

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108

DAVID BRANCO
Appellant

v.

D-06-269

CITY OF NEW BEDFORD,
Respondent

Appellant's Representative:

Michael J. Maccaro, Esq.
AFSCME Counsel 93
8 Beacon Street
Boston, MA 02108
(617) 367-6000

Respondent's Representative:

Jane Medeiros Friedman, Esq.
City of New Bedford
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Commissioner:

John E. Taylor

DECISION

Pursuant to G.L.c. 31, § 43, the Appellant, David Branco (hereafter "Branco" or Appellant) filed an appeal claiming that the City of New Bedford (hereafter the "City" or "Respondent") did not have just cause to suspend him from his employment as an EMT-Paramedic for one day. Appellant's Notice of Appeal was timely and a hearing was held on October 16, 2007. As no written notice was received from either party, the hearing was declared private. One tape was made of the proceedings.

FINDINGS OF FACT

Based on the documents entered into evidence, Joint Exhibits 1-13 and the testimony of Appellant; James Trout, Director of Emergency Medical Services; and Steven Arruta, Deputy Director of Emergency Medical Services, I make the following findings of fact:

1. Appellant is a tenured Civil Service employee who commenced employment with Respondent on or about November 20, 2005 as an EMT-Paramedic with the City's Emergency Medical Services ("EMS") Department. (Testimony of Appellant)
2. The EMS responds to approximately 12, 000 calls a year. It employs approximately 24 paramedics, two per ambulance. EMTs are supposed to function as patient advocates. (Testimony of Trout)
3. On or about August 18, 2006, Appellant was working a shift with is partner, John Gurney. They responded to a 911 call from Church Street indicating that a resident was experiencing severe pain. A City police officer also responded to the 911 call. (Testimony of Appellant)
4. Upon arriving at the residence, Appellant and Gurney discovered a man who had been recently released from the hospital following surgery, lying on the couch and complaining of stomach pain. The patient's girlfriend informed them that he had taken pain medication recently but it did not seem to be affecting him. (Testimony of Appellant)
5. Gurney removed the pillow the patient was holding over his stomach and examined the incisions on his stomach in order to determine if there was bleeding. There was not. (Testimony of Appellant)

6. Gurney retrieved the stretcher from the ambulance and brought it to the front door. Appellant asked the patient if he would like to walk to the stretcher and Appellant and Guerny subsequently transferred him to the stretcher. (Exhibits 3 and 4 and testimony of Appellant)
7. Appellant and Gurney placed the patient on the stretcher, laying him on his side due to the extreme pain he was experiencing, and placed him on an IV. Guerny rode in the back with the patient, who repeatedly requested pain medication and swore during the ride to the hospital. Guerny informed the patient that due to the location of his pain, and to the fact the EMTs were not aware of what medication he was taking, protocol prohibited them from administering medication. (Exhibits 3 and 4 and testimony of Appellant)
8. James Trout, Director, testified that EMTs were correct in not providing pain medication in this situation.
9. Appellant drove the ambulance to the hospital. The trip involved travel over roads that were under construction and thus bumpy. (Testimony of Appellant)
10. When the ambulance arrived at the hospital, the patient was transferred to another stretcher. The patient said, "Thanks for nothing." (Exhibit 4)
11. On or about September 7, 2007, Steven Arruda, Deputy Director, received a complaint from the patient regarding the treatment he received from the EMS staff on August 18, 2006. The patient and his girlfriend followed up with written complaints. In his statement, the patient alleged that there was heavy metal music blaring in the ambulance and that Appellant drove "like a madman." He also

- stated that he could not describe the EMTs as he had his eyes closed from the pain most of the time. (Exhibits 11-13 and testimony of Arruda)
12. Neither Appellant nor Guerney were interviewed regarding the complaint. The police officer at the scene was also not interviewed. (Testimony of Trout and Arruda)
 13. Trout testified that the patient identified the EMT who was upsetting as 5'7" and that is Appellant's height, while Guerney is approximately 6'6". Appellant testified that he is taller than 5'7". He also stated that the radio is controlled from the back area of the ambulance. Appellant further testified that he drove the ambulance at the speed limit but that there was road construction. (Testimony of Appellant, Trout and Arruda)
 14. The EMS receives ten to twelve complaints a year from members of the public. Arruda testified that part of his job is to handle complaints. He stated that he received three complaints against Appellant in 2006 and that was unusual. Arruda testified that he did not recall receiving multiple complaints against another EMT. (Testimony of Trout and Arruda)
 15. On September 19, 2006, Appellant was informed that he was being placed on administrative leave with pay. The Appointing Authority's reasons for suspending him were stated as 1) continued unprofessional and disrespectful behavior directed towards patients and their families; 2) failure to act as a patient advocate and treat patients and their families with dignity, empathy and compassion; and due to two prior incidents that occurred on April 13 and July 26, 2006 and August incident. (Exhibit 1)

16. On September 20, 2006, AFSCME Counsel 93, on Appellant's behalf, challenged the suspension. (Exhibit 2)
17. As a result of a suspension hearing held on September 25, 2006, Appellant accepted a reduction of his two week suspension to a one day suspension with time served on September 23, 2006. He also agreed to attend the Sensitivity Training and Massachusetts State Office of Emergency Medical Services Regulatory Training on September 27, 2006. He was not precluded by this agreement from filing with Civil Service. (Exhibit 5)
18. Guerney submitted a letter during the hearing to dispute the charges against Appellant. He wrote in part that the complaint was unwarranted because the patient had "had his mind made up to complain about anybody because he didn't get any meds from us for pain. We were professional towards him at all times." (Exhibit 4)
19. On September 28, 2006, Appellant filed his Civil Service appeal. (Exhibit 6)
20. Appellant's prior discipline includes a April 25, 2006 verbal warning from the EMS Department regarding an April 13, 2006 complaint in which the daughter of a patient complained that Appellant was rude to and made her mother feel as though he did not want to transport her to the hospital. (Exhibit 7)
21. On August 11, 2006, Appellant received a written warning stating he was rude and unprofessional towards patient's family and a visiting nurse. (Exhibit 8)
22. Trout testified that Guerney was counseled regarding the incident. He stated that Guerney's discipline differed from Appellant's as it was Guerney's second incident while it was Appellant's third. (Testimony of Trout)

23. Appellant was a credible witness with a calm demeanor.

24. Trout and Arruda were also credible witnesses.

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). Discipline is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighted by an unprejudiced mind, guided by common sense and correct rules of law.” Sullivan v. Municipal Court of Roxbury District, 342 Mass. 612 (1948), Police Comm’r of Boston v. Municipal Court of West Roxbury District, 368 Mass. 501 (1975) 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).

Here, Appellant argues that just cause did not exist for his suspension because at all times on August 18, 2006, he conducted himself in a professional manner and provided the patient with the best care possible. He maintains that he was never interviewed with regard to the complaint and was not specifically identified as the EMT that the patient complained about. Appellant also argues that he was treated disparately as his partner was not disciplined for the events at issue while he received a suspension. As stated above, Appellant’s testimony was credible and documentary evidence in the form of Guerney’s letter regarding the August 18, 2006 incident, supported his contentions.

Based on the totality of the circumstances, the Appointing Authority did not show by a preponderance of the evidence that it had just cause to suspend the Appellant from employment for one day.

For the above reasons, the Appeal under Docket No.D-06-269 is hereby ***allowed***.

Civil Service Commission.

John E. Taylor, Commissioner

By vote of the Civil Service Commission (Commissioner Guerin (yes), Commissioner Taylor (yes), Commissioner Henderson (yes), Chairman Bowman (no), Commissioner Marquis (no)) on February 21, 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)(l), 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 J. Maccaro, Esq.
Jane Medeiros Friedman, Esq.