

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

PHYLLIS IGOE,
Appellant

v.

D-07-182

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Phyllis Igoe (hereinafter "Appellant"), is appealing the decision of the Respondent, Boston Police Department (hereinafter "BPD") as Appointing Authority, to suspend her on November 9, 2006 for three (3) working days and on February 12, 2007 for five (5) working days from her position of School Traffic Supervisor (hereinafter "STS") in the BPD. The Appellant filed a timely appeal. A

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

hearing was held on March 20, 2008 at the offices of the Civil Service Commission (hereinafter "Commission"). Two tapes were made of the hearing. Since no notice was received from either party, the hearing was declared private. The witnesses were sequestered. Proposed decisions were filed by the parties.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Appellant's Exhibits 1 – 4 and Appointing Authority's Exhibits 1 - 26), and the testimony of the following: BPD Captain James Hasson (hereinafter "Capt. Hasson"), BPD Sergeant Kenneth Jameson (hereinafter "Sgt. Jameson"), BPD Officer Luis Vasquez (hereinafter "Officer Vasquez"), Ms. Jane Gibbons, Principal of St. Theresa's School in West Roxbury (hereinafter "Ms. Gibbons") and the Appellant, I make the following findings of fact:

1. At the time of the suspensions, the Appellant had served as an STS in the BPD since 1971. An STS is assigned to assist school children in crossing streets on their way to and from school. STSs work two separate duty shifts each school day. The first shift runs from 7:30 a.m. until 8:30 a.m. and the second shift runs from 2:00 p.m. until 3:00 p.m. (Testimony of Appellant and Capt. Hasson)
2. From May 2, 2005 until the time of her suspensions, the Appellant's assigned crossing post was the corner of Homewood Road and St. Theresa Avenue. (Testimony of Appellant and Appointing Authority Exhibit 19)
3. The Appellant was suspended on November 9, 2006 for three (3) working days for an alleged violation of Rule 102, § 4 (Neglect of Duty), § 8 (Directives and Orders) and § 10 (Reporting for Duty) of the BPD Rules and Procedures. The violations arose

from the Appellant's alleged failure to be at her assigned post on November 6 and 7, 2006. (Appointing Authority Exhibits 4 and 5)

4. A second progressive suspension of five (5) working days was imposed on the Appellant on February 12, 2007 for violations of the same BPD Rules and Procedures arising from her alleged failure to be at her assigned post on February 6, 2007. (Appellant Exhibit 1)
5. On November 13, 2006, BPD Police Commissioner's Personnel Order Number PO 06-382 was issued suspending the Appellant for one (1) working day for violating the same three rules previously discussed, as well as § 9 (Respectful Treatment). The Order was issued by then-Acting Police Commissioner Albert E. Goslin (hereinafter "Supt. Goslin). The Order stated, in pertinent part:

"On October 19, 2006 at 8:07 am, Ms. Igoe was not at her post as required from 7:30 am until 8:30 am. This one day suspension is to address multiple violations of the Rules and regulations committed between February 2004 and October 2006. Ms. Igoe signed the suspension form and waived her right to request a hearing."

The Appellant did not appeal the one (1) day suspension and served it on October 31, 2006. (Testimony of Capt. Hasson and Appointing Authority Exhibit 2)

6. Capt. Hasson testified at the Commission hearing that he has been a member of the BPD since June 8, 1998, and has been assigned to Area E-5 as Captain since August 2006. He stated that he currently supervises approximately 70 sworn officers and 20 civilian employees and that the Appellant is a STS under his command. (Testimony of Capt. Hasson)

7. Capt. Hasson testified that he is familiar with the Appellant, as well as her duties and schedule. He emphasized that the Appellant is expected to be at her post from 7:30 a.m. until 8:30 a.m. and from 2:00 p.m. until 3:00 p.m. (Id.)
8. Capt. Hasson credibly testified that there had been a previous issue with the Appellant neglecting her duties and that he had counseled her on the issues, including her duties and the Department's expectations of her position as school crossing guard. Capt. Hasson further testified that the appellant was therefore aware of her duties and of the schedule that she is required to maintain at her designated post. (Id.)
9. In a memorandum dated November 9, 2006, Capt. Hasson informed Supt. Goslin that he was disciplining the Appellant with the instant three (3) day suspension. He stated in part:

“This is not the first time she was observed not being at her post, in fact, she received a one-day suspension for not being at her post on October 19, 2006 – which she served on October 31, 2006. At the time of her being notified of that suspension she was counseled, or rather encouraged, to do her job as expected. She was also informed that this one-day suspension would incorporate all past transgressions and that she was starting out with a blank slate. She accepted her suspension and assured me that her behavior would change and that she would perform as expected. While this conversation was conducted I had Sgt. Perez as a witness.”
(Appointing Authority Exhibit 9)

10. Officer Vasquez credibly testified at the Commission hearing that he has served on the BPD for approximately fourteen (14) years, and has been a BPD Community Services Officer since December 2003. Officer Vasquez serves as the direct supervisor of the STSs assigned to Area E-5. He testified that he was familiar with the Appellant before he became a Community Services Officer. (Testimony of Officer Vasquez)

11. Officer Vasquez credibly testified that he received two e:mails from Ms. Gibbons of St. Theresa's School which is near to the crossing area at Homewood Road and St. Theresa Avenue. The first e:mail was sent at 3:40 p.m. on November 6, 2006, and read as follows:

"I called because I was frustrated my computer was not working etc. . . . No sign of our guard at 2:25 and the parking is the worst ever now people are parking on both sides of the street and leaving to go into the schoolyard. The problem is getting more and more dangerous. Thanks for all your help."

Officer Vasquez also testified that he received a second e-mail at the same time he received the first. Ms. Gibbons had sent the second e-mail at 3:29 p.m. on November 7, 2006. It read as follows:

"It is 2:25 and no sign of our crossing guard. Our volunteer Dad has been monitoring traffic on Pine Lodge and was given a stern talking to by an of duty (sic) officer. He informed him that the signs are not legal and will be removed by Mon. I think we will be in bigger trouble if that happens. Thanks for all your help."

Officer Vasquez forwarded the two e:mails to Capt. Hasson for further review and action. (Testimony of Officer Vasquez & Capt. Hasson and Appointing Authority Exhibits 6 and 7)

12. Capt. Hasson forwarded Ms. Gibbons's e:mails to Kelley Dineen (hereinafter "Ms. Dineen"), Assistant Director of the BPD Human Resource Division, seeking guidance in regard to the appropriate progressive discipline of the Appellant. Ms. Dineen recommended a three (3) day suspension. Before imposing the discipline, Capt. Hasson asked BPD Sergeant Clayton Pressley (hereinafter "Sgt. Pressley") to interview Ms. Gibbons to find out how she came to the conclusion that the Appellant had been off her assigned post. Sgt. Pressley reported to Capt. Hasson that Ms.

Gibbons “personally witnessed that [the Appellant] was not there.” (Appointing Authority Exhibit 9)

13. Ms. Gibbons testified that she had been principal for 5 of the last 16 years that she had served at St. Theresa’s School. As principal, she is ultimately responsible for the safety of students coming and going at the school. The school serves approximately 375 students from three year olds to eighth graders. The school’s doors open at 7:45 a.m. and close at 2:30 p.m. each school day. (Testimony of Ms. Gibbons)
14. Ms. Gibbons was credible in her testimony that she did not see the Appellant at her post on November 6, 2006, and that teachers at St. Theresa’s School were compelled escort the children across the street. She stated that she made her observation while she was helping some students onto the buses, which is part of her daily, after-school routine. She was, however, unsure on her recollection as to whether the Appellant had shown up for work later in the shift. Although Ms. Gibbons stated that the same situation occurred the next day, on November 7, 2006, she did recall whether the Appellant reported for duty at some point. She maintained that a volunteer father had to assist the children in the Appellant’s absence at some point on November 7, 2006 and that that the father had a verbal altercation with a BPD officer. (Id.)
15. Officer Vasquez testified that he personally observed the Appellant at 2:40 p.m. on November 7, 2006, but she was reading a newspaper and was inattentive to three children who were trying to cross the street. As a result of the Appellant’s inattention, Officer Vasquez had to assist the children. I assign great weight to this testimony as his statements were not refuted at the hearing. (Testimony of Officer Vasquez)

16. Although Ms. Gibbons was ill at ease and exhibited less than perfect recall of the events of November 6 and 7, 2006, I credit her e-mails as credible documentary evidence of her frustration with the Appellant's work performance at the time. I found that her testimony was sufficient to corroborate the documentary evidence. She did not appear to harbor any animus against the Appellant, but made it clear that the Appellant's work habits were a source of distraction and disappointment.
17. I find that Officer Vasquez was professional and serious in his demeanor at the Commission hearing. I detected no ill will from him towards the Appellant whom he directly supervised. I find that he had no reason to embellish his testimony to unduly harm the Appellant in any way and that his testimony was clear, unhesitant and informative.
18. I find that Capt. Hasson was also a professional witness. He was knowledgeable of the subject matter and he was responsive to all inquiries. Capt. Hasson appeared to be at ease and confident of his answers. This confidence, together with his excellent recollection of several events in question, was indicative of reliable, straightforward testimony. His testimony that he tried to work with the Appellant over the years, counseling her on what was expected from her, demonstrated a compassionate approach to correcting the Appellant's deteriorating work habits - rather than singling her out for unduly administered discipline. In fact, he testified that in regard to discipline, he "didn't want to go down that road with her." (Testimony of Capt. Hasson)
19. Sgt. Jameson credibly testified that he had served in the BPD for approximately thirty-four (34) years. He served as a sergeant for approximately twelve (12) years,

and was assigned to Area E-5 for approximately five (5) years. He stated that he was responsible for Community Services and oversees the STS program. He testified that he is not responsible for specific scheduling of STSs, but does assign posts, and is charged with ensuring that all STS's are in uniform and on-post at their scheduled times of duty. (Testimony of Sgt. Jameson)

20. Documentary evidence presented at the Commission hearing demonstrated that Sgt. Jameson had had several dealings with the Appellant regarding her failure to adhere to BPD Rules and Procedures. He testified that he was responsible for the Appellant's 2005 reassignment to her current post. He further testified that the Appellant had refused delivery of written memos and documents at least three (3) occasions, and that the Appellant had been rude and uncooperative with him in discussing her job duties. (Testimony of Sgt. Jameson and Appointing Authority Exhibits 19, 20 and 21)

21. I found that of the witnesses that dealt with the Appellant professionally, Sgt. Jameson had the most contentious relationship with the Appellant. Sgt. Jameson credibly testified that he personally observed the Appellant's failure to be on post on November 6, 2006 and February 6, 2007. He explained that he made it his practice to arrive at various posts 15 minutes prior to the scheduled assignment and leave the posts 10 minutes into the shift to ensure the posts were covered. He further testified that he had experienced no attendance issues or other problems with any other STS. Despite this strained relationship, however, Capt. Hasson testified that both Sgt. Jameson and Officer Vasquez attempted to counsel the Appellant before recommending any sort of discipline. (Testimony of Sgt. Jameson)

22. Capt. Hasson testified that the next instance of the Appellant failure to be at her post occurred on February 6, 2007. He credibly testified that he saw the Appellant drive by him at approximately 7:40 a.m. – during the time of her shift – about one half mile away from her post. He further stated that the Appellant was driving in a direction *away* from her post. (Testimony of Capt. Hasson)
23. Capt. Hasson testified that he then sent Officer Elvis Garcia (hereinafter “Officer Garcia”) to check the Appellant’s post and Officer Garcia reported to Capt. Hasson that he personally observed that the Appellant was not present at her post at 8:08 a.m., approximately 28 minutes after Capt. Hasson had personally observed her driving away from the post. (Testimony of Capt. Hasson and Appointing Authority Exhibit 12)
24. As a result of his personal observation and that of Officer Garcia, Capt. Hasson notified the Appellant that he was suspending her by progressive discipline for five (5) working days. The Appellant refused to sign the Notice of Suspension. (Appointing Authority Exhibit 13)
25. In response to both suspension notices, the Appellant submitted one sentence, handwritten denials of both incidents. She submitted these denials on November 9, 2006 and February 6, 2007. (Appointing Authority Exhibits 10 and 16)
26. At the Commission hearing, the Appellant offered a blanket denial that she had been off post during her scheduled shifts, and refuted that anyone could have personally observed her absences. She offered two time-dated photographs of her in uniform and under a street sign reading “Homewood Road” purported to have been taken on February 6, 2007 at 7:47 a.m. and February 7, 2007 at 2:23 p.m. The Appellant

testified that she began having parents take pictures of her after the November 6, 2007 incident so she could prove that she was, indeed, on post. (Testimony of Appellant and Appellant Exhibits 2 and 3)

27. I found the Appellant to be somewhat inattentive during the hearing. She was unusually animated and spoke out of turn many times. This hearing officer had to gently admonish her at times to allow her counsel to speak for her. She failed to provide a sensible account of how so many people who claimed to have personally observed her absence from her assigned post could be wrong. Her assertion that those people may have been observing a crossing area only 50 feet away instead of the area to which she was assigned was not persuasive. According to her own photos, the Appellant's uniform is intended to be highly visible to motorists and others in order to ensure safe street crossings. In short, it would be hard not to pick any STS out of a crowd. (Testimony and Demeanor of Appellant)

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." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of 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." Id. 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 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence which is established "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 reviewing an appeal under G.L. c. 31, § 43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

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 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See*

Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

As a member of the BPD, the Appellant was well aware that failing to arrive at her post on time, and failing to remain there during her entire shift would not only be a direct violation of the BPD's Rules and Procedures – but would also jeopardized the safety of school children left to navigate the crosswalks by themselves.

The BPD has proven by a preponderance of the evidence that there was just cause to suspend the Appellant. The BPD presented evidence through both testimony and significant corroborating documentation that Appellant was not at her post during her designated shift on November 6 & 7, 2006 and February 6, 2007, and was therefore not performing the duties of a STS. Her absence from her post during her scheduled shift, together with her failure to perform the duties of her position, give just cause to the Department to impose both the three (3) day and the five (5) day suspensions.

Therefore, for all the reasons stated herein, the appeal on Docket Number D-07-182 is hereby *dismissed*.

John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on July 24, 2008.

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. 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:

Frank J. McGee, Esq. (for Appellant)

David Jellinek, Esq. (for Appointing Authority)