

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

FREDERICK BAILEY,
Appellant

v.

D-08-170

TOWN OF EAST LONGMEADOW,
Respondent

Appellant's Attorney:

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NAGE
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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellant, Frederick Bailey (hereinafter "Bailey", or "Appellant"), is appealing the decision of the Town of East Longmeadow (hereinafter "Town" or "Appointing Authority") suspending Appellant Bailey for two (2) days from his position as a police officer.

Case No. D-08-170, in the matter of Frederick Bailey and Case No. D-08-172, in the matter of Scott Safford, arising out of the same incident, were heard concurrently. The full hearing was held on March 11, 2009 at the Springfield State Building in Springfield,

Massachusetts. As no written notice was received from either party, the hearing was declared private. All witnesses, with the exception of both of the Appellants, were sequestered. One (1) CD was made of the hearing and provided to the parties.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1-13) and the testimony of:

For the Appointing Authority:

- Chief Douglas Mellis; and
- Sgt. Patrick Manley.

For the Appellant:

- Officer Frederick Bailey, Appellant;
- Officer Scott Safford (Appellant in D-08-172);
- Ms. Donna Bailey
- Ms. Dena Grochmal

I make the following findings of fact:

1. The Appellant, Frederick Bailey, has been employed as a police officer with the Town of East Longmeadow for approximately twenty-six (26) years. (Stipulated Fact)
2. There is no prior discipline that is applicable to this appeal. (Stipulated Fact)
3. On June 16, 2008, after an investigation conducted by the East Longmeadow Police Department, Appellant Bailey was suspended for two (2) days for abusing his position as a police officer by requesting a fellow officer to access records from the Massachusetts Criminal History Systems Board and accessing these records without

the necessity for the actual performance of his legally authorized duties as a police officer. In addition, Appellant Bailey was required to be recertified by the Criminal History Systems Board (“CHSB”). (Exhibit 2)

4. Criminal Offender Record Information (“CORI”) is information regulated by the Criminal History Systems Board (“CHSB”) and contains criminal history information (A Board of Probation (“BOP”) check is a CORI check which reveals the crimes an individual has been charged with, the disposition of those crimes as well as any sentence that was imposed.) (Testimony of Sgt. Manley)
5. Prior to allowing officers of a police department to get access to Criminal Offender Record Information (CORI), officers must be certified by the Criminal History Systems Board and every two years thereafter. Certification includes training on the guidelines and regulations of the system as well as passing a test regarding this information. (Testimony of Sgt. Manley)
6. CORI may be accessed by a police officer only for a criminal justice purpose in the performance of their official duties and responsibilities. (G.L. c. 6, §172)(803 CMR 3.07)(803 CMR 3.08).
7. To maintain the integrity of the system, the CHSB will perform checks on the usage of the system. This includes checking with departments and inquiring into the purpose for running the criminal record of a particular individual. The purpose is to determine whether the individual’s criminal record was accessed for a legitimate law enforcement purpose. These records cannot be accessed for personal reasons. (Testimony of Sgt. Manley)

8. If CHSB determines that the access of an individual's CORI was not for a legitimate law enforcement purpose, it can modify or revoke a department's access to this information. (Testimony of Sgt. Manley)(803 CMR 3.14(1))
9. In February 2008, Donna Bailey began dating the citizen complainant.¹ Donna Bailey is the former wife of Appellant Frederick Bailey. (Testimony of Donna Bailey)
10. At the end of February 2008 or beginning of March 2008, Donna Bailey was told by a friend, Dena Grochmal, that the citizen complainant had a history of violence and drugs. Subsequent to this conversation, Donna Bailey did not know whether citizen complainant had a criminal record. (Testimony of Dena Grochmal and Donna Bailey)
11. During the month of March 2008, Donna Bailey repeatedly asked the citizen complainant whether he had a criminal record. The citizen complainant always responded that his past was his past. (Testimony of Donna Bailey)
12. As of March 23, 2008, Donna Bailey did not know whether the citizen complainant had a criminal record. (Testimony of Donna Bailey)
13. On March 23, 2008, Appellant Bailey received a telephone call from Donna Bailey. The two speak to each other by telephone approximately twice a day, every day. (Testimony of Appellant Bailey and Donna Bailey)

¹ The identity of this individual, known to the parties and the Commission, is omitted to comply with the protections afforded in G.L. c. 6, §§ 172 – 178.

14. Ms. Bailey was upset and disclosed to Appellant Bailey that her current boyfriend, the citizen complainant, was text messaging threats to her. (Testimony of Appellant Bailey and Donna Bailey)
15. Appellant Bailey told Donna Bailey that she should go to the Springfield Police Department or have them come to her house for the purpose of obtaining a restraining order against the citizen complainant. (Testimony of Appellant Bailey and Donna Bailey)
16. After completing the telephone call with Ms. Bailey, Appellant Bailey placed a call to the front desk of the East Longmeadow Police Department. Appellant Bailey was not on duty working as a police officer for the Town of East Longmeadow at the time of the telephone call. (Testimony of Sgt. Manley and Officer Safford)
17. Officer Safford was working the front desk at the East Longmeadow Police Department when Appellant Bailey telephoned. Appellant Bailey asked Officer Safford to run a check on the citizen complainant. He wanted to determine whether the citizen complainant was “someone I have to worry about” and stated that he wanted to “assist his ex-wife if she needs to go to the Springfield Police Department” to obtain a restraining order. During his testimony before the Commission, Appellant Bailey stated that he also wanted to protect the safety of his son. During cross-examination, Mr. Bailey stated that his son is 18 years old and was not staying with his ex-wife on the night in question. (Testimony of Appellant Bailey)
18. Appellant Bailey testified that he did not know exactly what type of check that Officer Safford would run. I do not find this statement to be credible. Mr. Bailey is a

twenty-six year veteran of the East Longmeadow Police Department. He testified that he has conducted numerous investigations and has accessed individuals' criminal histories in those investigations. He has attended trainings and received certifications to access this type of information. (Testimony of Appellant Bailey)

19. Officer Safford accessed the citizen complainant's CORI by running a BOP criminal records check between 8:24 P.M. and 8:35 P.M. (Testimony of Officer Stafford; Exhibits 4 and 5)

20. After accessing the citizen complainant's CORI, Officer Safford called Appellant Bailey. (Testimony of Officer Stafford and Appellant Bailey) Exactly what information was conveyed from Officer Safford to Appellant Bailey is in dispute. Appellant Bailey testified that Officer Safford only told him that "you do have something to worry about; he has a history". (Testimony of Appellant Bailey)

21. Officer Safford testified that he told Appellant Bailey, "I would have concerns because from what I can see on the BOP, there are three restraining orders from three different people." (Testimony of Officer Safford) However, In Officer Stafford's original statement, which he wrote himself and submitted, he stated that after accessing the Complainant's BOP, he called Appellant Bailey back and "read the information on the BOP to him" with no mention that he limited the information to restraining orders. (Exhibit 4; Page 5)

22. It is undisputed that Appellant Bailey subsequently had a phone conversation with Donna Bailey and Ms. Bailey sent a text message to the citizen complainant at 8:56

P.M. stating, “YOU HAVE A POLICE RECORD”. (Testimony of Donna Bailey and Sergeant Manley and Exhibits 4 and 5)

23. During her testimony before the Commission, Ms. Bailey stated that she intended to text, “DO YOU HAVE A POLICE RECORD.” She testified that the Appellant did not provide her with any specific information during their phone call other than “he (the citizen complaint) is bad news; get a restraining order.” (Testimony of Donna Bailey) Unfortunately, I do not find Ms. Bailey’s testimony to be credible on this issue. Her testimony appeared to be geared solely toward absolving the Appellant of any wrongdoing, quickly responding to questions during direct testimony, often stating “absolutely”, without carefully listening to the questions posed to her before answering. (Testimony, demeanor of Donna Bailey)

24. At the time Appellant Bailey requested the CORI check, there was no current investigation into the citizen complainant by the East Longmeadow Police Department. (Testimony of Sgt. Manley and Officer Safford)

25. Subsequent to an investigation into this matter, Appellant Bailey was suspended for two (2) days on the grounds that he “abused [his] authority as a police officer, used [his] position as a police officer to access records from the Massachusetts Criminal History Systems Board and accessed these records without the necessity for the actual performance of [his] legally authorized duties as a police officer.” (Exhibit 2) Officer Safford received a one (1) day suspension for unlawfully accessing Complainant’s CORI. Appellant Bailey received a two (2) day suspension because he instigated the actions which led to the unlawful access of CORI. (Testimony of Chief Mellis)

26. Chief Mellis, as required, provided CHSB with documentation regarding the violation of CORI access. (Testimony of Chief Mellis)
27. CHSB has the authority to take action independent of the appointing authority against those who violate CORI procedures, including requesting a criminal complaint be brought against the violator. (Testimony of Chief Mellis) (803 CMR 6.09)
28. CHSB was satisfied with the disciplinary action taken by Chief Mellis and did not take independent action. (Testimony of Chief Mellis)
29. Appellant Bailey appealed the disciplinary action to the Appointing Authority. A hearing was held before Chairman of the Board of Selectmen, James D. Driscoll. On July 7, 2008 the disciplinary action taken against Appellant Bailey was upheld. (Exhibit 10).
30. On or about July 12, 2008, Appellant Bailey appealed the Appointing Authority's decision to the Civil Service Commission. (Exhibit 12)

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.”

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. Mun. Ct. of Boston, 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 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 (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 rev.den., 426 Mass. 1102 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police

Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

“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 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, 453 (1983) and cases cited.

In the instant appeal, Appellant Bailey, while off-duty, contacted Officer Safford by telephone and requested him to run a “check” on the citizen complainant. This request came after a telephone call from his former wife, Donna Bailey, regarding text messages she received from her current boyfriend, the citizen complainant. Appellant Bailey told Donna Bailey that she should contact the Springfield Police Department in order to obtain a restraining order. This was a personal conversation with Ms. Bailey. It was not part of an investigation as a police officer of the Town of East Longmeadow, nor could it be since Appellant Bailey is not a police officer in Springfield. All of the actions taken by Appellant Bailey that night were not in the “actual performance of his criminal justice duties. Appellant Bailey explained to Donna Bailey the steps she needed to take and then the call ended. Even by the Appellant’s own statements, if any law enforcement action

was to take place, it had to be done by the Springfield Police Department. As an off duty officer for the Town of East Longmeadow, he had no authority in the matter. According to Appellant Bailey, no requests were made of him, and there was no intention of calling her back.

The reasons Appellant Bailey provided at hearing also confirm that he was not in the performance of his duties as a police officer for the Town of East Longmeadow when he contacted Officer Safford. His off-duty call to Officer Safford was to determine whether there was anything about the citizen complainant that Appellant Bailey “had to worry about.” He also stated that he was looking to assist his former wife if she needed to go to the Springfield Police Department to get a restraining order. This request to have Officer Safford run a “check” on the citizen complainant was not for a legitimate law enforcement purpose in the performance of his official duties but rather it was personal. He was using his position to get protected information he would not be entitled to as an ex-husband, father, or someone who wanted to help another with getting a restraining order in another city.

As stated above, Appellant Bailey’s intention in requesting Officer Safford to run a “check” of the citizen complainant’s history was to determine whether the citizen complainant was someone he needed to worry about in the context of the safety of his son and former wife. Appellant Bailey further implied that even if Officer Safford did access the citizen complainant’s CORI, Appellant Bailey did not ask or receive the details of the CORI. During cross examination he acknowledged that the mere existence of a criminal record does not make an individual dangerous, but rather it is the details of the record that need to be examined in making that determination. These details would include the

crime charged, whether there was a conviction, and the type of sentence received. Appellant Bailey further stated that in other investigations, in his twenty-six years as a police officer for the Town of East Longmeadow, he would look into the details of an individual's criminal record and gather all the facts before making a conclusion. Yet, in what he claims is a legitimate law enforcement purpose concerning the safety of his own son and former wife, he testified that he did not ask or get the details. This statement is also contradicted by a prior statement of Officer Safford and the actions of Donna Bailey. Furthermore, after Donna Bailey spoke with Appellant Bailey about the Complainant, she sent a text message to the Complainant which read "you have a criminal record."

In its investigation, the Town of East Longmeadow found that Appellant Bailey used his position as a police officer to access CORI information while not in the performance of his official duties and responsibilities for a criminal justice purpose. The results proved by a preponderance of the evidence that the Town had just cause to discipline him.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the Town was justified in the level of discipline imposed, which, in this case, was a 2-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. Even if there are past instances where other employees received more lenient

sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

“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 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (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., Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

The Appellant argues that the discipline rendered in this case was in retaliation of a complaint filed by the Appellant with the Massachusetts Commission Against Discrimination (“MCAD”). I conclude that this allegation is unfounded. As testified by Appellant Bailey, the issue which resulted in the MCAD complaint had been pending for a significant period of time. Appellant Bailey, who was handling most of the matter himself, was speaking with attorneys for the town and members of the Board of Selectmen. The Chief was not involved.

The Appellant also raised an issue of disparate treatment regarding a prior incident involving another officer's access to electronic records. After careful review and consideration, I find that the prior incident is not similar to the one regarding the instant

appeal and did not involve the improper accessing of an individual's criminal history from the CHSB.

The discipline rendered in this matter was not only to protect the integrity of the system, but most importantly the integrity of the East Longmeadow Police Department.

For all of the above-reasons, the Appellant's appeal under docket number D-08-170 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [Taylor – Absent]) on May 14, 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. 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:
Michael P. Clancy, Esq. (for Appellant)
John P. Talbot, Esq. (for Appointing Authority)