

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

SCOTT SAFFORD,
Appellant

v.

D-08-172

TOWN OF EAST LONGMEADOW,
Respondent

Appellant's Attorney:

Rebecca Lee Mitchell, Esq.
NAGE
1299 Page Blvd.
Springfield, MA 01104

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, Scott Safford (hereinafter "Safford", or "Appellant"), is appealing the decision of the Town of East Longmeadow (hereinafter "Town" or "Appointing Authority") suspending him for one (1) day 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 Scott Safford, Appellant;
- Officer Frederick Bailey (Appellant in D-08-170);
- Ms. Donna Bailey
- Ms. Dena Grochmal

I make the following findings of fact:

1. The Appellant, Scott Safford, has been employed as a police officer with the Town of East Longmeadow for approximately thirty-four (34) 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 Safford was suspended for one (1) day for accessing records from the Massachusetts Criminal History Systems Board (“CHSB”) and accessing these records without the necessity for the actual performance of his legally

authorized duties as a police officer. In addition, the Appellant was required to be recertified by the CHSB. (Exhibit 2)

4. Criminal Offender Record Information (“CORI”) is information regulated by the Criminal History Systems Board (“CHSB”) and contains information about an individual’s criminal history. 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 Officer 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 the 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, Officer Bailey received a telephone call from Donna Bailey. The two speak to each other by telephone approximately twice a day, every day. (Testimony of Officer 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 Officer Bailey that her current boyfriend, the citizen complainant, was text messaging threats to her. (Testimony of Officer Bailey and Donna Bailey)
15. Officer 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 Officer Bailey and Donna Bailey)
16. After completing the telephone call with Ms. Bailey, Officer Bailey placed a call to the front desk of the East Longmeadow Police Department. Officer 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 Appellant Safford)
17. Appellant Safford was working the front desk at the East Longmeadow Police Department when Officer Bailey telephoned. Officer Bailey asked Appellant Safford to run a check on the citizen complainant. Officer Bailey 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, Officer 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 Officer Bailey)
18. Officer Bailey testified that he did not know exactly what type of check that Appellant 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 Officer Bailey)

19. Appellant 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 Appellant Stafford; Exhibits 4 and 5)
20. Responding to a question during direct testimony, Appellant Safford testified that he would probably not run such a check for Attorney Mitchell if she wanted a check on her neighbor, but rather, he did the check for Officer Bailey because "he know both of them [the Baileys] so I was probably more concerned.". (Testimony of Safford)
21. After accessing the citizen complainant's CORI, Appellant Safford called Officer Bailey. (Testimony of Appellant Stafford and Officer Bailey) Exactly what information was conveyed from Appellant Safford to Officer Bailey is in dispute. Officer Bailey testified that Appellant Safford only told him that "you do have something to worry about; he has a history". (Testimony of Officer Bailey)
22. Appellant Safford testified that he told Officer 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 Appellant Safford) However, in Appellant Stafford's original statement, which he wrote himself and submitted, he stated that after accessing the Complainant's BOP, he called Officer 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)

23. It is undisputed that Officer 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)
24. During her testimony before the Commission, Ms. Bailey stated that she intended to text, “DO YOU HAVE A POLICE RECORD.” She testified that Officer Bailey 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 Officer Bailey 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)
25. At the time Appellant Safford did the CORI check, there was no current investigation into the citizen complainant by the East Longmeadow Police Department. (Testimony of Sgt. Manley and Appellant Safford)
26. Appellant Safford testified that if this happened again, he would do the same thing. (Testimony of Appellant Safford)
27. Subsequent to an investigation into this matter, Appellant Safford was suspended for one (1) day on the grounds that he “accessed records from the Massachusetts

Criminal History Systems Board without the necessity for the actual performance of [his] legally authorized duties as a police officer not for criminal justice purposes in violation of the CORI/CJIS rules”. (Exhibit 3) Officer Bailey received a two (2) day suspension because he instigated the unlawful access by requesting the information from Appellant Safford. (Testimony of Chief Mellis)

28. Chief Mellis, as required, provided CHSB with documentation regarding the violation of CORI access. (Testimony of Chief Mellis)

29. 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)

30. CHSB was satisfied with the disciplinary action taken by Chief Mellis and did not take independent action. (Testimony of Chief Mellis)

31. Appellant Safford 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).

32. On or about July 12, 2008, Appellant Safford 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.

While working dispatch on March 23, 2008, Appellant Safford received a call from Officer Bailey who was not on duty as a police officer. Appellant Safford was asked by Officer Bailey to run a check on the citizen complainant because he was dating Officer Bailey’s former wife and was concerned for the safety of his son. Although Appellant

Safford knew of no ongoing investigation into the citizen complainant he accessed the citizen complainant's CORI.

The reason why Appellant Safford accessed this information became clear during his direct examination. It was not for a law enforcement or criminal justice purpose, but rather he wanted to help out a fellow officer who he has known, along with his family, for a long time. This reason for accessing CORI became even clearer as he then stated that he would probably not run such a check for Attorney Mitchell if she wanted a check on her neighbor. He did this as a favor for a friend and fellow police officer. This is exactly the type of action the legislature and CHSB set out to prohibit when they limited an officer's ability to access CORI to that necessary for the actual performance of the criminal justice duties of the criminal justice agency.

The claim by Appellant Safford at the hearing that he did not provide specific information of the citizen complainant's BOP to Officer Bailey, although I do not find this to be credible, is irrelevant to his discipline for improper *access* of CORI. The prohibition with regards to an individual's CORI pertains to both dissemination *and* access.

A police officer should not and does not have greater rights to address "concerns" about another individual than any non-police officer in a dating relationship. 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. The consequence for violating the laws and regulations regarding the access to information the Legislature has deemed to be private is substantial. Not only do these violations

reflect poorly on the department, but a decision by CHSB to revoke certification, which it has the authority to do, would severely impact the Department.

The Town of East Longmeadow, after determining 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, has proven by a preponderance of the evidence, that they 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 1-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 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.

For all of the above-reasons, the Appellant’s appeal under docket number D-08-172 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

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:

Rebecca Lee Mitchell, Esq. (for Appellant)

John P. Talbot, Esq. (for Appointing Authority)