Police
470 Worcester Road
Framingham, MA 01702

Commissioner:

Daniel M. Henderson

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, Appellant, Trooper David Wetteland (hereafter "Wetteland" or "Appellant"), appealed the decision of the Massachusetts Department of State Police (hereinafter "Department" or "Appointing Authority") to suspend Appellant for a period of five (5) days for misconduct unbecoming an officer. The appeal was timely filed. Appellant filed a Motion in Limine to exclude the tape recording of the 911 call, and the transcripts thereof, in regard to the incident. A full hearing was held on August 26, 2009 at the offices of the Civil Service

Commission. As no notice was received from either party, the hearing was declared private. A digital recording of the hearing was made by the Commission. Post hearing proposed decisions were filed by the parties.

FINDINGS OF FACT:

Based on the twenty-five (25) exhibits entered into evidence. It was ordered by agreement that Exhibits 22, 23 & 24 (prior discipline) are identified and impounded except for administrative and appellate purposes. Exhibits 22, 23 & 24 are to be considered for all purposes, if just cause is found for the discipline here. Also, by agreement Exhibit 25, (audiotapes of Trial Board hearing) will be transcribed at the parties shared expense and the transcript entered as an exhibit in evidence instead of the audiotapes. Based on the Exhibits in evidence and the testimony of the following witnesses:

For the Massachusetts State Police:

- The Appellant, Trooper David Wetteland

For the Appellant:

- No Additional Witnesses

I make the following findings of fact:

1. Appellant is a Trooper and has been employed by the Department for approximately twenty-two (22) years. (Testimony of Appellant)
2. On July 24, 2007, Appellant was assigned to desk duty at the Charlton Barracks, Troop E, stationed at the Massachusetts Turnpike. Amongst his other duties, Appellant was responsible for answering incoming emergency 911 calls transferred from the Department

Communication Center at the General Headquarters (“GHQ”) in Framingham. (Testimony of Appellant)

3. Appellant fielded calls from motorists traveling on the highways, as well as local criminal emergencies. Appellant was aware that calls transferred to his location were recorded by GHQ. (Testimony of Appellant)
4. The Department did not have a policy requiring the immediate termination of recording after a call was connected to a regional barracks. (Testimony of Appellant)
5. On July 24, 2007, at approximately 5:45 P.M., Appellant answered two 911 telephone calls from Anthony Funches (hereinafter “Funches”). (Testimony of Appellant; Exhibits 1, 2, 3, 4, 5, 6, 7 and 9)
6. Funches was a civilian motorist traveling along the Massachusetts Turnpike who had encountered vehicle trouble. He had to park his vehicle on the shoulder of the road between Exits 9 and 10. (Testimony of Appellant; Exhibits 1, 7, 8 and 9)
7. Funches dialed 911 for help. (Testimony of Appellant; Exhibits 1, 7, 8 and 9)
8. Pursuant to Massachusetts State Police Policies and Procedure, the call was received and recorded by an integrated telephone system maintained by the GHQ. (Testimony of Appellant; Exhibits 8, 9 and 18)
9. During the first 911 call, Funches informed the 911 operator that he was broken down on the Massachusetts Turnpike, traveling eastbound between Exit 9 and 10. The operator said the call would be transferred and Funches responded by saying; “Thank you, Sir.” (Exhibits 8 and 9)
10. The call was then transferred to the Charlton Barracks. The Appellant received the call. (Testimony of Appellant; Exhibits 6, 7, 8, 9 and 14)

11. Fuches then introduced himself to Appellant in the following manner; “Hi Sir, my name is....” The recording of the call was subsequently terminated by GHQ but Fuches and Appellant continued their conversation. (Testimony of Appellant; Exhibits 8 and 9)
12. After briefly speaking with Fuches, Appellant hung up on Fuches. (Exhibits 8 and 9)
13. After Appellant hung up, Fuches called 911 a second time at approximately 5:45 P.M. on July 24, 2007. (Testimony of Appellant; Exhibits 1, 6, 7, 8 and 9)
14. Fuches then told the dispatcher that, during the first call, Appellant “wouldn’t even let me tell him what was wrong. He [was] hollering and screaming and hung up the damn phone on me.” When the dispatcher asked if Appellant had indicated whether or not help would be sent, Fuches said “No, he did not.” (Exhibits 8 and 9)
15. Fuches again explained his situation, that he was broken down on the Mass Pike, 90 east bound, and that he was “looking at a sign right now that says Exit 10. So I guess I’m between 9 and 10. I remember passing a plaza or something.” Fuches expressed frustration and puzzlement at the manner in which Appellant handled the first call. (Exhibits 1, 6, 7, 8 and 9)
16. Fuches requested that the GHQ operator connect him with “a sergeant or someone.” The operator informed Fuches that he would need to repeat his request after the call was transferred again to the Charlton Barracks. Fuches replied “Great. I’ll do that. That’s fine.” (Exhibits 1, 6, 7, 8 and 9)
17. The GHQ dispatcher remained on the line and continued recording during the second 911 call after the transfer. (Exhibits 1, 6, 7, 8 and 9)
18. The call was transferred and answered by Appellant. When Fuches requested to speak to a supervisor, Appellant identified himself as the supervisor. Thus, Fuches was precluded from speaking to a supervisor. (Exhibits 1, 6, 7, 8 and 9)

19. Funches asked Appellant “Can I ask you why you hung up the phone on me?” Appellant became enraged and among other comments, said: “I’m gonna hang this phone up and the next time I hang it up, I’m gonna send a cruiser out there and if you’re out of gas...I’m gonna have you written ... Are we on the same page now?” (Testimony of Appellant; Exhibits 8 and 9)
20. The recordings and transcripts from both 911 calls indicate that that Funches was respectful and able to provide his location. In his testimony before the Commission, Appellant attempted to portray Funches as belligerent, disrespectful and unable to provide any information about his location. The Commission does not credit Appellant’s testimony. The recordings of the interactions establish that Funches was polite and both willing and able to assist Appellant in determining his location. Conversely, Appellant was impatient, angry, disrespectful and unprofessional. (Testimony of Appellant; Exhibits 1, 6, 7, 8 and 9)
21. During the second call, Appellant belittled and intimidated Funches. Appellant stated to Funches that “I will send you assistance if you talk to me in the right manner.” Appellant forced Funches to submit and grovel. Funches replied “Sir, would you please send me some help?” to which Appellant replied “Absolutely” (Exhibit 8).
22. Pursuant to the Department’s Policies and Procedures (ADM-21) on July 24, 2007, the Appointing Authority maintained an “integrated communications system” that required the recoding and preservation of emergency 911 calls. Appellant was aware that incoming calls were recorded by GHQ. (Testimony of Appellant; Exhibit 18)
23. The same policy required Appellant, and all other employees, to answer telephone calls “professionally and courteously.” (Exhibit 18)

24. Also in effect on July 24, 2007, the Department's Policies and Procedures regarding Traffic Goals and Objectives ("TRF-02") required Appellant "to minimize the dangers a stranded motorist faces and creates by obtaining appropriate and timely assistance" and further required him to "maximize public acceptance and respect by cordially providing information." (Exhibit 19)
25. In effect on July 24, 2007, Department's Policies and Procedures regarding Traffic Goals and Objectives ("TRF-03") required Appellant to provide "traffic related services [to the public]...in an impartial and courteous manner in order to gain the public's acceptance and cooperation and to create a positive attitude towards the Department's objectives." (Exhibit 20)
26. TRF-03 also made Appellant "responsible to provide assistance to motorists, whenever possible [including but not limited to assistance for]... routine service for disabled vehicles." (Exhibit 20)
27. In effect on July 24, 2007, the Department's Policies and Procedures regarding Assisting Motorists ("TRF-11") required Appellant to make "every reasonable attempt...to provide assistance [to Funches], keeping in mind the value of good public relations." (Exhibit 21)
28. Pursuant to TRF-11, Appellant was, during his interactions with Funches, also required to "conduct [himself] in a professional manner and cordially provide answers to the best of [his] ability." (Exhibit 21)
29. The Department is a paramilitary organization that values and strives for all of its members "to strengthen public confidence in the Massachusetts State Police;" to administer the law in a just, impartial, and reasonable manner, affording the same reasonable treatment to all cases;" and to achieve "[e]xcellence in the performance of duty." (Exhibits 16 and 17)

30. Members failing to meet the values and standards established by the Department's Rules and Regulations and Policies and Procedures are subject to discipline. (Exhibit 17)

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 Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Watertown v. Arria, 16 Mass.App.Ct. 331 (1983); McIsaac v. Civil Service 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." Cambridge, 43 Mass.App.Ct. 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 proper inquiry for determining if an action was justified is, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Comm. of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488 (1997). This burden must be met by a preponderance of the evidence. G.L. c. 31, § 43. 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 (1956).

In order to carry out the legislative purpose of the civil service laws, the appropriate inquiry for the Commission is “whether the employee has been guilty of substantial misconduct which affects the public interest by impairing the efficiency of the public service.” Murray, 389 Mass. at 514. Substantial misconduct by police officers adversely affects the public interest, perhaps more than any other civil service position. In a free society, the public must have confidence in their police officers because of the vast power they can dispatch. “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 Comm’r of Boston v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371 (1986). “Police officers must comport themselves in accordance with the laws they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” *Id.* Because of the nature of a police officer’s position, and the risk of abuse of power, police officers are held to a high standard of conduct. Police officers are routinely called upon to prepare reports, provide sworn testimony, make public statements and mediate disputes. Integrity must necessarily be a trademark feature of anyone aspiring to work in law enforcement. Credibility is a paramount characteristic. Such is the level of public trust placed in a police officer that nearly any public indiscretion could be regarded as conduct unbecoming a police officer. School Comm. of Brockton, 43 Mass.App.Ct. at 491-492; McIssac, 38 Mass.App.Ct. at 475.

Regarding Appellant’s Motion in Limine to exclude the 911 tapes, Appellant’s motion is denied. The recording of incoming calls to the Massachusetts State Police is permitted by law and permitted by M.G.L. c. 272, §99. Appellant did not have a reasonable expectation of privacy that incoming calls transferred from GHQ were not recorded. Nor did Appellant have a right to

privacy under G.L. c. 272, § 99. On appeal, Appellant argued that the incoming call was “unlawfully intercepted in violation of the terms of G.L. c. 272, § 99 as the call was recorded without his knowledge or permission.” In support of his motion, Appellant cites see Dillon, et al v. M.B.T.A., 49 Mass.App.Ct. 309 (2000), *rev. denied* 432 Mass. 1105 (2000). That case does not support Appellant’s argument.

In Dillon, the Appellate Court held that the M.B.T.A. telephone recording system was permissible and an exception to G.L. c. 272, § 99 because it qualified as “telephone equipment” pursuant to that statute. *Id* at 318. The system was “commercially designed... purchased by the defendant for routine business... directly integrated into phone lines on which they depended in order to function, and recorded conversations for possible future listening.” Dillon, 49 Mass.App.Ct. at 317. The recording is permissible under Massachusetts Law regardless of whether the recording is conducted in secret. *Id*; *see also* O’Sullivan v. NYNEX Corp., 426 Mass. 261 (1997) (Defendant’s “secret monitoring and recording of calls from NYNEX telemarketers to customers fell within the “telephone equipment” and “common carrier” exceptions set forth in G.L. c. 272, § 99”). The Court in Dillon noted that the standardized recordings were necessary “to provide a record of procedures followed during emergencies” and “to preserve records of reports of and responses to problems with equipment and facilities.” *Id* at 311. The recordings conducted by the Appointing Authority were similar to those in both Dillon and O’Sullivan and are permissible under Massachusetts law.

In his testimony before the Commission, Appellant testified that the fist call ended when “the call was lost somehow.” However, the Commission does not credit Appellant’s testimony as accurate or reliable. Instead the Commission finds that Appellant intentionally terminated the call. This finding is supported by the fact that when Funches placed the second 911 call, the first

thing he told the dispatcher was that during the first call “the officer was very nasty to me and hung up the damn phone on me.” When reconnected to Appellant, Fuches asked Appellant “Can I ask you why you hung up the phone on me?” Appellant became angry and among other comments, said: “I’m gonna hang this phone up and the next time I hang it up, I’m gonna send a cruiser out there and if you’re out of gas...I’m gonna have you written ... Are we on the same page now?” These statements were unprofessional and unbecoming of a police officer.

The Commission also finds that Appellant’s account of the interactions, as he recounted in his testimony before the Commission, in the July 2007 log entry that Appellant made and in his September 2007 report, were inaccurate and misleading. The Commission does not credit Appellant’s claims that Fuches told the Appellant that he did not know where he was, that he was out of fuel, or northbound on the Mass. Turnpike. Each of these claims is not only unsupported by the evidence but directly belied by the recordings of the two 911 calls. Moreover, the claims would not, even if true, explain or excuse Appellant’s behavior.

In his testimony before the Commission, Appellant claimed that he could have handled Fuches’ “being argumentative” a little differently. He conceded that he could have “changed my tone a little bit”. The Commission finds Appellant’s explanation to be less than satisfactory to explain his conduct. Appellant shifted blame to Fuches for being “argumentative.” The Commission does not find that Fuches was argumentative. At most, Fuches was a distressed citizen who called 911 to received assistance. Appellant testified that he is trained to deal with difficult citizens that call 911 for assistance and that he has dealt with difficult citizens on prior occasions. Appellant also testified that he is aware of the Appointing Authorities’ Rules and Regulations regarding the handling of calls from difficult and/or distressed citizens who call 911 for assistance.

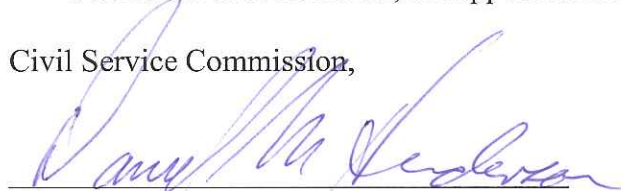
Appellant asserted that it was the policy of the Appointing Authority to not record calls once transferred to the Charlton Barracks and that there was no notice to Appellant that his conversation was being recorded. Appellant's assertions are unpersuasive and, even if given credit, fail to be relevant as a matter of law. It was the standard procedure for GHQ to record incoming 911 calls. While testifying before the Commission, Appellant claimed to have no knowledge that calls could or would be recorded subsequent to their transfer to the Charlton Barracks. The GHQ operator had no control regarding activating or deactivating the recordings. Rather, the recording continued so long as the GHQ operator remained on a call. The GHQ operator transferred the first call from Funches to the Charlton Barracks and disconnected after the transfer was complete. Upon receiving a second call from Funches and having heard his distress and concern regarding his conversation with Appellant, the GHQ operator decided to remain on the line after transferring the call. There is no policy by the GHQ or Appointing Authority to immediately terminate a transferred call. Rather, the GHQ operator exercised prudent judgment in remaining on the line to be available to further assist Funches and Appellant in responding to the emergency.

Appellant's knowledge, or lack thereof, of the fact that the call recording continued during Appellant's conversation with Funches is irrelevant. The Commission finds that Appellant's claim of lack of knowledge is not material to his intentional behavior. Based on Appellant's language and conduct as conveyed by Funches, the GHQ operator decided to remain on the line after transferring the second call. Appellant should not benefit from his claim that it was the operator's duty to terminate their participation in the call. Rather, the Commission credits the operator for remaining on the line as reasonable to ensure that proper services would be provided to the distressed caller.

There is no reasonable excuse for Appellant's conduct and language directed toward Funches, a stranded motorist. Appellant is an established member of the Massachusetts State Police and has performed his duties at the Charlton Barracks for a lengthy period of time. He is, or should be, aware of the rules and regulations governing his conduct, actions, and the manner in which he comports himself toward the public. As an officer of the law, Appellant is held to the highest standard of conduct. Although any human may have a "bad day," Appellant's conduct on this occasion was beyond what considered as acceptable given his position and experience. As such, the discipline of a five day suspension was appropriate in this matter.

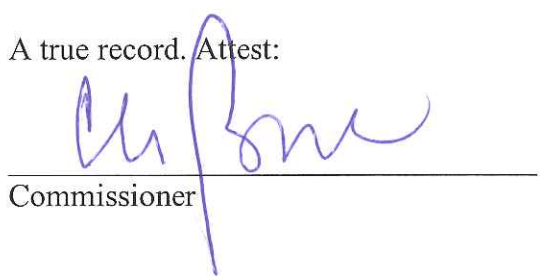
For all the above reasons, the appeal under Docket No. D-09-221 is hereby ***dismissed***.

Civil Service Commission,


Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on January 27, 2011.

A true record. Attest:


Commissioner

**Commissioner Marquis was
absent on January 27, 2011**

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:

Michael B. Halpin, Esq. (for Appointing Authority)
Joseph P. Kittredge, Esq. (for Appellant)