

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

EMIL E. MORALES,
Appellant

Case No.: D-09-453

v.

CITY OF HOLYOKE,
Respondent

Appellant's Attorney:

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International Brotherhood of
Police Officers
1299 Page Boulevard
Springfield, MA 01104

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Emil E. Morales (hereinafter "Appellant"), is appealing the action of the City of Holyoke (hereinafter "Appointing Authority" or "City") suspending him for one (1) day. The appeal was timely filed. The Civil Service Commission (hereinafter "Commission") held a full hearing on February 24, 2010 at the Springfield State Office Building. One (1) CD was made of the hearing and mailed to each party by the Commission.

FINDINGS OF FACT

Joint Exhibits 1 through 11A were entered into evidence at the hearing. Based on the documents submitted and the testimony of:

Called by the Appointing Authority:

- Emil Morales, Appellant;
- Sergeant Arthur C. Cranshaw, Holyoke Police Department (hereinafter “Sgt. Cranshaw”)
- Chief Anthony Scott, Holyoke Police Department (hereinafter “Chief”)

Called By the Appellant:

- Lonnie Westbrook, Police Officer, Holyoke Police Department (hereinafter “Officer Westbrook”)

I make the following findings of fact:

1. The Appellant has been employed as a permanent full-time Police Officer for the City since July 19, 1993. (Stipulation of Facts)
2. Sgt. Cranshaw has been employed as a Holyoke Police Sergeant since October 4, 2009. He was a Patrol Officer with the Holyoke Police Department (“HPD”) prior to that and has been employed with the HPD for over ten (10) years. (Testimony of Sgt. Cranshaw)
3. On Halloween, Saturday, October 31, 2009 there was a staffing shortage on the 2nd Watch (4:00 p.m. to Midnight) in the HPD. (Testimony of Sgt. Cranshaw, Officer Morales, Officer Whelihan, Jt. Exhibits 1, 3 & 5)
4. Sgt. Cranshaw was assigned as the 2nd Watch Commander in October, 2009. Although the 2nd Watch is from 4:00 p.m. to Midnight, the Commanding Officer usually comes in to the HPD at approximately 3:00 p.m. (Testimony of Sgt. Cranshaw)

5. On October 31, 2009, Sgt. Cranshaw arrived at work at approximately 2:45 p.m. and was informed by 1st Watch Commander, Lieutenant Michael J. Higgins, that two (2) officers from the 2nd Watch reported themselves out as sick. There was also an arrestee at the hospital that was being held and needed a police guard. Consequently, they were going to have to call three (3) other officers to work the 2nd Watch since they were short three (3) officers on the 2nd Watch. (Testimony of Sgt. Cranshaw and Jt. Exhibits 1, 3 & 5)
6. Pursuant to Local #388 Collective Bargaining Agreement, Paragraph 8.1 (d):

“In the event that a shortage of staffing occurs on any given shift and the Chief of Police or his/her designee decides to fill it, police officers who are regularly assigned and working the shift that is ending, normally will be held over before requiring officers already on a specific tour working an overtime shift to be held over.” (Jt. Exhibit 8)

In addition, Police Officers are held over based on reverse seniority. (Testimony of Sgt. Cranshaw & Jt. Exhibits 1, 3 & 5)

7. In October 2009, the Appellant’s regular shift was the 1st Watch (7:00 a.m. to 3:00 p.m.). (Testimony of Appellant)
8. The 1st Watch seniority list in reverse order on October 31, 2009 read as follows:
 7. Officer Douglas J. Lambert
 6. Officer Emil E. Morales
 5. Officer James M. Whelihan
 4. Officer Ronald M. Mihalak

3. Officer Gary J. Gresh
 2. Officer Lonnie Westbrook
 1. Officer Richard F. Conner
9. Sgt. Cranshaw first spoke with Officer Lambert, who had the least seniority in the 1st Watch, because he was already at the HPD station. He informed Officer Lambert that he was going to have to work the 2nd Watch that date; which he did. (Testimony of Sgt. Cranshaw)
10. Meanwhile, the Appellant was notified at approximately 2:50 p.m. via the Communications Center (dispatch) to report to the Commanding Officer's office. When he did report, the Appellant was notified by Sgt. Cranshaw of the 2nd Watch shortages and that he was "being held over." Specifically, Sgt. Cranshaw told the Appellant "we have this shortage and he was going to be drafted." (Testimony of Sgt. Cranshaw and Jt. Exhibits. 1, 3, & 5) Sgt. Cranshaw showed the Appellant a list of officers which indicated that the Appellant was the second least senior person. (Testimony of Sgt. Cranshaw and Appellant)
11. The Appellant testified that Officer Lenny Westbrook was also present during the above-referenced conversation. Although Sgt. Cranshaw has no independent recollection of Westbrook's presence, he has no reason to doubt the Appellant or Westbrook on this point. (Testimony of Sgt. Cranshaw)
12. The Appellant informed Sgt. Cranshaw that he was unable to work because his children were ill and he had to go home. There is no dispute that Sgt. Cranshaw then told the Appellant to complete a yellow "sick slip". (Testimony of Sgt. Cranshaw and Appellant & Jt. Exhibits. 1, 3 & 5)

13. The Appellant did not have any sick time remaining. (Testimony of Appellant) The Appellant testified that he told Sgt. Cranshaw that he could not put in a sick slip and that Sgt. Cranshaw stood there and said nothing in response. (Testimony of Appellant)
14. Sgt. Cranshaw testified that the Appellant never told him that he did not have any sick time remaining or that he would not be filling out a sick slip. Believing that the Appellant was going to fill out a sick slip and return it to him, Sgt. Cranshaw went to speak to the Police Chief about another matter. (Testimony of Sgt. Cranshaw) On this critical point, I credit the testimony of Sgt. Cranshaw and I do not credit the Appellant's testimony for the following reasons. The Appellant's testimony on this point was hesitant and equivocating and appeared to be more of a reluctant afterthought in his testimony as opposed to a clear recollection of what occurred. Finally, it is not plausible that Sgt. Cranshaw stood there in silence after being told by the Appellant that he could not put in a sick slip. In contrast, Sgt. Cranshaw's testimony on this point was clear, forthright and believable. He credibly testified that he never realized that the Appellant had no accrued sick time remaining until he was asked to testify in preparation for this hearing. Further, he has no ulterior motive for being untruthful. He considers the Appellant a friend who has otherwise been a reliable police officer. (Testimony, demeanor of Appellant and Sgt. Cranshaw)¹
15. I give no weight to the testimony of Officer Lonnie Westbrook as he does not remember any conversation regarding a sick slip, even though it is undisputed that some conversation did indeed take place regarding this issue. I find that he does not have a

¹ In the Appellant's post-hearing brief, he argues that Sgt. Cranshaw's testimony on this issue should not be credited given his inability to recall whether another police officer was present at the time and the fact that Cranshaw had only recently been promoted to the position of sergeant. Neither of these factors changed my conclusion that Cranshaw's testimony was truthful and accurate.

good enough recollection of what occurred to give his testimony any weight. (Testimony of Westbrook)

16. The Appellant also testified that he did not believe that he had been “ordered” to stay. Rather, he testified that Sgt. Cranshaw only told him that there was a shortage for the next shift and there was a “possibility” he would be drafted. The Appellant testified, however, that he was aware that the next shift was at least two people short and that he was the second least senior person on the seniority list. (Testimony of Appellant)
17. Sometime after Sgt. Cranshaw spoke with the Appellant, he left to go upstairs in the HPD as he was called up to the Chief’s Office to get candy to hand out to the children in the City since it was Halloween. (Testimony of Sgt. Cranshaw, Officers Morales and Whelihan)
18. The Appellant left the HPD station soon thereafter in his personal vehicle. Lieutenant Manuel J. Febo observed the Appellant on Nick Cosmos Street which is immediately adjacent to the HPD at approximately 3:05 p.m. Lt. Febo reported this fact to Sgt. Cranshaw after he overheard a conversation in the Police Department that there was a shortage on the 2nd Watch. (Stipulation, Testimony of Sgt. Cranshaw, & Jt. Exhibits 1 & 3)
19. When Sgt. Cranshaw learned that the Appellant had left, he directed the Communications Center staff to contact the Appellant and indicate to him that he was being ordered to come back to the station. The Appellant was called on his personal cellular telephone and at his home telephone which were all met with negative results. (Testimony of Sgt. Cranshaw and Jt. Exhibit 5)

20. Sgt. Cranshaw was informed by the Communication Center staff that there was no response by the Appellant. (Testimony of Sgt. Cranshaw)
21. Prior to 4:00 p.m., Sgt. Cranshaw himself telephoned the Appellant twice, once to his home and once to his cell phone telling him to return to the station. There was no response. (Testimony of Sgt. Cranshaw)
22. This created a situation where the next to least senior officer had to be held over, Gary Gresh, who was notified of this fact sometime prior to 4:00 p.m. but after it was determined that the Appellant was not responding to any of the calls.
23. The Appellant admitted that he received the telephone messages left for him from Sgt. Cranshaw but chose to telephone his Union Vice President rather than return the Sergeant's calls because he did not want to come in. He never did return Sgt. Cranshaw's telephone calls. (Testimony of Appellant & Jt. Exhibit 3)
24. The next day, November 1, 2009, Sgt. Cranshaw completed a Disciplinary Action Notice ("DAN") detailing the facts. This was reported to the Bureau Commander, Captain Alan Fletcher who approved the discipline of Appellant. (Jt. Exhibit 5)
25. By Interoffice Correspondence dated November 9, 2009, the Chief notified Officer Morales that he was being suspended as a result of the DAN for one (1) day without pay for violation of HPD Rules:
 - 1.) **Rule 1 Authority, paragraph 1.2 OBEDIENCE TO ORDERS** Members of the Department shall promptly obey any lawful order emanating from any superior officer. Should any such order conflict with a previous order from any other superior officer, with any General or Special Order, or any provision of the Rules, the member to whom such order is given shall respectfully call attention to such conflict, his order shall stand and the responsibility shall be his, and the person obeying the same shall not be held in any way responsible for disobedience of any orders theretofore issued. If

any unlawful order is given to any member of the department, such member shall promptly report such fact in writing to the Chief of Police. (old # 1.5)

- 2.) Rule 1 Authority, paragraph 1.3 OBEDIENCE TO ORDERS No member of the Department shall willfully disobey any lawful command of any commissioned officer, non-commissioned officer, or member of the Department senior to him. (old #1.50)**
- 3.) Rule 1 Authority, paragraph 1.4 COMPLIANCE TO ORDERS Officers shall promptly obey any lawful orders of a superior officer. This will include orders relayed from a superior officer by an officer of the same or lesser rank. (old # 1.18)**

(Jt. Exhibits 1 & 3)

- 26. The date that Officer Morales served his suspension was Thursday, November 19, 2009.

(Jt. Exhibit 2)

- 27. This was not the first discipline Officer Morales has received. (Testimony of Appellant and Chief Scott and Jt. Exhibits 1 & 3)

- 28. On October 19, 2005, the Appellant was issued a letter of reprimand for violation of Rule 1.2 Obedience to Orders, 1.3 Obedience to Orders and 1.4 Compliance to Orders. He did not dispute this fact at the Appointing Authority hearing or at the Civil Service hearing.

(Testimony of Appellant and Chief Scott and Jt. Exhibits 1, 3 & 6)

- 29. By letter dated November 19, 2009, the suspension was appealed to the Appointing Authority, then Mayor Michael J. Sullivan.

- 30. Former Mayor Michael Sullivan, the Appointing Authority, upheld the one (1) day suspension. (Jt. Exhibit 3, p. 3)

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); Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

By a preponderance of the evidence, the City has shown that it had reasonable justification to suspend the Appellant for one (1) day. I base this largely on the credible testimony of Sgt. Cranshaw, the commanding officer that informed the Appellant that he would need to be held over and work on Halloween night because of a shortage of police officers. 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 Comm’n, 401 Mass. 526, 529 (1988);

Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't 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).

When told by Sgt. Cranshaw that he would need to be held over, the Appellant told Cranshaw that his children were ill and he needed to care for them. In response, Cranshaw told the Appellant that he would need to complete a yellow "sick slip". At the time, Cranshaw was not aware that the Appellant had exhausted all of his sick time and thus would not be able to submit a sick slip. I do not credit the Appellant's testimony that he told Cranshaw that he would be unable to submit a sick slip because he had exhausted all of his sick time. Cranshaw credibly testified that, after talking to the Appellant, he left to speak with the Police Chief on another matter fully expecting that the Appellant would be providing him with a yellow sick slip. Instead, the Appellant went home and then decided not to return multiple phone calls and messages left by Cranshaw and others to explain his absence.

The Appellant's related argument that Cranshaw didn't actually "order" him to stay has no merit. Cranshaw made it clear to the Appellant that he would need to be held over and agreed to negate that order if the Appellant submitted a sick slip to care for his children. When the Appellant left without submitting a sick slip or at least explaining the reasons why he would not be able to submit a sick slip, he failed to obey an order. Under these circumstances, discipline is warranted.

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 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. Civil Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm’r v. Civil 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.*, Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006).

There is no evidence the discipline imposed involved inappropriate motivations or objectives or any other factors that would warrant the Commission modifying the discipline. Further, the

Appellant's one (1)-day suspension appears to be consistent with progressive discipline given that he has previously received a written warning.

For all of the above reasons, the Appellant's appeal under Docket No. D-09-453 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor, Commissioners) on April 8, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Michael P. Clancy, Esq. (for Appellant)
Melissa Shea, Esq. (for Appointing Authority)