

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

FRANCIS MCCUE,
Appellant

v.

CASE NO: D-10-264

TOWN OF WEYMOUTH,
Respondent

Appellant’s Attorney:

Francis X. McCue, *Pro se*

Appointing Authority’s Attorney:

Richard Grimes
Chief of Police
Weymouth Police Department
140 Winter Street
Weymouth, MA 02188

Commissioner:

Paul M. Stein¹

DECISION

Francis McCue (Officer McCue), the Appellant, an officer of the Weymouth Police Department (WPD), acting pursuant to G.L. c. 31, §43, duly appealed to the Civil Service Commission (Commission) from the Town of Weymouth, the Appointing Authority, suspending him for one day for violating the WPD’s Rules and Regulations §1(G)(4) Insubordination, when Officer McCue entered an area he was ordered to avoid. A hearing was held by the Commission on March 25, 2011. The hearing was declared private as no party requested a public hearing. Witnesses were not sequestered. Twenty (20) exhibits were received in evidence. The hearing was digitally recorded. The parties waived the submission of post-hearing proposed decisions.

¹ The Commission acknowledges the assistance of Legal Intern Thomas Butler in the preparation of this decision.

FINDINGS OF FACT

Based on the Exhibits, the testimony of Francis X. McCue, WPD Chief of Police Richard Grimes (Chief Grimes), and WPD Lt. Richard Abbadessa (Lt. Abbadessa), and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Francis X. McCue, has been a full-time tenured police officer since 1984. He was assigned to the day shift, 8 AM to 4 PM. (*Testimony of Officer McCue, Exhibit 10*)
2. Chief Richard Grimes has been with the WPD since 1982, being promoted to Chief in 2009. He has a bachelor's degree in human services and a master's degree in criminal justice. (*Testimony of Chief Grimes*)
3. Lt. Abbadessa has been with the WPD since 1996, being promoted to Lieutenant in October, 2009. He has a bachelor's degree in criminal justice. (*Testimony of Lt. Abbadessa*)
4. Officer McCue received a verbal warning in April 1995 after failing to respond to an incident in a timely manner. (*Exhibit 14*)
5. On June 30, 1999, Officer McCue received a letter of reprimand in his file to be removed after one year for investigating an accident in which his wife was involved after being ordered not to. (*Exhibit 15*)
6. On September 25, 2007, Officer McCue received a letter of reprimand in his file for failing to notify Dispatch when responding to a call. While on the scene, Officer McCue failed to call for medical assistance for an elderly man in respiratory distress and failed to secure a firearm found on the scene. (*Exhibit 16*)
7. On September 3, 2010, an operation, comprised of the FBI Bank Robbery Task Force, Massachusetts State Police, and the WPD, were surveying a potential bank robbery. At around

11:20 AM, the task force apprehended the suspects. (*Testimony of Lt. Abbadessa and Chief Grimes; Exhibit 8, 12*)

8. Lt. John Burke (Lt. Burke) was the Watch Commander on September 3, 2010 for the 8AM -4 PM shift. (*Exhibit 13*)

9. At 8:00 AM, Lt. Abbadessa conducted roll call with four other officers present, including Officer McCue and Sgt. James Barry (Sgt. Barry). Sgt. Barry was the north side patrol supervisor for the 8 AM -4 PM shift on September 3, 2010. (*Testimony of Lt. Abbadessa; Exhibit 9, 10*)

10. At roll call, Lt. Abbadessa gave “repeated instructions” to avoid “Jackson Square and the Wharf and East Street areas.” (*Exhibit 9*) Sgt. Barry suggested to Officer McCue that he stay in the Weymouth Landing area. (*Testimony of Lt. Abbadessa and Officer McCue; Exhibit 9*)

11. During roll call, Lt. Burke saw Officer McCue having trouble staying awake. Lt. Burke witnessed Officer McCue’s eyes closing, and at one point Officer McCue looked as though he had lost his footing. After roll call, Lt. Burke approached Officer McCue about his observations. However, Officer McCue assured Lt. Burke that he was fit for duty. (*Exhibit 17*)

12. In his testimony, Officer McCue acknowledges that he heard the order to avoid the areas stated in finding 10, above. He also acknowledged that he heard the suggestion made by Sgt. Barry. (*Testimony of Officer McCue; Exhibit 11*)

13. After roll call, Officer McCue went on patrol in the Weymouth Landing area. (*Exhibit 20*)

14. Detective Jason Cappello (Det. Cappello) worked as part of the task force on September 3, 2010. He attempted to verify where Officer McCue was around 10:30 AM, since Officer McCue was on patrol near the restricted area. Officer McCue responded ten minutes later by

saying he was in Central Square. In a memo to Chief Grimes on September 21, 2010, Det. Cappello submitted the chat logs of that day. (*Exhibit 12*)

15. Later that day, around 11:30 AM, Officer McCue entered Wharf Street to urinate. (*Testimony of Lt. Abbadessa, Chief Grimes, and Officer McCue; Exhibit 11*)

16. Officer McCue's car was observed on Wharf Street by Lieutenant Detective Richard Fuller (Det. Fuller), a member of the task force. Det. Fuller contacted Chief Grimes, who immediately contacted Lt. Burke to order Officer McCue out of the area. (*Exhibit 10*)

17. Chief Grimes responded to the day's events by ordering reports from Sgt. Barry, Lt. Abbadessa, and Officer McCue. As a result, Chief Grimes gave Officer McCue a one-day suspension for Insubordination under WPD's Rules and Regulations §1(G)(4). The Appellant served the suspension on September 15, 2010. Chief Grimes wrote the following on the reasons for suspension:

“When asked why you had failed to follow the order issued to you, you responded to Lieutenant Abbadessa and Sergeant James Barry that you had gone to Wharf Street to ‘pee’. As you know, Wharf Street is a small dead end road that offers no public rest rooms, while the assigned landing section offers numerous public rest rooms. In your report to Lieutenant Abbadessa you state, ‘I did not think my being on Wharf Street compromised the bank investigation.’ I strongly disagree. You were less than 90 seconds from confronting three violent criminals in the act of committing an extremely violent crime. Your unexpected presence would have likely triggered a violent offensive towards you and others present forcing law enforcement to react aggressively and at great risk to themselves and the public. I find no legitimate reasons for you to have been on Wharf Street. Your failure or deliberate refusal to obey a lawful order issued by a Superior Officer constitutes insubordination.”

(*Exhibit 8*)

18. Officer McCue requested a hearing which was held on Sept 21, 2010 before Cindy M. DePina (Ms. Depina). Ms. Depina found just cause for the suspension, and recommended to Chief Grimes that his decision be upheld. (*Exhibit 2*)

19. Officer McCue duly appealed to the Commission on September 30, 2010. (*Exhibit 1*)

20. Officer McCue stated that he did not intentionally disobey his orders, but forgot and acted negligently. (*Testimony of Officer McCue, Lt. Abbadessa, and Chief Grimes; Exhibits 9, 11*)

21. In his testimony before the Commission, Officer McCue stated “I have no defense whatsoever.” (*Testimony of Officer McCue*)

22. WPD’s Rules and Regulations §1(G)(4): Insubordination reads as follows:

“Insubordination – Failure or deliberate refusal to obey a lawful order issued by a superior officer” (*Exhibit 8*)

CONCLUSION

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L. c. 31, §41 may appeal to the Commission under G.L. c. 31, §43, which 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.” Town of 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." City of 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); City of 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 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.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited.

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). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

“The commission’s task, however, 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, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of 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. 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. . . .in the circumstances found by the commission to have existed when the appointing authority made its decision." Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of 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.

“Likewise, 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.’ ” Town of 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).

Applying these principles to this appeal, the Commission concludes that the Appointing Authority met its burden to establish just cause for discipline imposed on Officer McCue. The Appellant argues that the WPD rule for insubordination requires a willful act to disobey an order, and does not cover a negligent act or forgetting the order. Appellant's interpretation may be the ordinary meaning of insubordination, but reading the language of the regulation that defines insubordination includes "failure... to obey a lawful order." (*Exhibit 8*)

Officer McCue admits he should not have gone onto Wharf Street. Officer McCue stated that he did not see his actions as jeopardizing the operation, but his interpretation of the situation does not excuse failing to follow an order. In the letter from Chief Grimes to Officer McCue stating the reasons for the suspension, Grimes takes issue with Officer McCue's interpretation of the situation by saying that McCue was "less than 90 seconds from confronting three violent criminals."(*Exhibit 8*) Grimes continued by saying that Officer McCue had "no legitimate reason ... to have been on Wharf Street." (*Exhibit 8*) His reasoning for this is that "Wharf St. is a small dead end road that offers no public rest rooms," as well as stating Officer McCue knew this. (*Exhibit 8*)

Lt. Abbadessa testified that Officer McCue was given repeated orders to avoid the Wharf Street area. Officer McCue testified that he heard these orders at roll call, but still failed to

follow the orders. He also testified that he had “no defense whatsoever.” (*Testimony of Officer McCue*) Officer McCue’s actions inexcusably increased the potential of danger for many people, including himself, fellow officers, the F.B.I. agents, the State Police, and the public. The Appointing Authority had just cause to suspend Officer McCue.

Accordingly, for the reasons stated, the appeal of the Appellant, Francis X. McCue, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell, and Stein, Commissioners) on June 16, 2011.

A True Record, Attest:

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)(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:
Francis X. McCue (for Appellant)
Police Chief Richard Grimes (for Appointing Authority)