

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MICHAEL AMERAL and
MICHAEL KIELY,

Appellants

v.

D-03-292 (AMERAL)
D-03-289 (KIELY)

SOMERVILLE POLICE DEPARTMENT,

Respondent

Appellants' Attorney:

Stephen C. Pfaff, Esq.
Merrick, Louison & Costello, LLP
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305
spfaff@merricklc.com

Respondent's Attorney

Peter J. Berry, Esq.
Brian Magner, Esq.
Deutsch Williams Brooks
DeRensis & Holland, P.C.
99 Summer Street
Boston, MA 02110-1213
pberry@dwbboston.com

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, s. 43, the Appellants, Michael Kiely and Michael Ameral, (hereafter, "Kiely", "Ameral" or "Appellants"), are appealing the

decision of the Somerville Police Department (hereafter “City” or “Appointing Authority”) suspending them each for fifteen (15) days for violating various rules of the Somerville Police Department revolving around an incident that occurred on January 18, 2003. Kiely was charged with: a) falsifying records; b) being untruthful; and two charges related to c) not filing a timely and accurate report after using a weapon. Ameral was also charged with: a) falsifying records; and b) being untruthful; in addition to c) leaving an assigned area without permission; and d) neglect of duty. The two cases were consolidated as they relate to the same incident. The appeals regarding these two cases were timely filed. A hearing was held on August 28, 2006 at the offices of the Civil Service Commission. As no written notice was received from either party, the hearing was declared private. Three tapes were made of the hearing.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 & 2; Appointing Authority Exhibits 3-61; and Appellant Exhibits 62-65) and the testimony of:

For the Appointing Authority:

- Somerville Police Captain John O’Connor;

For the Appellant:

- Officer Michael Kiely, Appellant;
- Officer Michael Ameral, Appellant;

I make the following findings of fact:

1. Appellant Michael Kiely was a tenured civil service employee in the position of police officer with the Somerville Police Department on January 18, 2003 and had been employed in that position for eight (8) years. He served as Vice President of the

local police union from 1998 through 2002 and described his relationship with the then-Police Chief as “hostile” as a result of several union-management issues involving budgetary matters. He had no record of discipline prior to January 18, 2003. (Testimony of Appellant Kiely)

2. Appellant Michael Ameral was also a tenured civil service employee in the position of police officer with the Somerville Police Department on January 18, 2003 and had been employed in that position for seventeen (17) years. Ameral had just recently succeeded Kiely as Vice President of the local police union in January 2003 and concurred with Kiely that there was a contentious relationship between the union and management at the time of the incident. Ameral had received a written reprimand one month earlier for being out of his sector without permission. (Testimony of Ameral)
3. Officer Kiely was assigned to a detail duty from 9:00 A.M. to 1:00 P.M. on January 18, 2003 at the East Cambridge Savings Bank on the corner of Highland Avenue and Cedar Street in Somerville, MA. (Testimony of Kiely, Exhibits 1 & 12)
4. Officer Ameral was working a tour of duty in Ward 2 on January 18, 2003 but had been given permission to attend a meeting at City Hall concerning the police department’s budget. At the conclusion of the meeting at City Hall, Ameral, the newly-elected union vice president, drove to the East Cambridge Savings Bank to discuss what happened at the meeting with Kiely, the now-former union vice president, who was on detail duty at the bank. The bank is located in Ward 5,

approximately 3/10 of a mile outside the ward that Ameral was assigned to that day (Ward 2). (Testimony of Ameral, Exhibits 2 & 15)

5. Officer Kiely did not have permission to go outside of Ward 2 at the conclusion of the City Hall meeting. (Exhibit 19)
6. Somerville Police Department General Order 97-7, Section J states, “Officers are not to leave their assigned areas without permission from the Street Supervisor or the Shift Commander.” (Exhibit 56)
7. Exactly how far away Ameral parked his car from the bank that morning when he went to visit Kiely would become an important issue at the Commission hearing in regard to the veracity of the Appellants’ testimony, particularly Ameral’s. The bank is located on the corner of Highland Avenue and Cedar Street and the entrance to the bank faces Highland Avenue. There is no dispute that Ameral, when arriving to see Kiely, parked his car somewhere down on Cedar Street.
8. Captain O’Connor, who testified on behalf of the Appointing Authority at the Commission hearing, measured the distance from the bank’s front entrance on Highland Avenue to the corner of Cedar Street (33 feet) and then measured the nearest location where Ameral’s car could have been parked on Cedar Street (an additional 75 feet). (Testimony of O’Connor and Exhibit 59)
9. Officers Ameral and Kiely conversed in the bank from approximately 11:00 A.M. to 11:38 A.M. Both officers were monitoring their police radios while in the bank. (Testimony of Kiely and Ameral; Exhibits 1, 12 and 19)

10. At approximately 11:35 A.M., the Somerville Police Department received a radio transmission from the Cambridge Police Department indicating that the Cambridge Police were pursuing a gray Honda which was believed to be a stolen vehicle. The Somerville Police dispatch broadcast this information to all units, including Officers Kiely and Ameal, at 11:36:49 A.M. (Exhibit 62)
11. Nine (9) members of the Somerville Police Department (other than the Appellants) were monitoring their police radios at the time and filed written reports with the Somerville Police Department regarding their recollection and/or involvement with the vehicle chase that day. (Exhibits 21-24; 26 & 27; 30, 32 & 33)
12. At least six of the officers who wrote the above-referenced reports explicitly referenced in their reports that they remember hearing on the radio that the stolen vehicle was headed into or toward Union Square in Somerville. While different streets are referenced in the reports as to where the stolen vehicle was at any given time, all of the streets referenced in the reports are in very close proximity to the intersection of Highland Avenue and Cedar Street, the location of the East Cambridge Savings Bank, where both of the Appellants were located. (Exhibits 21-24; 26 & 27; 30, 32 & 33)
13. There is no dispute that at some point, the pursuit of the stolen vehicle was subsequently called off by the Somerville Police Department.
14. Both Officers Ameal and Kiely testified before the Commission that they heard the initial radio transmission regarding the pursuit of the stolen vehicle. (Testimony of Appellants Ameal and Kiely)

15. Key parts of the testimony offered by Officer Amental at the Commission hearing in regard to what happened *after* they initially heard the radio transmission about the pursuit of the stolen vehicle are inconsistent, not plausible and unsupported by the evidence.
16. Officer Amental testified before the Commission that he left the bank before Officer Kiely left and walked back to his car parked down on Cedar Street, based on his purported belief that the stolen car was headed *away* from the bank and Union Square. According to Officer Amental, he was back in his car down on Cedar Street when he heard the sound of gunshots. (Testimony of Amental)
17. Officer Kiely, who heard the exact same radio transmission, testified that he exited the bank ten to fifteen seconds after Amental, ordered pedestrians out of the cross walk, looked easterly on Highland Avenue and heard the sound of an accelerating engine. A car started speeding toward Officer Kiely and he put his hand up in an attempt to get the driver of the vehicle to stop. The speeding car started closing in on Officer Kiely and Kiely fired his gun in an attempt to shoot the driver of the car. Some of the bullets fired hit a building across the street. It was the first time Officer Kiely had discharged his weapon in a non-training environment during his tenure as a police officer. Even though Kiely's testimony comes three years after the incident, it was clear from his emotional testimony that this was a harrowing, life-threatening event that he will never forget and for which he has a vivid, detailed recollection. (Testimony of Kiely)

18. On February 5, 2003, less than 30 days after the incident in question, Officer Kiely was interviewed by Captain O'Connor. During that interview, Officer Kiely stated that, "a couple of seconds" after the shooting, he saw Officer Ameral standing on the sidewalk trying to get his attention. During his testimony before the Commission, Kiely confirmed that he saw Ameral standing there about two seconds after the shooting. (Testimony of Appellant Kiely)
19. Kiely's testimony directly contradicts that of Ameral. Ameral testified before the Commission that he was sitting in his car, parked down on Cedar Street, when he heard the sound of gunshots. Absent some super natural abilities, it is simply not possible that Ameral was able to get out of his car and walk, run or otherwise transport himself back to the scene --75 feet away-- in two seconds. What is more likely, based on the evidence and the testimony of Kiely, is that Ameral never went back to his car at all ---and was actually present for the entire incident, including Kiely's attempt to stop the driver of the stolen vehicle by shooting at him.
20. Ameral's credibility was further undermined by his testimony that, after purportedly making it back to the location in front of the bank where he believed shots may have been fired, he simply asked Officer Kiely, "are you alright, need any help?". Upon seeing Officer Kiely waving him off, Ameral testified that he went back to his car on Cedar Street without asking even one question about the sound of gun shots. In his interview with Captain O'Connor on February 4, 2003, Ameral stated that he thought, "either they shot at him (Kiely) or he shot at them or there was no shot it was just the vehicle striking something." (Testimony of Ameral)

21. Ameral, having fired his weapon in the line of duty for the first time in his career, testified that he was seriously shaken by the incident, was nauseas, and vomited twice at his mother's house shortly after the incident. (Testimony of Ameral and Kiely)
22. Based on a call from Officer Kiely, Lt. Polito of the Somerville Police Department arrived at the scene. Polito's report indicates that upon arriving at the scene, Kiely handed over his gun voluntarily and that Kiely looked, "somewhat disoriented and a bit dazed at what had just happened." (Exhibit 32)
23. While at the scene on the day of the incident on January 18, 2003, Lt. Polito ordered Officer Kiely to "file a station report explaining his actions regarding what had occurred." (Exhibit 32)
24. Captain Matthews of the Somerville Police Department also arrived at the scene of the incident on January 18, 2003, and instructed Kiely "to go home, gather himself, and file a report right away". (Exhibit 49)
25. Lt. Polito spoke again with Officer Kiely the next morning, Sunday, January 19, 2003. According to a statement from Lt. Polito, "I asked him how he was doing and told him I needed his written report regarding what had occurred involving his actions. He (Kiely) informed me that he would be in to file his report this evening". (Exhibit 32)
26. Consistent with standard procedure, Kiely was relieved of duty on the day of the incident, January 18, 2003. He sought medical treatment and was ordered home by his personal physician. January 19, 2003 was Kiely's regular day off and he was scheduled to return to duty at midnight and begin a tour of duty at 12:01 A.M. on

January 21, 2003, but called in sick. He also called in sick on January 22, 2003, but did file his report that day (January 22, 2003). (Testimony of Kiely)

27. Section F, Rule 30 of the Somerville Police Department Rules and Regulations requires all officers to “promptly and accurately complete and submit all reports and forms as required by department procedures.” (Exhibit 55)

28. In his report filed on January 22, 2003, Officer Kiely offered a detailed account of what transpired on January 18, 2003, including references to his detail duty, with one glaring omission: there is not one reference to Officer Ameral being in, near or around the bank that day. Kiely repeatedly uses the pronoun “I” in his written report when describing even the most routine events that morning in which “we” is clearly more accurate, including, “I was standing inside the lobby of the bank”. In fact, it is undisputed that Officer Ameral was standing inside the bank with Officer Kiely. (Exhibit 1)

29. Officer Kiely never mentioned that Officer Ameral was present on January 18, 2003 to any of the numerous officers and superiors who responded to the shooting. (Testimony of Captain O’Connor)

30. During the course of his investigation, Captain O’Connor ordered all personnel who had been on patrol duty during the incident to file reports. On January 25, 2003, three days after Kiely filed his report, Officer Ameral filed a report describing his activities during the time when Officer Kiley fired his weapon on January 18th. Officer Ameral indicated in his report that he had been at or near the scene when Officer Kiley fired the shots. This was the first time that Captain O’Connor became aware that Officer

Ameral had been present with Officer Kiley in the bank during the stolen car chase.
(Exhibit 2, Testimony of Captain O'Connor)

31. In his January 25th report, Ameral stated in part “minutes before 11:30 A.M. I departed the East Cambridge Saving bank.” (emphasis added) It is undisputed, however that the original radio transmission regarding the pursuit of the stolen vehicle did not come in until 11:36:49 A.M. and it is undisputed that Officer Kiely did not exit the bank until after 11:36:49 A.M. Since Kiely testified before the Commission that Ameral only left the bank “10 – 15 seconds” before him, Ameral’s statement can not be true. Further, Exhibit 16 is a picture captured by the bank security camera at 11:38:10 A.M. on January 18, 2003 – and Officer Ameral is standing in the bank lobby with Officer Kiely. (Exhibit 2, Exhibit 16)
32. Section F, Rule 34 of the Somerville Police Department Rules and Regulations requires an officer to “truthfully state the facts in all reports as well as when he appears before any judicial, departmental or other official investigation, hearing, trial or proceeding. He shall cooperate fully in all phases of such investigations, hearing, trial and proceedings” (Exhibit 55)
33. Officer Kiely was charged with: a) falsifying records; b) being untruthful; and two charges related to c) not filing a timely and accurate report after using a weapon and was suspended for fifteen (15) days. (Exhibit 3)
34. Officer Ameral was also charged with: a) falsifying records; and b) being untruthful; in addition to c) leaving an assigned area without permission; and d) neglect of duty. (Exhibit 4)

35. Both Appellants filed a timely appeal with the Civil Service Commission and the appeals were consolidated. (Exhibits 64 & 65)

CONCLUSION

The role of the Civil Service 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 Commission, 43 Mass. App. Ct. 300,304 (1997). *See* Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." *Id.* at 304, quoting 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. 211, 214 (1971). 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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The Appointing Authority's burden of proof is one of a preponderance of the evidence "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 (1956). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an appellant, the Commission shall affirm the action of the appointing authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

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 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." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). *See* Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

In January 2003, the City of Somerville and the police union had a strained relationship as a result of fiscal problems. The relationship between the local police union and the then-Police Chief was acrimonious, including the relationship between the Police Chief and the two Appellants. Officer Kiely, was the outgoing police union vice president and Officer Ameral was the incoming police union vice president.

On January 18, 2003, Officer Ameral, in his role as union vice president, attended a meeting at City Hall in regard to budget issues. Instead of returning to his assigned sector after the meeting, Ameral went outside of his sector (without permission) to speak with Officer Kiely, who was working a detail assignment at the East Cambridge Savings Bank, located on the corner of Highland Avenue and Cedar Street in Somerville.

Approximately one month prior to the incident which occurred on January 18, 2003, Officer Ameral had been disciplined for going outside his sector without permission.

While the Appellants were conversing inside the East Cambridge Savings Bank on the morning of January 18, 2003, a radio transmission was issued indicating that the Cambridge Police were pursuing a stolen vehicle into Somerville toward Union Square. All streets referenced in the radio transmission were in close proximity to the East Cambridge Savings Bank.

Officer Ameral asks the Commission to believe that, in response to these radio transmissions, he left the East Cambridge Savings Bank and walked back to his car parked over seventy (70) feet down Cedar Street. According to Ameral, once he was back in his car, he heard a sound which he assumed was gunshots. He then purportedly went back to the corner of Highland Avenue and Cedar Street. Officer Ameral then testified incredulously before the Commission that he simply asked Kiely if he was alright and, upon being waived off by Kiely, walked back to his car and drove away – never once asking Kiely about the gunshots, if Kiely himself had been shot at or whether Kiely had fired shots. On its face, this testimony is absurdly incredulous. Further, other evidence presented and the testimony of Officer Kiely confirms that Ameral is simply not telling the truth. In a report filed one week after the incident, Ameral stated that he left the bank minutes before 11:30 A.M. – which would have meant he left well before hearing the radio transmission. Pictures captured by the bank's security video, submitted as evidence by the Appointing Authority, put both Kiely and Ameral in the bank at least until 11:38:10 A.M., offering irrefutable evidence that Ameral is not telling the truth about what time he walked out of the bank that morning. Further, even Officer Kiely

testified before the Commission that he saw Officer Ameral standing on the sidewalk outside the bank two seconds after he stepped into the road and fired his gun at the speeding vehicle. In order for Ameral's version of events to be remotely true, he (Ameral) would need to have gotten out of his car and walked or run 70 feet up Cedar Street toward Highland Avenue in two seconds.

Cognizant that his fellow officer (Ameral) had been disciplined by management approximately one month earlier for leaving his sector without permission, Officer Kiely waited three days to fill out a report regarding the incident, and once he did, failed to mention even once that Officer Ameral was present that morning at the bank, outside of his assigned sector.

An Appointing Authority is well within its rights to take disciplinary action when a police officer has "a demonstrated willingness to fudge the truth in exigent circumstances" because "[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or might embarrass a fellow officer." See Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2004); citing City of Cambridge, *supra* at 303.

By a preponderance of the evidence, the Appointing Authority has shown that Officer Kiely sought to conceal the fact that Officer Ameral was at the bank, out of his sector, when the incident in question occurred on January 18, 2003 by failing to indicate that Officer Ameral was present in the written report he submitted to the Somerville Police Department. In doing so, he was not truthful and he violated the rules and regulations regarding truthfulness and filing accurate reports. While there is a strong suspicion that

Kiely deliberately waited four days to file his report in order to coordinate his response with Ameral, which would support the charge related to Kiely not filing a timely report, the Appointing Authority did not prove this. Further, Kiely was clearly shaken by the shooting that day, appropriately sought medical attention and was out sick for two days after the incident, all mitigating factors in determining whether or not the report was filed in a timely manner. The underpinning of this case, however, is not whether or not the report in question was filed in a timely manner. Rather, the underlying question is whether or not the report was accurate, complete and truthful. It was not. As such, the 15-day suspension should not be disturbed solely because the Appointing Authority failed to show that Kiely's report was untimely.

The most troubling aspect of this case, however, is the untruthfulness of Michael Ameral. The irrefutable evidence, and even the testimony of Kiely, show that Ameral's version of events regarding the morning of September 18, 2003 is simply not true. By a preponderance of the evidence, the Appointing Authority has shown that Kiely was untruthful, falsified records, and was out of his sector without permission that day.

For all of the above-reasons, the Appellants' appeals under docket numbers D-03-289 and D-03-292 are hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis, Taylor, Commissioners) on October 26, 2006.

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 M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Stephen C. Pfaff, Esq.
Peter J. Berry, Esq.
Brian Magner, Esq.