COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KRISTIN LEARY,
Appellant

v.

D-09-15

TOWN OF SOUTH HADLEY,
Respondent

Appellant's Attorney:

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Worcester, MA 01609

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Kristin Leary (hereinafter "Leary" or "Appellant"), pursuant to G.L. c. 31, § 43[1] filed an appeal with the Civil Service Commission (hereinafter "Leary") on January 21, 2009, claiming that the Town of South Hadley (hereinafter "Town" or "Appointing Authority") did not have just cause to suspend her for two (2) days from the South Hadley Police Department (hereinafter "Department") for insubordination and conduct unbecoming a police officer.

The appeal was timely filed. A pre-hearing conference was conducted on February 11, 2009 and a full hearing was held on April 8, 2009 at the Springfield State Building in Springfield, MA. The Appellant filed a written notice requesting that the hearing be held in public session and that request was granted. The witnesses were not sequestered.

The hearing was digitally recorded onto one (1) CD which was later provided to the parties. Both parties submitted post-hearing briefs in the form of proposed decisions on June 5, 2009.

FINDINGS OF FACT:

Eighteen (18) exhibits were entered into evidence. Based upon the documents entered into evidence and the testimony of:

For the Town of South Hadley:

- Lieutenant Steven Parentella, Town of South Hadley Police Department;
- Lesley Cartabona, Dispatcher for the Town of South Hadley;
- Chief David LaBrie, Town of South Hadley Police Department;

For the Appellant:

- Kristin Leary, Police Officer for the Town of South Hadley;

I make the following findings of fact:

1. The Appellant, Kristin Leary, is a tenured civil service employee of the Town of South Hadley currently serving in the position of police officer within the Police Department. She has been employed by the Town for approximately 6 1/2 years. (Testimony of Appellant)

[1] The Appellant also filed an appeal under G.L. c. 31, § 42 regarding procedural issues, but that appeal was

2. The parties stipulated that there has been no prior discipline against the Appellant. (Stipulated Facts)
3. On October 8, 2008, the Appellant submitted a doctor's letter to the Department documenting that she could no longer perform normal police duties. Specifically, the doctor's note restricted the Appellant to station duty stating in relevant part: "[The Appellant] may work at the station and perform any desk duties, conduct interviews with witnesses, assist the public with information via phone." (Exhibit 14)
4. South Hadley Police Chief David LaBrie (hereinafter "Chief LaBrie") assigned the Appellant to dispatch duties on October 10, 2008. (Exhibit 16)
5. In addition to their dispatch duties, dispatchers conduct "tone tests" for public safety departments. A tone test is a sound the dispatchers send over the radio to the firefighters' pagers once a day to make sure that they are functioning properly. This same sound goes out to the firefighters' pagers when they need to respond to an emergency. A tone test takes approximately five (5) seconds to complete. (Testimony of Cartabona)
6. Prior to the Appellant's assignment to dispatch duties, the issue of police officers assigned to dispatch conducting "tone tests" for the firefighters' pagers was a subject on which the union and the administration were having some form of dialogue. (Testimony of Chief LaBrie)
7. The Appellant testified before the Commission that, like other police officers, she objected to performing these "tone tests" or being involved at all with radio transmissions of the Fire Department. (Testimony of Appellant)

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waived by the Appellant as part of a pre-hearing conference on February 11, 2009.

8. A meeting was held on October 16, 2008 to discuss matters related to the Appellant's duty status as well as the overall issue related to performance of the firefighters' tone tests. The meeting was attended by Chief LaBrie, the Appellant, Officer Jess Camp of the local union as well as Bob Dixon, the union business agent. (Testimony of Chief LaBrie and Appellant).
9. The union president wanted to negotiate because he claimed that the Appellant's duty to do tone tests for the fire department as a dispatcher represented a change in working conditions for her. Chief LaBrie stated that he did not think that this duty constituted a change in working conditions, but that he would check with counsel for the town anyway. (Testimony of Chief LaBrie)
10. Chief LaBrie testified that he received clarification from counsel that the dispatch duties at issue did not constitute a change in working conditions. (Testimony of Chief LaBrie).
11. On October 23, 2008, the first day that the Appellant was scheduled to work dispatch, Chief LaBrie had a conversation with Lieutenant Steven Parentela in which he directed Lieutenant Parentela to convey to the Appellant that she was to begin performing dispatch duties related to fire, including the "toning out" of fire personnel. (Testimony of Chief LaBrie and Parentela)
12. The Appellant was assigned to the dispatch desk for a 3:00 P.M. – 11:00 P.M. shift on October 23rd. Dispatcher Lesley Cartabona (hereinafter "Dispatcher Cartabona") was assigned to the desk from 3:00 P.M. – 7:00 P.M. in order to teach the Appellant the required dispatch functions. (Testimony of Cartabona)

13. It is undisputed that at approximately 4:00 P.M. on October 23rd, Lt. Parentella went to the dispatch desk and relayed the Chief's order to Dispatcher Cartabona and the Appellant. The Appellant replied "I take my orders from the Chief." Lt. Parentella stated that the order had come from the Chief. (Testimony of Parentella and Appellant)
14. Lt. Parentella told the Appellant that she had to do the test tone for the Fire District 2 at 5:45 P.M. and as many practice test tones as needed. (Testimony of Appellant and Parentella)
15. Lt. Parentella was a good witness and I credit his testimony. He had a calm demeanor, a good recollection of events and he did not appear to have any ulterior motive for testifying against the Appellant. (Testimony, demeanor of Lt. Parentella)
16. Dispatcher Cartabona, in the Appellant's presence, asked Lt. Parentella further questions in order to clarify when and how often they should do the tones. When Lt. Parentella answered those questions, the Appellant was still present. (Testimony of Cartabona and Parentella)
17. When District 1 conducted its test tone at 5:45 P.M., the Appellant reached over and turned down the volume of the fire radio to the point that it could not be heard by Dispatcher Cartabona. Dispatcher Cartabona waited to see if Officer Leary would tone District 2 as ordered. When Dispatcher Cartabona asked the Appellant if she was going to perform the tone test, the Appellant stated that she had "no time for that shit" and refused to conduct the test tone. (Testimony of Cartabona)

18. Dispatcher Cartabona was a good witness. She had a good recollection of the events that occurred; she did not try to overreach in her testimony; and her testimony was logical and rang true to me. (Testimony, demeanor of Cartabona)
19. The Appellant testified that she never said, "I don't have time for this shit" regarding the test tones. I do not credit the Appellant's testimony on this point. It is contrary to the credible testimony of Dispatcher Cartabona and the Appellant's testimony before the Commission on this issue appeared far less certain than her testimony on other points that are not in dispute. (Testimony, demeanor of Appellant)
20. The Appellant also testified that she misunderstood the order, and that she did not have time to complete the tones due to other calls and activities that were going on. On this point, I also do not credit the Appellant's testimony. (Testimony of Appellant)
21. As opposed to being confused, I find that the Appellant willfully disobeyed the order to conduct the tone tests because she disagreed with police officers performing any fire-related radio transmissions.
22. Although the Appellant testified that she was completing log entries at the time of the tone, that work took minutes at most, and could have been done at any time during the shift. (Testimony of Cartabona and Parentela)
23. When confronted by Lt. Parentela on a subsequent day as to why she didn't perform the test tones, the Appellant was disrespectful, at one point telling to the Lieutenant to "shut up" so she could tell her story. (Testimony of Parentela)
24. On November 12, 2008, Chief LaBrie notified the Appellant by letter that she was being suspended for two (2) days because she had disobeyed Lt. Parentella's order.

25. During his testimony before the Commission, Chief LaBrie testified that he based the Appellant's 2-day suspension on: 1) her defiance at the October 16, 2008 meeting; and 2) her decision to disobey the order to "tone out" the fire department and stating "I don't have time for that shit." (Testimony of LaBrie)

26. Under G.L. c. 31, § 41, the Appellant had the right to request a hearing before the appointing authority as to whether or not there was just cause for her suspension. (Exhibits 4 and 6)

27. The hearing was held on December 18, 2008 at the South Hadley Town Hall, presided over by Interim Town Administrator Barry Del Castilho (hereinafter "Interim Town Administrator"). (Exhibits 2, 7, 8, 13)

28. On January 6, 2009, the Interim Town Administrator presented his hearing officer's report, which included his findings of fact, analysis, and recommendation, to the South Hadley Selectboard (hereinafter "Selectboard"). (Exhibit 1)

29. On January 8, 2009, the Interim Town Administrator informed the Appellant that the Selectboard had voted 5-0 to uphold her suspension. (Exhibit 1)

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. Municipal 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'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, 857 N.E.2d 1053, 1059 (2006). See 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.

Under Section 43, 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, 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." 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 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).

There are a number of facts that are undisputed by the Appellant. First, it is undisputed that Lt. Parentela gave Officer Leary an order to practice fire tones on the night of October 23, 2008. There is no dispute that that this was an order from Lt. Parentela, who is Officer Leary's superior officer. There is no dispute that it was a lawful order. The Appellant clearly understood it to be an order, as she immediately (and defiantly) refused the order, stating "I take my orders from the Chief." Thereafter, Lt.

Parentela repeated the order and confirmed that the order did, indeed, come from the Chief. The Appellant admits this as well. Finally, it is undisputed that Appellant did not perform the fire tones as ordered. Although the Appellant claims that she was otherwise occupied at the time of the test tones, she admits that she could have performed the test tones, had she chosen to do so. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirment Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Department of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

The Appellant's contention that she was somehow confused by the order also fails to hold water. See Rooney v. Scituate, 7 MCSR 235 (1984) ("If the Appellant truly did not understand the order, he would have asked the Lieutenant to explain it further.") The Appellant has suggested that the "confusion" around the dispute over performing fire duties and the dispute over what duties the Appellant could perform somehow translated into confusion about Lt. Parentela's order. First, any dispute regarding whether fire duties should be performed was a matter that, if it violated the contract, could be grieved. The principle of "work now, grieve later" is particularly apt in this case. Police officers are not entitled to refuse orders simply because they believe there may be a contract violation.

The Appellant violated the lawful order to conduct the test tones. "Compliance with the rules and procedures of the Appointing Authority assures that its officers comport in a manner that exemplifies the operation of a paramilitary organization." See Murphy v. Chelmsford Police Dept., 19 MCSR 322, 325 (2006). By a preponderance of the evidence, the Town of South Hadley has shown that is was justified in disciplining the Appellant for insubordination and conduct unbecoming a police officer.

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. Civ. Serv. 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. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. 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., Town of Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006).

I conclude that a modification of the penalty imposed here is warranted for the following reason. In his testimony before the Commission, Chief LaBrie stated that the two-day suspension was based, at least in part, on the Appellant's "defiance" at the October 16, 2008 meeting that was attended by union officials. Although the October 16th meeting was called in part to address the modified duties of the Appellant, that meeting also included a conversation regarding the broader issue of police officers performing fire-related dispatch duties, an issue that was the subject of an ongoing discussion between the Town and the local police union. Instead of asking the Appellant to leave the meeting for this broader labor-management discussion, Chief LaBrie allowed the Appellant to remain in the room and participate in the conversation and voice her concerns. Basing part of the Appellant's two-day suspension on her alleged "defiance" during this adversarial union-management discussion is not appropriate and warrants a modification of the penalty in this particular case.

For all of the above reasons, the Appellant's appeal is allowed in part and the 2-day suspension is reduced to a one-day suspension.

Civil Service Commission

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Christopher C. Bowman, Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on July 2, 2009.

A True Record. Attest:

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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:
Andrew J. Gambaccini, Esq. (for Appellant)
Timothy D. Norris, Esq. (for Appointing Authority)