

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

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

**NANCY THIBODEAU,**  
Appellant

**v.**

**D-13-249**

**TOWN OF DARTMOUTH,**  
Respondent

Appearance for Appellant:

William Straus, Esq.  
15 Hamilton Street  
New Bedford, MA 02740

Appearance for Respondent:

Howard L. Greenspan, Esq.  
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Suite 304  
Lynn, MA 01940

Commissioner:

Paul M. Stein.<sup>1</sup>

**DECISION**

On November 15, 2013, Nancy Thibodeau (“Officer Thibodeau”), pursuant to G.L.c.31, §§ 41-43, filed an appeal with the Civil Service Commission (“Commission”) from a decision of the town of Dartmouth (“Dartmouth” or “Respondent”), suspending her from her employment for one (1) day as a police officer for the Dartmouth Police Department (DPD). A full hearing was held at the Commission’s office in Boston on March 14, 2014. The hearing was declared private. The hearing was digitally recorded and copies were sent to the parties. Both parties submitted proposed decisions to the Commission.

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Craig E. Reeder, in the drafting of this decision.

## **FINDINGS OF FACT**

Twenty-six (26) exhibits were entered into evidence at the hearing. Based upon these exhibits, the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Robert Szala, DPD Deputy Chief
- Timothy Lee, DPD Chief of Police

*Called by the Appellant:*

- Appellant, DPD Police Officer
- Frank Condez, DPD Police Sergeant

and inferences reasonably drawn from the credible evidence, I make the findings of fact set forth below:

1. Officer Thibodeau is employed by Dartmouth in the position of police officer. She was appointed on January 5, 1987 and was a permanent tenured civil service employee at the time of her discipline. (Stipulation of Fact)
2. Officer Thibodeau has a lengthy prior record of discipline, mostly for tardiness, delays in writing reports and failure to report for duty over the period from 1994 through 2009. As a result of these disciplinary incidents, Officer Thibodeau received eight written reprimands, served an aggregate of six (6) days of punishment duty for three other infractions, four one-day suspensions and one four-day suspension. (Exhs. 1 through 17)
3. In the two years since the present Police Chief, Timothy Lee has commanded the DPD, Officer Thibodeau was reprimanded on one additional occasion for tardiness in July 2012. (Exh.18)
4. On September 1, 2011, Chief Lee adopted General Order 140.02 regarding agency-owned property. Section 7.6 of General Order 140.02 states: "Permission for Vehicle

Use—Officers shall not use department vehicles without permission of the commanding officer.” (Exh. 22)

5. According to DPD policy, as set forth in General Order 140.02, officers who use police vehicles for private details are required to get permission from a shift commander. (Exh. 22; Testimony of Chief Lee & Dep. Chief Szala)
6. Permission for cruiser use is required to ensure officer safety. It also benefits the DPD mission by allowing the Department to pin-point where their officers and police cruisers are located at all times. (Testimony of Chief Lee)
7. General Order 140.02 was sent to all DPD police officers via e-mail. (Testimony of Chief Lee)
8. Once an officer reads an e-mail for a policy change, the sender is notified that the officer has electronically signed that the officer read the e-mail. (Exh. 21; Testimony of Chief Lee)
9. Officer Thibodeau received the e-mail concerning General Order 140.02 and electronically signed denoting that she read it. (Exh. 21; Testimony of Appellant & Chief Lee)
10. On July 24, 2013, Officer Thibodeau worked a police detail at the “Celebration 350” concert series. (Exh. 24 and 25; Testimony of Appellant, Chief Lee & Dep. Chief Szala)
11. Due to issues raised by the Dartmouth Parks Department concerning details at this event in the past, a memo had been circulated to patrol supervisors by Lt. Rutch outlining the expectations for the event. The memo stated, among other things, “If a police car is at the detail it should be parked at the first spot upon entering the main gate . . .” (Exh. 26)

12. Officer Thibodeau was aware of Lt. Rutch's memo. Officer Thibodeau took this statement to mean that she was expected to bring a cruiser to the event. In her opinion, as a police public safety matter, the cruiser was needed to properly handle the duties of the detail. In particular, at the conclusion of the event, participants typically were crossing the street and the cruiser's headlights provided lighting needed to assure safe passage. (Exhs. 25 & 26; Testimony of Appellant, Dep. Chief Szala & Sgt. Condez)
13. Officer Thibodeau did, in fact, bring a police cruiser while working the detail. On July 30, 2013, Deputy Chief Szala had a communication with the Dartmouth Parks Department, which hosts the "Celebration 350" event. The Parks Department informed the Deputy Chief that a police cruiser was present at the "Celebration 350" event, that a cruiser was not requested, and the Parks Department did not want be charged for the cost of the cruiser. (Testimony of Appellant & Dep. Chief Szala)
14. After being informed of the cruiser presence by the Dartmouth Parks Department, Deputy Chief Szala opened an investigation to determine whether Officer Thibodeau received permission to use the police cruiser. He ascertained that while a police detail had been requested and approved for the "Celebration 350" event, the Department of Parks had not requested that a cruiser accompany the officer. (Exh. 24 and 25; Testimony of Dep. Chief Szala)
15. During the investigation, Deputy Chief Szala e-mailed Sergeant Levesque and Patrol Supervisor Stanton, who were working the second relief on July 24, 2013, to establish if they gave permission for Officer Thibodeau to use a police cruiser for the detail. (Exh. 24; Testimony of Dep. Chief Szala)

16. Sergeant Levesque and Patrol Supervisor Stanton would have been able to give permission for a cruiser to be used. (Testimony of Dep. Chief Szalza)
17. Sergeant Levesque and Patrol Supervisor Stanton informed Deputy Chief Szala that Officer Thibodeau did not get permission to use the police cruiser for the detail. (Exh. 24; Testimony of Szala)
18. Deputy Chief Szala spoke with Officer Thibodeau regarding the incident. When questioned by Deputy Chief Szala, Officer Thibodeau stated that she thought it was standard practice to bring a cruiser to the detail. She did not consciously intend to break any rules by taking the cruiser on the detail. (Exh. 24 and 25; Testimony of Dep. Chief Szala and Appellant)
19. Officer Thibodeau had worked the “Celebration 350” event in the past and had always taken a cruiser. (Testimony of Appellant)
20. By letter dated July 31, 2013, Chief Lee was notified by Deputy Chief Szala that Officer Thibodeau used a police cruiser for the detail. (Exh. 24; Testimony of Dep. Chief Szala)
21. After reviewing Deputy Chief Szala’s report and Officer Thibodeau’s disciplinary history, Chief Lee ordered a one-day suspension. (Exh. 19; Testimony of Chief Lee)
22. By letter dated August 20, 2013, Officer Thibodeau was notified that she would be suspended for one (1) day for using a police cruiser while working a private detail without the permission of a commanding officer. Chief Lee also provided Officer Thibodeau with an opportunity to work an eight (8) hour tour of duty without pay in lieu of serving the suspension which she declined. This appeal duly ensued. (Exh 19; Testimony of Chief Lee; Claim of Appeal)

Applicable Law

Pursuant to G.L. c. 31, § 43, a “person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . .” The statute provides, in pertinent 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 the 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 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.

G.L. c. 31, § 43.

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.” Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Comm’rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (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. of Brockton v. Civil Serv. Comm’n, 43 Mass.App.Ct. 486, 488 (citing Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)).

While the Commission makes *de novo* findings of fact, “the Commission’s task, however, is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). “Here, 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.’” Id. at 823-24 (citing Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983)).

G.L.c.31, Section 43 also vests the Commission with authority to affirm, vacate or modify the penalty imposed by an appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600 (1996) and cases cited. See Faria v. Third Bristol Div., 14 Mass.App.Ct. 985,987 (1982) (no findings to support modification)

In deciding to exercise discretion to modify a penalty, the commission’s task “is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

See also Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 800 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996). (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded to the appointing authority.”)

### Analysis

Dartmouth has established, by a preponderance of the evidence, that it had just cause to discipline Officer Thibodeau for violating General Order 140.02 § 7.6, when she used a police cruiser for a private detail without permission from a commanding officer. Although I am persuaded that Officer Thibodeau’s actions did not rise to the level of willful disregard of Chief

Lee's orders, she did violate a departmental rule that provoked a incident with the Parks Department. To be sure, the incident was, admittedly, minor, but the failure to follow protocol clearly added a complication that should not have occurred. More importantly, the DPD operates as a para-military organization, and Chief Lee is entitled, as a general matter, to expect strict compliance with his lawful orders as essential to the good order and discipline of the department. Under these circumstances, imposition of discipline for misconduct that substantially affected the public service was properly warranted.

The Appellant argues that her lengthy prior discipline improperly influenced Chief Lee's decision and led to his suspension of Officer Thibodeau when no discipline ( or lesser discipline was warranted). First, for the reasons stated above, the preponderance of the evidence did justify some discipline. Second, as to the severity of the discipline, while some of the discipline on Officer Thibodeau's record dated back many years ago, there were some more recent incidents, including one imposed by Chief Lee as recently as 2012. I do note that Chief Lee has expressed a general policy to give DPD officers a "fresh start" and to put little emphasis on an officer's disciplinary history prior to his appointment as Chief. In this case, however, he had imposed one prior discipline upon Officer Thibodeau (for tardiness).

After careful consideration, I do not find good reason for the Commission to exercise discretion to modify this one-day discipline here. Indeed, the Commission is judicially restrained from doing so, when the facts found by the Commission do not vary substantially from those upon which the appointing authority relied. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (minor, immaterial differences in factual findings by Commission and appointing authority did not justify a modification of 180 day-suspension to 60 days). See, e.g., Town of Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct.

796 (2004) (modification of 10-day suspension to 5 days unsupported by material difference in facts or finding of political influence); Commissioner of MDC v. Civil Service Comm'n, 13 Mass.App.Ct. 20 (1982) (discharge improperly modified to 20-month suspension)

Chief Lee did offer Officer Thibodeau a lesser alternative of an eight-hour punishment duty tour (without pay), in lieu of the suspension for the present infraction. Had that offer been accepted, the suspension would not have been imposed. Nothing in this decision is meant to preclude Chief Lee from revisiting that offer but, as explained above, it would not be appropriate for the Commission to order a reduction in discipline below the one-day suspension based on the facts presented here.

### **CONCLUSION**

For the reasons stated herein, the appeal of the Appellant, Nancy Thibodeau, filed under Docket No. D-13-249 is hereby *denied*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on January 8, 2015.

A True Record. Attest:

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Commissioner

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.

Notice to:

William Straus, Esq. (for Appellant)

Howard L. Greenspan, Esq. (for Respondent)