

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL O'DONNELL,
Appellant

v.

Case No. D-12-27

TOWN OF CARVER,
Respondent

Appearance for Appellant:

Michael F. Hanley, Esq.
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Appearance for Respondent:

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Commissioner:

Paul M. Stein¹

DECISION

Procedural History

Pursuant to G.L. c. 31, § 43, the Appellant, Mr. Michael O'Donnell ("Appellant" or "Sgt. O'Donnell"), filed a timely appeal with the Civil Service Commission ("Commission") on January 24, 2012, contesting the decision of the Town of Carver ("Town" or "Appointing Authority") to suspend him for two (2) days for violating the Carver Police Department ("Department") Rules and Regulations 4.02 (Conduct Unbecoming an Officer) and 4.03 (Violating Conflict of Interest Law). A pre-hearing conference was held on February 24, 2012

¹ The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

at the UMASS Dartmouth School of Law. A full hearing was held at the same location on August 10, 2012. Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the parties were provided with copies of the recording. The parties submitted post-hearing briefs on or before October 26, 2012.

Summary

The Town has demonstrated, by a preponderance of evidence, that it had just cause to suspend Sgt. O'Donnell for two (2) days, based on his violation of Rule 4.02 and Rule 4.03 of the CPD Rules and Regulations.

FINDINGS OF FACT

Based on the eight (8) exhibits entered into evidence, the stipulations of the parties, the testimony of:

Called by the Town:

- None

Called by Sgt. O'Donnell:

- Sgt. Michael O'Donnell, Appellant;
- Mr. Michael Miksch, Chief of Police, Carver Police Department;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Sgt. O'Donnell is a tenured civil service employee of the Town. He has been employed by the Department since approximately 1998. Sgt. O'Donnell has been a full-time sergeant with the Department since September 2000. (Testimony of Sgt. O'Donnell)

2. At seventeen (17) years old, Sgt. O'Donnell enlisted in the Marines and spent approximately twenty-two (22) years on active duty before he retired as a Captain. (Testimony of Sgt. O'Donnell)
3. From approximately 2004-2005, Sgt. O'Donnell served as acting chief of the Department.
4. Sgt. O'Donnell is a member of the Carver Police Union ("Union"). (Ex. 3)
5. The Department has promulgated Rules and Regulations. Sgt. O'Donnell acknowledged receipt of the Manual of Rules and Regulations on or about August 24, 2005. (Ex. 1)
6. Rule 4.02 of the Rules and Regulations, Conduct Unbecoming an Officer, states the following:

Officers shall not commit any specific act or acts of immoral, improper, unlawful, disorderly or intemperate conduct, whether on or off duty, which reflect(s) discredit or reflect(s) unfavorably upon the officer, upon other officers or upon the police department. Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the department and its members.

Conduct unbecoming an officer shall include that which tends to indicate that the officer is unable or unfit to continue as a member of the department, or tends to impair the operation, morale, integrity, reputation or effectiveness of the department or its members.

Conduct unbecoming an officer shall also include off-duty conduct where there is a nexus or connection between the act or acts committed by the officer and that individual's continued fitness or ability to effectively perform his or her required duties and responsibilities and/or the impact or adverse effect said conduct may have on the operation, morale, integrity, reputation or effectiveness of the department and ability of the officers not involved in said act to effectively perform their required duties and responsibilities.

CONFLICT OF INTEREST

Since the position of a police officer is a public trust, it is important to avoid all situations involving conflicts of interest whether in fact or only in appearance. Special areas of concern include certain kinds of outside employment; financial transactions with units of government or others; membership in non-police unions; activities in partisan politics; and the use of an official position to secure unwarranted privileges, pecuniary advantage or preferential treatment.

(Ex. 4)

7. Rule 4.03 of the Rules and Regulations, Violating Conflict of Interest Law, states that officers shall not violate any provision of G.L. c. 268A. (Ex. 4)
8. On or about November 4, 2009, Sgt. O'Donnell completed the Ethics Commission's online conflict of interest law training program. On or about November 7, 2009, and on or about January 2, 2011, Sgt. O'Donnell signed an acknowledgement of receipt of the conflict of interest law for municipal employees. (Ex. 8)
9. Sgt. O'Donnell has been an elected member of the Town's Board of Selectmen ("Board") since approximately 2005. Sgt. O'Donnell is serving his third term and is presently the chairman of the Board. (Testimony of Sgt. O'Donnell; Ex. 3)
10. On or about December 8, 2011, Sgt. O'Donnell entered into a Disposition Agreement with the Commonwealth's State Ethics Commission ("Ethics Commission"). (Ex. 3)
11. The Carver Town Administrator is responsible for negotiating all Town labor contracts, including the collective bargaining agreement with the Union. The Town and the Union have been in negotiations for several years, during which period the police have been without a contract. The negotiations have been referred to a state arbitrator, but the Town Administrator still participates in the negotiations. (Ex. 3)
12. In or about March 2006, the Ethics Commission learned that Sgt. O'Donnell had participated as a selectman in the Board's executive session negotiations regarding the renewal of the Town Administrator's employment contract. On or about June 5, 2006, the Ethics Commission advised Sgt. O'Donnell, via letter, that his participation as a selectman in matters concerning the Town Administrator's employment contract would violate G.L. c. 268A, § 19, because the Town Administrator was involved in negotiations with the Union.

As a Union member, Sgt. O'Donnell had a financial interest in who would conduct those negotiations on behalf of the Town. (Ex. 3)

13. In or about early 2011, the Board began considering a new employment contract with the Town Administrator. On or about February 22, 2011, the Board met in executive session to discuss strategy regarding the Town Administrator's contract. Sgt. O'Donnell participated in this portion of the meeting as a selectman. The Town Administrator was then invited into the executive session to negotiate with the Board. Sgt. O'Donnell was not present for that portion of the meeting. (Ex. 3)

14. The Board followed the same format at its meeting on or about March 8, 2011. However, this time, Sgt. O'Donnell participated in both the strategy and negotiation portions of the executive session regarding the Town Administrator contract. (Ex. 3)

15. In a telephone interview on or about March 22, 2011, with Ethics Commission Enforcement Division staff, Sgt. O'Donnell confirmed that he participated in the Board's two executive session portions of the meetings regarding the Town Administrator's contract. When Ethics Commission Enforcement Division staff asked Sgt. O'Donnell why he had not heeded the advice in the Ethics Commission's 2006 letter, Sgt. O'Donnell stated that he could not recall receiving the letter and, in any case, he thought that he was only prohibited from participating as a selectman in matters concerning the police department. The Ethics Commission Enforcement Division staff advised Sgt. O'Donnell that his understanding was incorrect and that he should abstain from involvement in the Town Administrator's contract. On or about March 22, 2011, the Ethics Commission Enforcement Division staff mailed a copy of the letter dated June 5, 2006 to Sgt. O'Donnell. (Ex. 3)

16. On or about March 28, 2011, the then-Board chairman emailed the Board members to remind them that the Board was scheduled to resume contract negotiations in executive session with the Town Administrator on March 29, 2011. On or about the afternoon of March 28, 2011, Sgt. O'Donnell forwarded the chairman's email to a fellow Board member. In the message, Sgt. O'Donnell wrote that he must "caution" the Board member that, if that Board member attended the Board meeting, "[y]ou will give them a quorum to conduct a vote." In addition, Sgt. O'Donnell stated in the email that the citizens of the Town "would not want me to support something as egregious as this during this recession." (Ex. 3)
17. On or about March 29, 2011, during the executive session of the Board, by a two-to-one vote, the Board agreed upon a new contract with the Town Administrator. Sgt. O'Donnell did not participate in discussion or vote on this matter. (Ex. 3)
18. Sgt. O'Donnell states that he received the Ethics Commission's June 5, 2006 letter and sought no clarification from the Ethics Commission at that time. Sgt. O'Donnell thought the prohibition on him participating in matters concerning the Town Administrator's contract meant that he could not be present in the room and actively participate when the Board discussed the Town Administrator's contract, or actively participate in such discussions with individual selectmen. Sgt. O'Donnell claims that he did not understand that the email he sent to a fellow Board member about the Town Administrator's contract constituted participating in the matter. (Ex. 3)
19. The Disposition Agreement states that Sgt. O'Donnell violated G.L. c. 268A, § 19, by participating as a member of the Board in the Town Administrator's contract discussions. (Ex. 3)

20. By signing the Disposition Agreement, Sgt. O'Donnell agreed to waive all his rights to contest, either before the Ethics Commission or in any other administrative or judicial proceeding to which the Ethics Commission is or may be a party, the findings of fact, the conclusions of law, and the terms and conditions contained in the Disposition Agreement. (Ex. 3)
21. According to the Disposition Agreement, the fact that Sgt. O'Donnell had previously been warned in 2006 by the Ethics Commission was an exacerbating factor. (Ex. 3)
22. Subsequent to Sgt. O'Donnell's execution of the Disposition Agreement, Chief Miksch commenced Administrative Investigation #IAI-2012-01 to determine whether Sgt. O'Donnell violated any CPD Rules and Regulations by his conduct. (Ex. 4)
23. Chief Miksch opened the investigation without coercion or prompting from others. Chief Miksch was not motivated to open the investigation given his working relationship with the Town Administrator. Chief Miksch opened the investigation solely to determine whether Sgt. O'Donnell had violated CPD Rules and Regulations. (Testimony of Chief Miksch)
24. Chief Miksch concluded that Sgt. O'Donnell violated Rule 4.02 and Rule 4.03 of the CPD's Rules and Regulations by engaging in the conduct that resulted in his executing the Disposition Agreement with the Ethics Commission. (Ex. 4)
25. On or about December 28, 2011, Chief Miksch suspended Sgt. O'Donnell for two (2) working days for violating Rule 4.02 and Rule 4.03 of the CPD Rules and Regulations. (Ex. 5)
26. On or about December 29, 2011, Sgt. O'Donnell requested a hearing before the Board regarding Chief Miksch's issuance of a two (2) day suspension. (Ex. 6)

27. Mr. Richard J. LaFond, the Town Administrator, advised Sgt. O'Donnell by memorandum dated January 5, 2012, that the Board had scheduled a meeting for January 9, 2012, to hear his appeal. (Ex. 7)

28. At the Board's hearing, the Board upheld Chief Miksch's issuance of the two (2) day suspension. (Testimony of Sgt. O'Donnell)

29. Chief Miksch allowed Sgt. O'Donnell to schedule the time off for his suspension and he was allowed to use compensatory time off so that Sgt. O'Donnell got paid during his suspension. (Testimony of Sgt. O'Donnell)

LEGAL STANDARD

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)).

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).

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 town, 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.* (citing *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983)).

Absent significant differences between the Commission’s findings of fact and those found by the appointing authority, or a substantially different interpretation of the relevant law, “the commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” *Town of Falmouth*, 447 Mass. 814 at 824 (citing *Police Comm'r of Bos. v. Civil Serv. Comm'n*, 39 Mass. App. Ct. 594, 600 (1996)).

ANALYSIS

As Sgt. O'Donnell entered into the Disposition Agreement with the Ethics Commission, which expressly states that Sgt. O'Donnell violated G.L. c. 268A, there can be no question that discipline was warranted in this matter. While Sgt. O'Donnell suggested in his testimony that he signed the Disposition Agreement based on financial considerations, there is no evidence to suggest that the agreement was the result of coercion, duress, or otherwise involuntarily entered into. In any case, the underlying conduct for which he was penalized by the Ethics Commission violates the CPD's Rules and Regulations.

Having determined that it was appropriate to discipline Sgt. O'Donnell, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case was a two (2) day suspension from his employment as a sergeant with the CPD.

It is of vital importance that police officers maintain public trust, both in fact and appearance. Therefore, it is essential that a police sergeant, particularly one with aspirations of one day becoming chief, adhere to the Rules and Regulations of the department and set a good example by his own conduct. Given Sgt. O'Donnell's lack of knowledge and understanding of the applicable law, his disregard of the prior warnings of potential conflict, and his failure to adequately conform to the CPD's Rules and Regulations, the Commission declines to modify the discipline imposed on Sgt. O'Donnell by the Town. The Commission's findings of fact do not differ significantly from those reported by the Town, nor does the Commission interpret the law differently than the Town has in this case. In addition, there is no evidence of disparate treatment in regard to the penalty imposed nor has there been evidence of any ulterior motives that would warrant the Commission's intervention in regard to the penalty imposed.

It may be that the punishment imposed by the Ethics Commission could stand as sufficient penalty without further remedial discipline by the Town, but that is a matter of judgment for the appointing authority to address and not something that the Commission would choose to second-guess in this matter. His actions violated both the ethics law and CPD rules and may be sanctioned appropriately by each authority.

For the foregoing reasons, Sgt. O'Donnell's appeal under Docket Number D-12-27 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [Absent]; Ittleman, Marquis, McDowell, and Stein, Commissioners) on May 16, 2013.

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)(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:
Michael F. Hanley, Esq. (for the Appellant)
Brian M. Maser, Esq. (for the Respondent)