

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

GRAHAM MAXFIELD,
Appellant

V.

Docket No. D-04-159

TOWN OF CHARLTON,
Respondent

Appellant's Attorney:

Joseph P. Kittredge, Esq.
Law Offices of Timothy Burke
160 Gould Street, Suite 111
Needham, MA 02494

Respondent's Attorney:

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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of M.G. L. c. 31, § 41A, the Appellant requested a hearing before a disinterested hearing officer designated by the chairman of the Civil Service Commission (hereinafter "Commission") in lieu of a hearing before the Appointing Authority.

The 41A hearing was prompted by the issuance of a written notification of an intent to suspend the Appellant at a meeting on June 4, 2003 (the notice of suspension meeting or "the meeting") at which the Charlton Chief of Police, James Pervier, made known that he was contemplating suspending the

Appellant without pay for three (3) days, June 5, 6, and 7, 2003. The Appointing Authority identified the specific reasons for Sergeant Maxfield's suspension as:

“... due to your improper or unsuitable conduct and your unjust or improper orders to Officer Keith R. Cloutier on May 28, 2003 and June 2, 2003 and to Officer Richard M. McGrath on May 28, 2003 regarding Charlton Auxiliary Officers and Charlton Police Explorers not working or engaging in any activity for the next month and in the case of Officer Cloutier, to stop writing citations and making arrests in an effort to send the Town a message re: the union being upset relative to the current status of contract negotiations.”

The Commission held a full hearing on the matter on June 6, 2005 at the offices of the Commission. Three (3) tapes of the hearing were made. As no notice was received from either party, the hearing was declared private. Ten (10) exhibits were entered into evidence. Witnesses, with the exception of the Appellant, were sequestered. The parties filed post-hearing proposed decisions thereafter.

FINDINGS OF FACT:

Based on the documents entered into evidence (Joint Exhibits 1 through 10) and the testimony of Chief of Police James A. Pervier, Lieutenant Carl G. Ekman, Officer Keith R. Cloutier, Detective Richard M. McGrath, Auxiliary Patrolmen Michael C. Adcock, Officer Bernard Ryan, Appellant Graham S. Maxfield and Patrolman Daniel Dowd of the Charlton Police Department, I make the following findings of fact: Findings 1 through, and including, 13 are taken directly from the parties' Stipulation of Facts filed and accepted into evidence at the June 6, 2005 hearing at the Commission's Offices as Exhibit 1.

1. The Appellant, Graham S. Maxfield has been employed as a full-time police officer with the Charlton Police Department since September 20, 1997.
2. The Appellant is covered by the Civil Service Law, M.G. L. c. 31.
3. The Appellant was promoted to his present rank of sergeant as of May 22, 2000.

4. The Appellant's rate of salary at the time of the suspension discussed below was \$974.80 per week.

5. The Appellant's duties as a sergeant include those set forth in the Charlton Police Department's Policies and Procedures.

6. By notice dated and given to Appellant on June 4, 2003 (the notice of suspension) the Charlton Chief of Police James A. Pervier suspended the Appellant without pay for three days, June 5, 6, and 7, 2003.

7. The copy of the document introduced as Exhibit 3 is a true and complete copy of the notice of suspension.

8. The notice of suspension meeting was attended by the Chief, the Appellant and his union attorney, Joseph P. Kittredge, and also by Lieutenant Carl G. Ekman and Patrolman Daniel P. Dowd.

9. At the meeting, the Chief, in addition to the notice of suspension, gave the Appellant the copies of M.G.L. c. 31, §§ 41, 41A, 42, 43, 44 and 45 as required by M.G. L. c. 31, § 41.

10. After having done so, the Chief also advised the Appellant orally that the Chief was suspending the Appellant for three (3) days commencing June 5 and that the Appellant was neither to enter the Charlton Police Department safety complex nor to perform any official duties during the period of suspension.

11. The Appellant's attorney the same day in a letter to the Chairman of the Board of Selectmen, sent by facsimile and first class mail, advised that the Appellant was appealing the suspension and proposed to waive the hearing before the Appointing Authority and to proceed directly with an appeal to the Civil Service Commission.

12. The Board on June 10, 2003 agreed to that suggestion and so notified the Appellant's attorney by letter dated and mailed June 17, 2003.

13. On June 18 the Appellant, by his attorney, appealed to the Commission pursuant to M.G. L. c. 31, § 43 as to the issue of just cause.

14. The reason for the suspension, as stated in the notice of suspension, was as follows:

“ . . . due to your improper or unsuitable conduct and your unjust or improper orders to Officer Keith R. Cloutier on May 28, 2003 and June 2, 2003 and to Officer Richard M. McGrath on May 28, 2003 regarding Charlton Auxiliary Officers and Charlton Police Explorers not working or engaging in any activity for the next month and in the case of Officer Cloutier, to stop writing citations and making arrests in an effort to send the Town a message re: the union being upset relative to the current status of contract negotiations.” (Exhibit 3)

15. During the time of the alleged activities for which Sergeant Maxfield was suspended, he was a member of the bargaining unit for the Charlton Police Union (hereinafter “CPU” or “Union”), which was the successor union after the relevant parties had decertified from the Massachusetts Coalition of Police, AFL-CIO (hereinafter “MASSCOP”). As the bargaining unit representative, Maxfield was involved with discussions with the town which were not, according to several witnesses’ testimony, “going very well.” (Testimony of Dowd, Cloutier, Pervier and Maxfield)

16. Prior to decertification from MASSCOP, Cloutier had been vice president of MASSCOP and had objected to the decertification. Cloutier was not involved in the new bargaining unit discussions of the CPU. (Testimony of Cloutier)

17. On May 28, 2003, in response to Officer Cloutier’s inquiry as to how collective bargaining negotiations were proceeding with the town, Appellant Maxfield met with Officer Cloutier and Officer McGrath in his office and stated to them that he was acting as a union officer and not as a sergeant and stated that the work of the Explorers and the Auxiliaries was undermining the bargaining position of the CPU and asked them to request that the Auxiliaries and Explorers not assist the police for a month’s period of time. (Testimony of Maxfield and McGrath)

18. At that time, Officer Cloutier was the liaison with the Auxiliaries and Officer McGrath was the liaison with the Explorers. The Auxiliaries are not members of the police department, but do from time to time assist the police department with detail work. The Explorers are young adults, many of

whom were Boy Scouts, who help the department but do not provide any “typical” police services that directly relate to public safety. (Testimony of Cloutier and McGrath)

19. Officer Cloutier testified that he did not believe that refusing Appellant’s request was disobeying an official order. Although he stated that he believed that, due to his adverse relationship with Appellant, “something bad” would come from not complying, he did not know what that would be. He stated that he did not speak to the Auxiliaries about Appellant’s request to not take the Bay Path High School graduation detail which was scheduled for that coming weekend although he had talked with Auxiliary Officer Lewandowski about it on 6/3/03. (Testimony of Cloutier)

20. Appellant Maxfield requested Officer McGrath to not have Explorers volunteer for activities that assist the town and stated that the Explorers’ participation “undermines the union’s position by allowing the Town to show an organized police presence without engaging its full time officers.” Officer McGrath, both in his report and in his testimony, stated that Sgt. Maxfield just made a request and that it was not an order. When Officer McGrath explained that the Explorers had already signed up for the Bay Path detail, Sgt. Maxfield said he was fine with that, and there was no disciplinary action taken by Sgt. Maxfield with respect to Officer McGrath’s statement. (Exhibit 5 and Testimony of McGrath)

21. Michael Adcock an Auxiliary officer for Charlton since 2001 testified that he received a call on 6/2/03 by a full time officer at Charlton Police Department (Officer Martocci) who requested him not to accept the detail at the Bay Path Graduation. The Chief of Police subsequently called him to find out why he wasn’t working. Mr. Adcock stated that the Chief ordered him to write a letter or be suspended. He eventually did work the Bay Path detail. (Exhibit 10 and Testimony of Adcock)

22. Bernard Ryan, an auxiliary police officer, testified that Officer Dowd of the Charlton Police Department told him that people were being asked not to work the Bay Path graduation; he did not cancel his participation in the detail. Ryan confirmed that Sergeant Maxfield never approached him or spoke to him about working or not working the Bay Path graduation. (Testimony of Ryan)

23. Lieutenant Carl Ekman, who has been with the Charlton Police Department since 1977 and a lieutenant since 11/2000, testified that he received a call on 6/3/03 from Police Chief Pervier and that the Chief asked for reports from Officers McGrath and Cloutier regarding the discussions which they had with Sergeant Maxfield on May 28, 2003 (in Sgt. Maxfield's office) and June 2, 2003 (in the locker room). During the phone conversation, the Chief said he had also asked for several Auxiliary reports. Accordingly, Lieutenant Ekman requested reports from Officer McGrath and Officer Cloutier as to the substance of the conversations which they had with Sergeant Maxfield. Lt. Ekman did not tell Officer McGrath what Officer Cloutier alleged occurred during the meeting. Lt. Ekman also admitted that he only interviewed Officer Cloutier as to the substance of the meetings despite knowing that Officer McGrath was present throughout the entire two meetings. Lt. Ekman never interviewed Sergeant Maxfield or Officer McGrath nor, to his knowledge, did any one in the department interview the aforementioned individuals. He was told by the Police Chief not to speak to Sgt. Maxfield. (Testimony of Lt. Ekman)

24. Exhibit 6 contains the memo from Lt. Ekman to Chief Pervier and attached to such is the respective reports of Officer McGrath and Officer Cloutier as well as a report from Daniel Dowd to Lt. Ekman and a three-page excerpt from the regulations of the *Charlton Police Department's Professional Conduct and Responsibilities*. The report of Cloutier refers to the request made by Maxfield to limit the volunteer activities of the Auxiliaries. The report of McGrath refers to the request may by Maxfield to limit the volunteer activities of the Explorers. The report of Cloutier states that Maxfield requested him to stop writing so many warrants and making arrests. The report of McGrath contains no such reference to the alleged request for a work slow down even though McGrath was with Cloutier on both occasions when the discussion with Sgt. Maxfield took place. Lt. Ekman testified that he thought Sergeant Maxfield had violated section 2. (d) "Unjust or Improper Orders". Ekman acknowledged that Officer Cloutier never carried out any order of Sgt. Maxfield either with respect to contacting the Auxiliaries or with respect to a work slow-down. Lt. Ekman submitted his report to Chief Pervier at approximately 2:00 p.m on June 4, 2003. (Exhibit 6)

25. Based on the testimony and exhibits, this Commissioner believes that Lt. Ekman, who did not interview either Officer McGrath or Sergeant Maxfield and who acknowledged that Officer Cloutier did not carry out the alleged "orders" of Sergeant Maxfield, did not have sufficient basis to

determine that Sergeant Maxfield had violated the section(s) of the Charlton Police Department's Policies and Procedures with respect to Improper or Unsuitable Conduct.

26. Police Chief Pervier testified that he was promoted to Chief from the position of patrolman on February 2, 1999. Prior to assuming the position of Chief, he did not perform supervisory functions. Pervier asked Ekman to conduct an investigation but did not allow Maxfield to present his side of the story with respect to his conversations with Officers Cloutier and McGrath on May 28, 2003 and June 2, 2003. Chief Pervier acknowledged that he did not talk to Maxfield in advance about the proposed suspension, and that he had already informed the Board of Selectmen through Jill Myers, the Town Administrator, of his decision to suspend Maxfield. This was done on the morning of June 4, 2003, prior to his having received the written report from Lt. Ekman, and prior to his having discussed the matter with Maxfield and prior to his having any reports from the Auxiliaries about any discussion which they may or may not have had with Maxfield. In Ekman's report to the Chief, it is clear that he relied on no letters or reports from Auxiliary officers in making his determination to suspend Maxfield. Chief Pervier testified that he thought Sgt. Maxfield gave improper orders. He acknowledged, however, that there was no requirement for a patrolman to work a voluntary detail. Also, if he thought that public safety would be compromised he could order the officers to undertake the detail duties. (Exhibit 9 and Testimony of Chief Pervier)

27. Officer Daniel Dowd, who has been a patrolman with the Town of Charlton since 9/20/97 and who has been union president from 2001 – 2004 and a member of the bargaining unit at the time of Sgt. Maxfield's suspension, stated that, at the time of the suspension, the bargaining process with the town was not going well. He confirmed that it was his idea, and not Appellant's, that the union decided to take action and to not work the Bay Path graduation and to ask the Auxiliary members to not work the detail. Officer Dowd had a discussion with an Auxiliary officer, Bernard Ryan, and told him that "some guys would be pissed" if the Auxiliaries worked the Bay Path detail. He did not refer to any officer by name and he did not refer to Appellant when he made this remark. Officer Dowd had a discussion with Officer Cloutier on or about June 3, 2003. Dowd clarified that he had never heard that Maxfield ordered Cloutier not to write tickets or to slow down on arrests and that the only thing he had discussed with him was the Bay Path graduation. Officer Dowd said that the Chief asked him to write a letter, which he did, but he did not recall when the letter was submitted to the Chief. He stated

that he found out about the meeting of suspension with the Chief, held on June 4, 2003, only very shortly prior to the meeting. He was not sure whether his letter had been submitted prior to that time. (Testimony of Officer Dowd)

28. Officer Dowd attended the meeting which was held by the Chief at which Maxfield, Ekman, and Attorney Kittredge were present. At no time was Sergeant Maxfield allowed time to speak in his own defense. Dowd also said there was no discussion of the Explorers at the time of the meeting. (Id.)

29. Sergeant Graham Maxfield, who has been employed by the Charlton Police Department since September 1997 and who has held the position of sergeant since 2000, testified that in his capacity as sergeant he is responsible for scheduling, fire arms training and, on occasion, answers patrol calls when necessary; he usually supervises 5 officers per day. He was elected to the union bargaining committee after decertification from MASSCOP. With respect to the conversation which Maxfield had with Officers Cloutier and McGrath on May 28, 2003, Maxfield testified that the conversation was initiated at the request of Cloutier who had asked how negotiations with the Town were proceeding with respect to the union negotiations. Because Cloutier had asked the question in a public place, Maxfield suggested that they go into his office to discuss it. While in his office, Sergeant Maxfield, put his hand over his stripes and told Cloutier and Mc Grath that they were talking as union brothers and, that he was not talking to them in his capacity as a sergeant. At no time was Maxfield alone with Cloutier. In response to Cloutier's questions, Maxfield said that the union had made a decision not to volunteer for extra detail positions because it would undermine the union position. (Testimony of Sgt. Maxfield)

30. In his capacity as sergeant, Maxfield had supervisory authority over Cloutier and, on several occasions, he had to take corrective measures against Cloutier because Cloutier had failed to follow orders that had been issued by the Police Chief. Sergeant Maxfield had also in the past taken corrective action against Officer McGrath, in particular with respect to pistol permits, which he had initially failed to do in response to the Chief's order. McGrath ultimately ended up performing the work that was requested. Sgt. Maxfield testified that he had a professional relationship with both Cloutier and McGrath. At no time did Sergeant Maxfield threaten or intimidate Officer Cloutier or

Officer McGrath. At no time did Sergeant Maxfield tell Cloutier to stop writing warrants and making so many arrests. At no time in the two conversations which are the subject of Maxfield's suspension did Maxfield order McGrath not to have the Explorers attend the graduation ceremony at Bay Path. (Testimony of Sgt. Maxfield and Officer McGrath).

31. Cloutier admitted that he did not get along with Sgt. Maxfield. He admitted his closeness to the Chief, as he often goes into private meetings with the Chief to report on activities of the department. (Testimony of Officer Cloutier)

32. With respect to the suspension meeting on June 4, 2003, Maxfield had no prior notice of the meeting except for one hour before hand. He had asked Lt. Ekman that morning whether he would like a statement from him because he heard rumors the night before, but Ekman responded "no" and said he should go out on patrol. (Testimony of Sgt. Maxfield)

33. The next time he heard about the meeting was one hour before-hand when he was called in from patrol duty and was informed there would be a meeting, at which time he called the union's lawyer, Mr. Kittredge, who was able to attend the meeting that afternoon. (Testimony of Sgt. Maxfield)

34. The testimony of Sergeant Maxfield at this hearing is considered to be very credible and is afforded a great deal of weight by the Commission. He provided thoughtful and straightforward testimony. The testimony of Officer McGrath was also perceived by this Commissioner (especially with respect to the fact that he had never heard of Maxfield's requesting a work slowdown or asking Officer Cloutier to stop writing so many tickets and making so many arrests) as to be very credible.

35. In contrast, the testimony of the town's witnesses was not perceived by this Commissioner to be credible for several reasons. Officer Cloutier's testimony regarding Maxfield's statement to slow-down on arrests and citations is not supported by the testimony of other witnesses, including that of Officer Dowd. Officer Cloutier had a poor relationship with Sergeant Maxfield due to prior disciplinary actions and because of Cloutier's non-involvement in the union's current negotiations. Lt. Ekman's "investigation" was not at all an investigation, but a charade. Also, the testimony of Police

Chief Pervier lacked credibility on several points. Pervier had trouble explaining why or how Maxfield's actions were a violation of the sections of the Police Code attached to Ekman's report. The Chief admitted that regardless of whether officers signed up for the Bay Path graduation there was no safety risk because the Chief had the right to order officers to work that detail. Further, the action taken against Maxfield was done without Pervier providing an opportunity for Maxfield to present his side of the story and without a thorough investigation of the allegations before he took the action to suspend Maxfield. Also, due to the contentious nature of bargaining discussions that were ongoing at the time, there were overtones of a political nature of Pervier's action to suspend, which is the duty of the Civil Service Commission to protect against.

CONCLUSION:

A tenured civil service employee may only be suspended from his or her employment for "just cause:" MGL. c. 31, s. 41, a phrase judicially defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second District Court of E. Middlesex, 389 Mass. 508, 514, 451 N.E. 2d 408 (1983). The role of the Commission is to determine whether the Appointing Authority proved, by preponderance of evidence, just cause for the action taken. M.G. L. c. 31, s. 43; School Committee of Brockton v. Civil Service Commission, 43 Mass App. Ct. 486, 488, 684 N.E. 2d 620 (1997). "In making that analysis, the Commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism and bias in governmental employment decisions ... and to protect efficient public employees from political control. When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304, 682 N.E. 2d 923 (1997).

It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighted by an unprejudiced mind guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct.

of E. Middlesex, 262 Mass. 477, 482 (1928) Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass 214 (1971). A “preponderance of the evidence test requires the Commission to determine whether on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned... were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991).

The Appointing Authority has not proven by a preponderance of the evidence that Sgt. Maxfield violated any provision of the Code of Conduct of the Charlton Police Department such that he should be suspended for three days.

On the contrary, the actions taken by the Charlton Police Department were a calculated attempt to unfairly discipline the Appellant and to take action against him for impermissible reasons based on the Appellant’s union activities. Appellant Maxfield had every right to act as he did as a member of the bargaining unit of the Charlton Police Department. In no way did he undermine the Chief’s authority and in no way did he endanger the public safety of the residents of Charlton.

There is no evidence that an unjust or improper order was given by the Appellant. Officer Cloutier refused to follow the suggestion of the Appellant. By definition, before an order may be considered an unjust or improper order, “it ...shall be carried out...” and later questioned through the chain of command. Officer Cloutier’s inaction in carrying out the Appellant’s request as an order and, the department’s indifference and inaction regarding Officer Cloutier’s failure to comply with the purported order, confirms that it was not, in fact, an order.

In light of the above stated findings of facts and conclusions of law, the Commission determines that, by a preponderance of evidence, there was no just cause for the three (3) day suspension from employment without pay by the Employer. Therefore, the Appellant’s appeal on Docket D - 04 –159 is hereby *allowed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By a 4 – 1 vote of the Civil Service Commission (Taylor, Guerin, Marquis and Bowman,
Commissioners voting yea - Goldblatt, Chairman voting nay) on January 25, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A, s. 14(1) for purpose of tolling the time for appeal.

Pursuant to MGL, c. 31, s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL, c. 30A, s. 14 in the superior court within thirty 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:

Joseph P. Kittredge, Esq.
James F. Cosgrove, Esq.