

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JAMES WHITE,

Appellant

v.

CASE NO: D-08-178

WAREHAM POLICE DEPARTMENT,

Respondent

Appellant's Attorney:

Gerald S. McAuliffe
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Quincy, MA 02169

Appointing Authority's Attorney:

Irving I. Wallace, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, James White, a sworn officer of the Wareham Police Department (WPD), acting pursuant to G.L.c.31, §43, duly appealed to the Civil Service Commission (Commission) from a decision of the Interim Town Administrator of the Town of Wareham, the Appointing Authority, suspending him for one day for violating WPD rules and regulations concerning a motor vehicle accident in which his police cruiser collided with another WPD cruiser. A full hearing was held by the Commission on December 12, 2008. The hearing was declared private as no party requested a public hearing. Witnesses were not sequestered. The WPD called two witnesses and the Appellant testified on his own behalf. Nine (9) exhibits were received in evidence. The hearing proceeded by agreement but was not recorded due to an audiocassette malfunction. The parties waived the submission of post-hearing proposed decisions.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of Thomas A. Joyce, WPD Chief of Police; Arthur J. Brightman, WPD Police Lieutenant; and the Appellant, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, James M. White, is a full-time permanent police officer appointed to the Wareham Police Department. (*Undisputed Fact*)

2. On March 21, 2008, at approximately 1:00 AM, while on patrol in the Onset North sector of Wareham and operating marked cruiser No. 09, Officer White collided with another WPD marked cruiser No. 13, operated by Officer Peter Silvia, at the intersection of East Boulevard and Union Avenue. (*Undisputed Facts*)

3. Immediately prior to the collision, Officer White had been traveling in an easterly direction on East Boulevard. As he approached Union Avenue, he stopped at a stop sign and then proceeded to execute a right turn onto Union Avenue. Officer Silvia was proceeding in a northerly direction on Union Avenue when he saw Officer White pulling out. Officer Silvia attempted to avoid the collision by turning to the left, but was unable to do so and the front end of Officer White's cruiser "t-boned" into the passenger side front quarter panel and front door of Officer Silvia's cruiser No. 13. Neither officer was injured but Office White's cruiser No. 9 was un-drivable and the combined damage to both cruisers totaled approximately \$9,000. (*Undisputed Facts; Exhibits AA1, AA2*)

4. Officer White and Officer Silvia immediately reported the collision to their superior, Sergeant Kevin Walsh who responded to the scene. Officer White was "very forthcoming" in taking responsibility for the collision. He acknowledged, at the scene,

that he was “at fault” for the collision and, also, acknowledged responsibility to Lieutenant Brightman who conducted an internal investigation of the incident, as well as during his testimony at the hearing before the Commission. (*Exhibits AA1, AA3, AA5; Testimony of Chief Joyce, Lieutenant Brightman, Officer White*)

5. In the course of the investigation, both Lieutenant Brightman and Chief Joyce made inquiry to determine whether there might have been any mitigating circumstances that would excuse Officer White from responsibility. They both credited Officer White’s honesty with them “as he always was”. Based on the evidence, it is undisputed that Officer Silvia had the right of way on Union Avenue, a relatively-well travelled street and that Officer White was obliged by the rules of the road to yield to him. Neither officer was en route to an emergency or response to an official police call. There was no indication of any equipment malfunction on either cruiser. Neither cruiser appeared to be traveling at an excessive rate of speed. The evidence also established that Officer White was familiar with the vicinity and had patrolled the area for several years. (*Exhibits AA1, AA3, AA5 APP8, APP9; Testimony of Chief Joyce, Lieutenant Brightman, Officer White*)

6. Lieutenant Brightman informed Officer White that he would recommend imposition of “punishment duty” and Officer White initially indicated he would consent.¹ Lieutenant Brightman obtained approval from Chief Joyce who authorized 16 hours punishment duty as the discipline. Meanwhile, Officer White spoke to his collective bargaining unit representative and informed Lieutenant Brightman that he would not accept punishment duty and preferred to preserve his rights to a disciplinary hearing. (*Testimony of Chief Joyce, Lieutenant Brightman, Officer White*)

¹“Punishment duty”, essentially, extra duty without pay, requires the officer’s consent. G.L.c.31, §62.

7. On March 27, 2008, Lieutenant Brightman recommended to Chief Joyce that he impose a two-day suspension on Officer White for negligence “in that you did not take prudent care and acted in a careless manner while pulling out from a stop sign in to the path of another cruiser . . . causing significant damage to two police cruisers.” (*Exhibit AA3; Testimony of Lieutenant Brightman*)

8. On April 7, 2008, Chief Joyce notified Officer White that he had decided to impose a one day suspension, for the following reasons:

“The specific reason for this suspension is a violation of Department Rules and Regulations, Section 1, G-3, Negligent Abuse of Department Property. On March 21, 2008, while operating a marked cruiser, you negligently initiated a right turn from a stopped position and crashed into a cruiser traveling with right-of-way. While you were honest in acknowledging the crash was your fault, the Lieutenant found that you failed to take prudent care and acted in a careless manner while pulling away from the stop sign.

“Although this appears to be the first major crash that you have been involved with, your carelessness has resulted in over \$9,000 worth of damage to two cruisers. The last complaint against you involved you driving beneath police line tape in your cruiser, which had been erected to protect vehicles from electric wires, loose tree limbs and a leaning tree. While you indicated that you felt the time of potential danger had gone by with the passing of the storm, your actions required the Crime Watch member to re-tie the banner tape and potentially put himself in harm’s way as a result of your careless maneuvering.

“While I have always believed you to be a good officer, you must pay more attention to your surroundings and better control your actions to assure their appropriateness.”

(*Exhibit AA5; Testimony of Chief Joyce*)

9. Officer White exercised his right to a hearing on the suspension before the Appointing Authority, in this case Interim Town Administrator, John Sanguinet. After the hearing, Mr. Sanguinet concluded that there was just cause for the discipline imposed, for the following reasons:

“My decision was based upon three items: 1. there were no mitigating circumstances that prevented you from seeing Officer Silvia’s cruiser; 2. the fact

that you “t-boned” the other cruiser indicates negligence to me; and 3. that you were offered similar discipline presented to other officers but rejected it.

“I believe Section 1,G-3 of the Wareham Police Department Rules and Regulations was violated, that you acted negligently and misused department property and felt that discipline needed to be imposed. When a vehicle has to be taken off the road due to operator error – whether it is gross or not – places the safety of the residents in peril or provides them less protection than they are accustomed to, therefore this requires all operators of town vehicles to be extra diligent when operating those vehicles.”

10. Section G.3 of the specific WPD Regulation involved states:

“Department Property, Abuse of – intentionally or negligently abusing, misusing, damaging or losing Police Department property or equipment.”

11. The other incidents of discipline to which the Interim Town Administrator’s letter refers include four officers who negligently damaged their cruisers, three of whom had more than one accident. None of those incidents involved as extensive damage to police property as caused by Officer White, but one e other collision did involve damage to a private vehicle. The discipline imposed in those other cases varied from assignment to 10 to 15 days “desk duty” to 16 hours “punishment duty”. In one other case mentioned, in which an officer lost a police radio, the officer agreed to make restitution, presumably in lieu of discipline. (*Testimony of Chief Joyce, Lieutenant Brightman*)

CONCLUSION

A person aggrieved by disciplinary action of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which 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.”

Under Section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Town of 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." City of 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 City of 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).

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., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of 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 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.’ ” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited.

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). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

“The commission’s task, however, 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, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d

1053, 1059 (2006). See Town of 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. 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. . . .in the circumstances found by the commission to have existed when the appointing authority made its decision." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of 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.

"Likewise, 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.' " Town of Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 659 N.E.2d 1190 (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. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

Applying these principles to this appeal, the Commission concludes that the Appointing Authority met its burden to establish "just caue" for the discipline imposed on Officer White and the discipline was not based on any 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 Officer White not “reasonably related to the fitness of the employee to perform in his position.” See Mass.G.L.c31, §43.

The Appellant argues that the WPD regulation only authorizes discipline of an officer for “intentionally or negligently abusing” WPD property and, while Officer White admits to negligence, he does not admit, nor did he “abuse” any property. The Commission finds such an interpretation of the regulation irreconcilable with its plain meaning as well as the reasonable common sense expectation of the WPD’s intent.

The WPD and the Town Administrator are clearly within reason to have read the regulation as a whole, which plainly suggests that the words “intentionally” and “negligently” modify each word that follows, i.e.: “abusing, misusing, damaging or losing Police Property.” The Interim Town Administrator’s decision rested on “misuse”, not “abuse”, if there is any distinction. See Webster’s New World Dictionary (3rd Coll. Ed., 1991) (abuse: to use wrongly; misuse). Surely, negligent operation of a motor vehicle that results in significant damage to two police cruisers is certainly within the scope of “misusing” or “damaging” property. See Webster’s New World Dictionary (3^d Coll. Ed., 1991) (misuse: to use incorrectly and improperly; damage: injury or harm to a person or thing resulting in a loss in soundness or value) Indeed, the fact that a number of WPD officers “consented” to punishment duty for negligently damaging a cruiser attests to the understanding that, whatever one chooses to call it, such mistakes have been accepted historically within the WPD as a legitimate grounds for imposing discipline.²

² The Appellant also argues that the WPD’s interpretation of the regulation means an officer could be disciplined for “negligently” spilling coffee on a report or tripping with a light bulb in her hand and breaking it. The Commission doubts either scenario as calling into question the “fitness” to perform the duties of a police officer that could legitimately trigger any discipline by WPD, but, surely, there is a significant distinction in kind, not just degree, when it comes to negligent operation on the public roads of a costly piece of town-owned property, such as a police cruiser, with which an officer is personally entrusted.

Further, to adopt the Appellant's interpretation of the WPD regulation here would lower the bar for acceptable conduct by police officers beneath what the law demands and the public may properly expect. "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIssac v. Civil Service Comm'n, 38 Mass.App.Ct. 473,475, 648 N.E.2d 1312, 1314 (1995) (negligent off-duty handling of firearm) When it comes to police officers, the law teaches that there is a special "trust reposed in [a police officer] by reason of his employment. [Citations]. Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." Police Comm'r v. Civil Service Comm'n, 22 Mass.App.Ct. 364, 371, 494 N.E.2d 27, 32, rev.den., 398 Mass. 1103, 497 N.E.2d 1096 (1986)

Every city or town is entitled to expect that its police officers, above anyone entrusted with a public vehicle, serve as an example of the model safe driver, defensively alert and vigilant, always expecting the unexpected when driving on the public roads. An officer who falls short of his duty in this regard, surely, must be a proper subject of discipline as a corrective measure.

Finally, the Appellant argues that Officer White's one-day suspension amounts to improper disparate treatment, when other similar offenses have resulted in "desk duty" or

“punishment duty” but never a suspension. As to punishment duty, which cannot be imposed without the officer’s consent, the answer is simply that Chief Joyce offered the same discipline to Officer White but Officer White declined his consent. More generally, having found the facts upon which this discipline has been imposed to be substantially as the Appointing Authority determined them to be, and in the absence of any evidence of political, arbitrary or ulterior influence, the Commission is constrained to uphold the discipline imposed for the same reasons that the Appointing Authority reasonably found it justified. See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

The Commission takes note that Officer White has impressed both his superiors and the Commission as an honest, dedicated and competent police officer, and finds the integrity with which he handled himself in the present matter commendable. His steadfast refusal to succumb to temptation, far too frequently encountered by this Commission, to fudge the truth in his own self-interest, is highly commendable. The Town of Wareham, however, remains entitled to take appropriate corrective action, as it has done in this case, necessary to hold its employees accountable for missteps that directly impact a legitimate public interest, including, but not limited to the Town’s fisc.

Accordingly, for the reasons stated, the appeal of the Appellant, James White, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 8, 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. 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:

Gerard S. McAuliffe, Esq. (for Appellant)

Irving I. Wallace, Esq. (for Appointing Authority)