

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STACEY HIGHTOWER,
Appellant

v.

D-08-219

BOSTON POLICE DEPARTMENT,
Respondent

Appellant's Attorney:

John J. Hightower, Esq.
Alex G. Henlin, Esq.
Robbins, Kaplan, Miller & Ciresi, LLP
800 Boylston Street: 25th Floor
Boston, MA 02199

Respondent's Attorney:

Nicole I. Taub, Esq.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Stacey Hightower (hereinafter "Hightower" or "Appellant"), is appealing the decision of the Boston Police Department (hereinafter "BPD" or "Appointing Authority") to suspend her for one (1) day for an incident that occurred on May 19, 2008 and involved alleged violations of BPD Rules 102 §4 (Judgment) and §9 (Respectful Treatment). The appeal was timely filed with the Civil Service Commission (hereinafter "Commission") on September 5, 2008. A full hearing was held on February 6, 2009 at the offices of the Commission. As no written notice was received from either party, the

hearing was declared private. Three (3) audiocassettes were made of the hearing. All witnesses were sequestered. Both parties submitted post-hearing briefs in the form of proposed decisions.

FINDINGS OF FACT:

Based upon the eight (8) documents entered into evidence by the Appointing Authority, the twenty-two (22) documents entered into evidence by the Appellant and the testimony of the following witnesses:

For the Appointing Authority:

- Lakenya Webster, police officer, Boston Police Department;
- Frank Holbrook, citizen complainant;
- Maureen Saint Guillen, friend of automobile passenger of citizen complainant;
- Captain Paul Russell, Boston Police Department;
- Sergeant Joseph Gallarelli, Boston Police Department;

For the Appellant:

- Stacey Hightower, Appellant;

I make the following findings of facts:

1. The Appellant was employed by the BPD as a police officer from June 1998 to July 2008. (during the time prior to her resignation) The Appellant was last assigned to Area B-2, which includes the Roxbury section of the City of Boston. (Testimony of the Appellant and Captain Russell).
2. The genesis of the Appellant's 1-day suspension was a citizen complaint filed by Frank Holbrook (hereinafter "Mr. Holbrook"), a motorist who was traveling on Tremont Street in Boston on May 19, 2008. Both Mr. Holbrook and his female passenger that day, Maureen Saint Guillen (hereinafter "Ms. Saint Guillen") testified before the Commission.
3. Both Mr. Holbrook and Ms. Saint Guillen were good witnesses with high credibility. They are both senior citizens and struck me as being honest to a fault. Their testimony

was consistent with one another on key facts and both of them were careful not to overreach, answering only those questions for which they had a solid memory, regardless of whether the answer would portray the Appellant in a positive or negative light. I fully credit their testimony. (Testimony, demeanor of Mr. Holbrook and Ms. Saint Guillen)

4. Unfortunately, I did not find the Appellant to be a credible witness. Her testimony before the Commission, particularly regarding the sequence of events that occurred on the day in question, directly contradicted the credible testimony of Mr. Holbrook and Ms. Saint Guillen. Even when viewed independently, I find that the Appellant's testimony was less than what is expected of a witness testifying under oath before the Commission. I do not credit her testimony regarding the event on May 19, 2008. (Testimony, demeanor of Appellant)
5. I also do not credit the testimony of police officer Lakenya Webster. Officer Webster's testimony before the Commission was markedly different than the initial report she submitted to the BPD shortly after the incident. Unfortunately, her testimony before the Commission appeared to be geared toward portraying the Appellant in the best light, as opposed to providing an accurate recollection of the events. (Testimony, demeanor of Officer Webster)
6. On May 19, 2008, at approximately 4:00 P.M., Mr. Holbrook was traveling on Tremont Street, towards Brigham Circle, to his home in the Mission Hill section of the City of Boston. Mr. Holbrook was driving a 2002 Nissan Pathfinder with Ms. Saint Guillen in the passenger seat. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
7. While stopped at a red light at the intersection of Tremont Street and St. Alphonsus Street, approximately four (4) or five (5) car lengths back from the traffic light, Mr.

Holbrook noticed a female approaching his vehicle in the rear view mirror. Mr.

Holbrook did not observe the female exit a vehicle and believed she was crossing the street. (Testimony of Mr. Holbrook and Ms. Saint Guillen).

8. As the female approached the vehicle, Mr. Holbrook could see that she was wearing a Red Sox jersey, but was unable to see the clothing on the bottom half of her body. (Testimony of Mr. Holbrook).
9. The female, later identified as the Appellant, approached the driver's side of the vehicle and started banging on the closed window. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
10. At the time of the motor vehicle stop, the Appellant was on her way to a detail in Mission Hill that was not part of her regularly scheduled tour of duty. (Testimony of the Appellant).
11. Mr. Holbrook rolled down the window and, without identifying herself as a Boston police officer, the Appellant repeatedly demanded his license. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
12. The Appellant repeatedly stated, "give me your license and registration.". (Testimony of Ms. Saint Guillen).
13. Mr. Holbrook asked the Appellant why he was being pulled over and, in response, the Appellant threatened to arrest him if he did not turn over his license. Additionally, the Appellant stated that when Mr. Holbrook told her who he was, she would tell him what he did. The Appellant ultimately told Mr. Holbrook that he was being pulled over because she had to step on her brakes to avoid hitting his car. (Testimony of Mr. Holbrook and Ms. Saint Guillen).

14. Mr. Holbrook did not know what the Appellant was referring to, but provided her with his driver's license. (Testimony of Mr. Holbrook).
15. While handing over his driver's license, Mr. Holbrook and Ms. Saint Guillen observed a marked Boston Police cruiser parked on the other side of the street and facing the opposite direction. The driver of the cruiser, later identified as Police Officer Lakenya Webster, observed the motor vehicle stop and asked the Appellant if she needed assistance. The Appellant asked Officer Webster to stand by with her and give her a citation book while she completed the stop. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
16. Mr. Holbrook drove his vehicle from Tremont to St. Alphonsus Street and the Appellant parked her personal vehicle behind him. Then Officer Webster positioned her cruiser near the Appellant's vehicle and activated the lights. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
17. Officer Webster remained in the cruiser and the Appellant entered the cruiser with Mr. Holbrook's driver's license. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
18. After filling out a citation, Officer Webster left her vehicle for the first time and followed the Appellant to Mr. Holbrook's vehicle. The Appellant approached the driver's side window and Officer Webster approached the driver's side window. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
19. While Officer Webster was standing at the passenger side window, Ms. Saint Guillen asked, "Officer, why are we being pulled over?" In response, Officer Webster stated, "Ma'am, I did not pull you over the officer that pulled you over can answer that question

for you.” Ms. Saint Guillen did not have any further conversations with Officer Webster.
(Testimony of Ms. Saint Guillen).

20. The Appellant returned Mr. Holbrook’s driver’s license and issued him a citation for “failure to yield” at Parker and Tremont Street. The location of the alleged violation was approximately a quarter mile from the location of the motor vehicle stop and Mr. Holbrook did not know what specific conduct resulted in the citation. (Testimony of Mr. Holbrook).
21. After receiving the citation, Mr. Holbrook requested the Appellant’s name and badge number. When Mr. Holbrook asked her to repeat her badge number because she stated it too quickly, the Appellant responded with a negative and condescending attitude and asked, “Do you need me to spell Hightower?” (Testimony of Mr. Holbrook).
22. This was the first time the Appellant identified herself by name and Mr. Holbrook was able to see that she was wearing a Boston police officer uniform under the Red Sox jersey. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
23. After leaving the motor vehicle stop, Mr. Holbrook and Ms. Saint Guillen decided to file a complaint with the BPD because they believed the Appellant’s conduct during the motor vehicle stop to be an abuse of power, disrespectful, and inappropriate. Ms. Saint Guillen even described the Appellant’s behavior, which included banging on the window and yelling at Mr. Holbrook, as scary and frightening. (Testimony of Mr. Holbrook and Ms. Saint Guillen).
24. In her testimony before the Commission, the Appellant stated that she approached Mr. Holbrook’s vehicle because she and Mr. Holbrook were merging from a double lane into

a single lane when Mr. Holbrook “sped his vehicle up and almost hit my vehicle.”

(Testimony of Appellant)

25. Mr. Holbrook contacted the Department’s Internal Affairs Division (hereinafter referred to as “IAD”) and spoke to Sergeant Detective Robin DeMarco (hereinafter referred to as “Sgt. Det. DeMarco”). Sgt. Det. DeMarco contacted Captain Paul J. Russell (hereinafter referred to as “Captain Russell”), the commander of Area B-2, and notified him of Mr. Holbrook’s complaint. Captain Russell contacted Mr. Holbrook and notified him of the investigation. (Testimony of Captain Russell).
26. Captain Russell earned the rank of Captain in December 2001 and has been assigned to Area B-2 since August 2006. As the Captain, Captain Russell is the overall commander for the largest district in the City of Boston and is responsible for supervising approximately one hundred and sixty (160) employees, including sworn and civilian personnel. (Testimony of Captain Russell).
27. As the Appellant’s Commander, Captain Russell assigned the matter to Sergeant Joseph Gallarelli (hereinafter referred to as “Sergeant Gallarelli”) and instructed him to conduct an investigation. At the time of the complaint, Sergeant Gallarelli was a squad supervisor in Area B-2. (Testimony of Captain Russell).
28. Sergeant Gallarelli has been employed by the Department for almost twenty (20) years and earned the rank of Sergeant in June 2007. As a Sergeant in Area B-2, Sergeant Gallarelli is responsible for responding to incidents in the district as necessary. Since January 1, 2009, Sergeant Gallarelli works during the Last Half tour of duty, from 11:45 pm to 7:30 am. (Testimony of Sergeant Gallarelli).

29. On or about June 30, 2008, Sergeant Gallarelli contacted Mr. Holbrook to discuss the nature of his complaint against the Appellant. During a phone conversation, which lasted approximately thirty (30) minutes, Sergeant Gallarelli ascertained the necessary details relative to the Appellant's conduct. Mr. Holbrook described the motor vehicle stop conducted by the Appellant, including the Appellant's attire and demeanor during the stop. (Testimony of Sergeant Gallarelli and Department Exhibit 4).
30. In addition to speaking to Mr. Holbrook, Sergeant Gallarelli asked the Appellant and Officer Webster to submit a "Form 26" detailing the motor vehicle stop conducted by the Appellant. A review of the two (2) documents evidenced inconsistencies between the Appellant's account of the incident and Mr. Holbrook's account. Specifically, the Appellant alleged that Officer Webster arrived almost immediately and the two officers approached the car together; however, Mr. Holbrook stated that Officer Webster arrived after the motor vehicle stop was initiated by the Appellant. Officer Webster's account of the stop in her Form 26 also notes that, when she arrived on scene, the Appellant had already initiated the stop and communicated with Mr. Holbrook. (Testimony of Sergeant Gallarelli and Department Exhibit 4, 5, and 6).
31. After speaking with Mr. Holbrook and reviewing all of the relevant documentation, Sergeant Gallarelli determined that "it is more believable than not that this incident occurred as Mr. Holbrook describes it." Sergeant Gallarelli recommended that the complaint be sustained and that discipline be administered to the Appellant at the District level if possible. (Testimony of Sergeant Gallarelli and Department Exhibit 4).
32. Sergeant Gallarelli completed a report detailing his investigation and submitted it to Captain Russell for review. (Department Exhibit 4).

33. Captain Russell reviewed the report submitted by Sergeant Gallarelli, as well as the reports submitted by Officer Webster and the Appellant. Captain Russell agreed with Sergeant Gallarelli's recommendation and determined that the Appellant violated Rule 102 §4 (Judgment) and §9 (Respectful Treatment) of the Rules and Procedures of the Boston Police Department. (Testimony of Captain Russell and Department Exhibit 2).
34. Rule 102 §4 of the Department's Rules and Procedures prohibits "any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees or which constitutes use of unreasonable judgment in the exercising of any discretion granted to an employee." (Department Exhibit 1).
35. Captain Russell sustained a violation of Rule 102 §4 as a result of the Appellant's decision to initiate and conduct a motor vehicle stop while off duty and in her personal vehicle for a minor traffic offense. (Testimony of Captain Russell and Department Exhibit 2).
36. Rule 102 §9 of the Department's Rules and Procedures requires that "employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate any person(s) due to their race, color, creed or sexual orientation except when necessary in police reports or in testimony." (Department Exhibit 1).
37. Captain Russell sustained a violation of Rule 102 §9 as a result of the Appellant's disrespectful demeanor and conduct during the motor vehicle stop of Mr. Holbrook. (Testimony of Captain Russell and Department Exhibit 2).

38. Captain Russell provided the Appellant with a Notice of Suspension, a copy of M.G.L. c. 31 ss. 41-45, and discussed the underlying conduct with the Appellant. The Appellant refused to accept the one (1) day suspension and requested a hearing. (Department Exhibit 2 and 3).
39. After issuing the suspension to the Appellant, Captain Russell forwarded a copy of the documentation to IAD for review. IAD did not conduct a separate investigation and instead reviewed the documentation provided and signed off on the charges, as is the normal practice with Captain issued suspensions. (Testimony of Captain Russell).
40. After reviewing the investigation into the Appellant's conduct, IAD notified the Appellant, Captain Russell, and other Department personnel of the final disposition. This disposition is based solely on IAD's review of the documentation and does not constitute a separate charge or investigation. (Testimony of Captain Russell and Department Exhibit 7).
41. The Appellant served the one (1) day suspension on July 2, 2008. (Department Exhibit 2).
42. The Appellant voluntarily resigned from the Department to accept another job opportunity, effective August 15, 2008, prior to the scheduling of the hearing to appeal the one (1) day suspension. (Testimony of the Appellant and Appellant Exhibit 17).

CONCLUSION

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of

law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Mun. Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

The Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew.” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 rev.den., 426 Mass. 1102 (1997). See also Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, rev.den., 440 Mass.

1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

“The commission’s task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’”, which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, 453 (1983) and cases cited.

In the instant appeal, for all of the reasons cited in my findings, I base my conclusion primarily on the credible testimony of citizen complainant Frank Holbrook and his vehicle passenger, Maureen Saint Guillen. 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).

Mr. Holbrook and Ms. Saint Guillen are residents of the City of Boston and, up until May 19, 2008, they had no personal knowledge of the Appellant. While travelling home on March 19,

2008, Mr. Holbrook and Ms. Saint Guillen had their first interaction with the Appellant in the form of an unreasonable and disrespectful motor vehicle stop conducted while the Appellant was off duty, in her personal vehicle, and wearing a Red Sox jersey over her Department uniform. Mr. Holbrook and Ms. Saint Guillen filed a complaint with the Department as concerned citizens that wanted to ensure other people were not treated with the same disrespect by members of the Department.

Shortly after the incident, Sergeant Gallarelli a telephone interview with Mr. Holbrook. During the interview, Mr. Holbrook described the motor vehicle stop. He said that while stopped at the traffic light at St. Alphonsus Street and Tremont Street, a person came to the driver side of his vehicle and began banging on the window and yelling at him to give her his license and registration. The Appellant was wearing a Red Sox jersey over a blue shirt. Mr. Holbrook asked the Appellant why he was being stopped and, in response, the Appellant threatened to place him under arrest if he did not comply with her demand. At no point during the verbal exchange did the Appellant identify herself as a police officer. Mr. Holbrook was unable to identify her as a Department employee until much later because of her attire.

While the Appellant was demanding Mr. Holbrook's driver's license, a marked Department cruiser drove by in the opposite direction. The officer, later identified as Officer Webster, asked the Appellant if she needed assistance, and subsequently drove her vehicle to the location of the motor vehicle stop and remained in the cruiser. The Appellant instructed Mr. Holbrook to move his vehicle to the side of the road and, after moving her personal vehicle, the Appellant entered the Department cruiser with Mr. Holbrook's driver's license. After running Mr. Holbrook's vehicle plate number and filling out the motor vehicle citation, the Appellant and Officer Webster exited the cruiser and approached Mr. Holbrook's vehicle.

Officer Webster approached the passenger side of the vehicle and stood by Ms. Saint Guillen. Ms. Saint Guillen spoke to Officer Webster and asked why they were stopped; however, Officer Webster was unable to provide any information because the stop was conducted by the Appellant and she could provide the information. In the meantime, the Appellant approached the driver side of the vehicle and handed Mr. Holbrook a citation. After receiving the citation from the Appellant, Mr. Holbrook asked for her name and badge number. The Appellant provided the information; however, when Mr. Holbrook asked her to repeat the badge number because she stated it too quickly, the Appellant responded with a negative attitude and asked, “Do you need me to spell Hightower?”

Put simply, the Appellant, while driving her personal vehicle on May 19, 2008, was annoyed that another motorist did not allow her to merge from a double lane into a single lane before him. As a result, she overreacted and exercised poor judgment by getting out of her car, confronting the motorist, treating him in a discourteous manner and, at one point, even threatening to arrest him. This was a violation of the rules cited by the Boston Police Department and an abuse of her authority as a police officer.

Having determined that it was appropriate to discipline the Appellant, the Commission must determine if the City was justified in the level of discipline imposed, which, in this case, was a one-day suspension.

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. Even if there are past instances where

other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. See Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

"The 'power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.' "

Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996). Unless the Commission's findings of fact differ significantly from those reported by the appointing authority or interpret the relevant law in a substantially different way, the commission is not free to "substitute its judgment" for that of the appointing authority, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation" E.g., Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006).

I have found no reasons that would warrant a modification of the penalty imposed in the instant appeal.

For all of the above reasons, the Appellant's appeal under Docket No. D-08-219 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [Taylor – Absent]) on May 14, 2009.
A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:

John J. Hightower, Esq. (for Appellant)

Alex G. Henlin, Esq. (for Appellant)

Nicole E. Taub, Esq. (for Appointing Authority)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STACEY HIGHTOWER,
Appellant

vi.

D-08-219

BOSTON POLICE DEPARTMENT,
Respondent

DECISION ON APPELLANT'S MOTION FOR SUMMARY DECISION

During the pendency of this appeal, the Appellant filed a Motion for Summary Decision in which she asks the Commission to expunge an "Absence and Termination Form" from her BPD personnel record which states that she resigned while disciplinary charges were pending against her.

The Appellant alleges that there were no charges pending against her at the time of her resignation and, pursuant to G.L. c. 149, § 52C, asks the Commission to expunge the record from her personnel file. As part of this appeal, while reserving judgment on whether the Commission had jurisdiction over this matter, I heard witness testimony, including testimony from the Appellant, on this issue and accepted sworn affidavits from Robin Hunt, Director of Human Resources for the BPD and Kenneth Fong, Chief of the Bureau of Professional Standards and Development.¹

Based on the testimony of the Appellant and sworn affidavits of Ms. Hunt and Mr. Fong, I conclude that the issue of pending charges is unrelated to the instant appeal. Rather, it relates to a BPD Internal Affairs Investigation in 2005. While the Appellant testified before the

Commission that she was only a witness in that matter, she then testified about a settlement offer presented by BPD at the time to resolve the charges against her for a written reprimand, which it appears the Appellant rejected.

Even if the issue of pending charges did relate to the instant appeal regarding the 2008 incident with a motorist and even if there were no charges pending against the Appellant at the time of her resignation, the Commission does not have jurisdiction to order an Appointing Authority to expunge a record from an employee's personnel record.

The Commission's statutory authority is extremely narrow relative to the subject matter of cases it may preside over. Pursuant to G.L. c. 31, § 42, any person who alleges that an appointing authority has failed to follow the requirements of G.L. c. 31, § 41, in taking action which has affected his/her employment or compensation, may file a complaint with the Commission. G.L. c. 31, § 42. However, the statute further limits the Commission's authority to actions involving discharge, removal or suspension. G.L. c. 31, § 41. Nothing within the statute can be deemed to extend the Commission's authority beyond the specifically stated employer actions, and as such, it does not extend to personnel record disputes. (See Hamm v. Boston Police Department, 21 MCSR 630, 633 (2008) (While the Commission is subject to public records law, it is not charged with enforcement of statutes and is not in a position to make a definitive ruling of the applicability of the statute in any particular case)).

In support of her position, the Appellant relies heavily upon G.L. c. 149, § 52C for the Commission's alleged statutory authority to preside over and remedy employee concerns relative to personnel record issues; however, this reliance is misplaced. On the contrary, the statute provides a remedy "through the collective bargaining agreement, other personnel procedures or judicial process." G.L. c. 149, § 52C. The statute's reference to an employee's collective

¹ The Appellant's motion to strike the affidavits of Ms. Hunt and Mr. Fong is denied.

bargaining agreement (hereinafter “Agreement”) is clearly only meant to include the course of action allowed to address alleged disputes concerning the interpretation, application or enforcement of that agreement through the grievance process. Article VI, Section 1 et seq. As stated in the Agreement upon which the Appellant relies, the following grievance procedure is in place: (1) a grievance shall first be submitted in writing to the Police Commissioner; (2) if it cannot be resolved, the Agreement requires that the grievance shall next be submitted in writing to the City’s Grievance Committee; (3) if the grievance remains unresolved, the Union, and only the Union, may submit the grievance to expedited arbitration. Article VI, Section 2. The Agreement does not confer jurisdiction upon the Commission relative to grievances and, as a result, this provision of the statute cannot be properly relied upon by the Appellant.

The remaining remedies afforded by the statute are also unrelated to the Commission and in no way afford the Commission jurisdiction over personnel record disputes. Although the Appellant cites to numerous sources of statutory text, case law, and various pieces of correspondence, none of the sources referenced contain any language to support her position that the Commission has the necessary jurisdiction relative to personnel record disputes. Unlike the Courts, which have powers derived from a variety of sources, including the Constitution, the Rules of Federal Procedure, and state statutes, the Legislature did not explicitly give the Commission power over personnel record disputes. The controlling statute, G.L. c. 142, § 52C, does specifically mention the Commission, but only with regard to retaining records during pending litigation. Specifically, the statute requires that, in any cause of action brought by an employee against an employer of twenty (20) or more employees, “in any administrative or judicial proceeding, including but not limited to, the...Massachusetts Civil Service Commission, attorney general, or a court of appropriate jurisdiction, such employer shall retain any personnel

record required to be kept under this section which is relevant to such action until the final disposition thereof.” G.L. c. 149, § 52C. The Legislature specifically mentioned the Commission in this paragraph and obviously intended this provision of the statute to apply; however, the Legislature’s failure to specifically name the Commission as having jurisdiction indicates that such jurisdiction is limited to those specifically listed in the statute. The statute does not grant any specific authority to the Commission to hear disputes of this nature, but simply places a requirement upon employers to retain and safeguard employees’ records during the course of an action taken by an employee.

For all of the above reasons, the Appellant’s Motion for Summary Decision is hereby *denied*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [Taylor – Absent] on May 14, 2009.

A true record. Attest:

Commissioner

Notice to:
John J. Hightower, Esq. (for Appellant)
Alex G. Henlin, Esq. (for Appellant)
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