

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK,ss.

RAYMOND LAKE,
Appellant

v.

D-07-203

TOWN OF DARTMOUTH,
Respondent

Appellant's Attorney:

William M. Straus, Esquire
15 Hamilton Street
New Bedford, MA 02740

Respondent's Attorney:

Anthony C. Savastano, Esquire
404 County Street
New Bedford, MA 02740

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Raymond Lake (hereafter "Appellant"), filed an appeal with the Civil Service Commission (hereafter "Commission") on May 31, 2007, claiming that the Respondent, Town of Dartmouth (hereafter "Town") as Appointing Authority, did not have just cause to demote him from Sergeant to Patrolman on the Dartmouth Police Department (hereafter "Department") for a period of 90 days and to reduce his compensation accordingly for his failure to report for duty on April 28, 2007. The appeal was timely filed. A full hearing was held on November 20, 2007 at the

offices of the Commission. As no written notice was received from either party, the hearing was declared private. Two (2) audiotapes were made of the hearing. Following the hearing, Proposed Decisions were to be submitted by the parties no later than December 20, 2007. Only the Respondent submitted a Proposed Decision in this matter.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibit 1 and Appointing Authority's Exhibits 1 - 14) and the testimony of Dartmouth Police Chief Mark Pacheco ("Chief Pacheco"), Captain Scott T. Brooks ("Cpt. Brooks"), Lieutenant Gary Soares ("Lt. Soares") and the Appellant, none of whom were sequestered, I make the following findings of fact:

1. The Appellant, Raymond Lake, was a tenured civil service employee of the Town of Dartmouth in the position of Sergeant. He had been employed by the Town for approximately 22.5 years at the time of the demotion. (Testimony of Appellant)
2. Mark Pacheco was appointed as Chief of Police in the Town of Dartmouth in or about May, 2004. He decided that as he started his administration, he would commence a progressive disciplinary policy starting over with all employees. (Testimony of Chief Pacheco)
3. Cpt. Brooks spent several hours reviewing and organizing the Appellant's personnel file. As a result, he compiled a list of the Appellant's disciplinary incidents both before and after Chief Pacheco began his tenure. (Testimony of Cpt. Brooks; A.A. Exhibit 6)

4. The Appellant's discipline prior to Chief Pacheco's tenure includes the following:

- 10/11/94 A written warning was issued to the Appellant for tardiness.
- 01/14/00 An oral reprimand was issued to the Appellant for three unexcused incidents of tardiness within a six month period.
- 06/02/01 A disciplinary letter of reprimand was issued to the Appellant for failure to report for duty.
- 09/26/01 A disciplinary letter of reprimand was issued to the Appellant for failure to report for duty.
- 08/19/02 A written reprimand was issued to Appellant for failure to report for duty; the Town's decision included a warning to Appellant that further absences without leave would not be tolerated.

(Testimony of Cpt. Brooks; A.A. Exhibit 6)

5. In his review of the Appellant's personnel file, Cpt. Brooks determined that there were additional disciplinary issues beyond those he listed in A.A. Exhibit 6 (and listed in #4 above) under prior administrations. However, he did not include those additional issues because they were either not properly documented, unclear, or not signed by the Appellant. (A.A. Exhibit #1; A.A. Exhibit #13; Testimony of Cpt. Brooks).

6. After the Commencement of Chief Pacheco's tenure, the Appellant was further disciplined under the "start over" progressive disciplinary policy as follows:

- 12/30/04 The Appellant was tardy and was ordered to submit a memo detailing his infraction and was counseled.
- 03/26/05 The Appellant was tardy and was ordered to submit a memo detailing his infraction and was counseled.

- 09/11/05 The Appellant was tardy and was ordered to submit a memo detailing his infraction and was counseled.
- 11/11/05 The Appellant was tardy on 11/11/05 and was ordered to submit a memo detailing his infraction and was counseled.
- 02/02/06 The Appellant failed to report for duty on 01/17/06 and arrived approximately one hour late after being contacted. The Appellant received a permanent letter of reprimand in his personnel file.
- 05/04/06 The Appellant failed to report for duty on 03/24/06 and on 03/31/06 and was replaced at overtime; the Appellant received a one-day suspension.
- 02/21/07 The Appellant failed to report for duty on 01/25/07 and was replaced at overtime; the Appellant received a two-day suspension.
- 04/27/07 - The Appellant failed to report for duty on 04/12/07 and was replaced at overtime but subsequently reported for duty one hour late; the Appellant received a three-day suspension. (The disciplinary action letter was written on 04/27/07 but signed by Appellant on 05/01/07).

(A.A. Exhibit #6; A.A. Exhibits 8 through 12; Testimony of Cpt. Brooks)

7. In addition to the above-listed documented incidents of tardiness and failure to report to duty, the Appellant was often tardy or failed to report, causing the commanding officers on the prior shift to work late and cover for the Appellant. Prior to their respective promotions, Cpt. Brooks and Lt. Soares, as Sergeants, were often victims of the Appellant's repetitive tardiness (Testimony of Cpt. Brooks and Lt. Soares).

8. On April 19, 2007 a meeting took place between Chief Pacheco, Captain McGuire, Captain Brooks, the Appellant and the Appellant's attorney concerning the Appellant's disciplinary record and his failure to report for duty in a timely fashion on April 12, 2007. (Exhibits #5, 6, 7; Testimony of Chief Pacheco and Cpt. Brooks)

9. At the April 19, 2007 meeting, the Appellant was warned that further violations would lead to more severe disciplinary action. (A.A. Exhibits #7, 14; Testimony of Chief Pacheco and Cpt. Brooks)
10. The Appellant ultimately received a three-day suspension as a result of his failure to report for duty in a timely fashion on April 12, 2007. (Exhibit #1, Testimony of Cpt. Brooks and Chief Pacheco)
11. On April 24, 2007, the Appellant and Lt. Soares spoke at a Firearm Qualification at the firing range. At that time, the Appellant stated to Lt. Soares that he wanted to give Lt. Soares a “heads-up” in case Lt. Soares wanted overtime. The Appellant stated that he was considering taking the night off on April 28, 2007 but would let Lt. Soares know. (Testimony of Lt. Soares and Appellant)
12. All Dartmouth Police Officers are required to document their requests for time off in a book referred to as the “Green Book.” (Testimony of Lt. Soares, Cpt. Brooks, Cpt. McGuire, and Chief Pacheco)
13. The Appellant was aware of his obligation to document his requested time off in the “Green Book.” (Exhibit # 4; Testimony of Appellant)
14. The Appellant never documented his request for time off on April 28, 2007 in the “Green Book.” (Testimony of Lt. Soares and Appellant; Exhibits #2, 4)
15. The Appellant admitted that the discussion with Lt. Soares at the range did not fulfill his obligation to document a request for time off and that during the

discussion at the range, the Appellant was tentative about his intent to take time off. (Testimony of Appellant)

16. The Appellant was scheduled to report for duty at 11:45 P.M. on April 27, 2007 for his shift beginning at 12:00 A.M. on April 28, 2007. (Testimony of Lt. Soares and Appellant; Exhibit #4)

17. Lt. Soares was scheduled to be relieved by the Appellant at 11:45 P.M. on April 27, 2007. (Testimony of Lt. Soares and Appellant; A.A. Exhibits #3, 4, 5)

18. The Appellant failed to report for duty at 11:45 P.M. on April 27, 2007. (Testimony of Lt. Soares and Appellant; Exhibits #3, 4, 5)

19. Lt. Soares attempted to contact the Appellant shortly after midnight on April 28, 2007 but was unable to reach him. (Testimony of Lt. Soares; A.A. Exhibits #2, 3, 4)

20. Lt. Soares eventually assigned another officer to work overtime to fill the Appellant's shift on April 28, 2007 which cost the Town additional money. (Testimony of Lt. Soares; Cpt. Brooks, and Chief Pacheco; A.A. Exhibits #2, 3)

21. At approximately 5:45 A.M. on April 28, 2007, the Appellant realized that he had neglected to document his requested time off in the "Green Book" and called into the Police Department. (Testimony of Appellant; A.A. Exhibit #5)

22. Lt. Soares reported the incident to Cpt. Brooks in an email on April 28, 2007. I found Lt. Soares to be a credible witness with a professional demeanor who answered questions with clarity, confidence and good recollection. (Testimony of Lt. Soares and Cpt. Brooks, A.A. Exhibit #2, 3)

23. Cpt. Brooks investigated the incident and, on May 4, 2007, prepared a written report detailing his investigation and recommending that the Appellant be demoted to Patrolman for a period of ninety (90) days. (Testimony of Cpt. Brooks and Chief Pacheco, A.A. Exhibit #7)

24. On May 9, 2007 Chief Pacheco prepared a written report detailing the incident and his recommendation that the Appellant be demoted to Patrolman for a period of ninety (90) days. (Testimony of Chief Pacheco, A.A. Exhibit #14)

25. Chief Pacheco's report was forwarded to the Dartmouth Select Board for consideration. (Testimony of Chief Pacheco)

26. Chief Pacheco credibly testified at the Commission hearing that he felt a five-day suspension would be in keeping with the progression of the Appellant's previous discipline but that he did not want the Appellant to be "inconvenienced financially" nor adversely impacted in terms of discipline. The Chief stated that he would place the Appellant on the 4 P.M. to 12 Midnight shift so that the 3% salary differential for working that shift would mitigate the financial impact of the demotion to Patrolman. (Id.)

27. The Chief also testified that he has known the Appellant for well over 30 years since High School and that the Appellant is a good police officer. I find that the Chief was attempting to be compassionate to the Appellant in light of the Appellant's personal issues that contributed to his attendance problems. Nonetheless, the Chief was seeking to make clear to the Appellant that he (the Appellant) was inconveniencing the rest of the Department and adversely affecting the public service. (Id.)

28. A hearing was held by the Dartmouth Select Board on May 21, 2007 with respect to the disciplinary action recommended by Chief Pacheco. (Id.)

29. The Appellant was given proper notice of the Select Board hearing in accordance with G.L. c. 31, § 41. (Id.)

30. After hearing, the Select Board voted to demote the Appellant from Sergeant to Patrolman for a period of 90 days, and to reduce his compensation during that period by 15 percent. (Testimony of Chief Pacheco, Joint Exhibit #1)

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 which is established “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).

It is well established that 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 the 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.” *See Meaney v. City of Woburn*, 18 MCSR 129, 133 (2005); citing *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass. App. Ct. 364, 371 (1986)

The disciplinary action taken by the Town here was no doubt severe. However, given the Appellant’s history of repeatedly failing to report for duty at the scheduled time, the significant adverse effect that these failures have on the efficiency of the public service in Dartmouth and the ineffectiveness of numerous prior disciplinary actions in resolving this issue, the Commission finds that the disciplinary action was justified.

During the hearing on this appeal the testimony of the witnesses presented on behalf of the Town was largely uncontested. The Appellant does not dispute his history of failing to report for duty in a timely manner, nor does he dispute the fact that he failed to report for duty for his April 28, 2007 shift and had neglected to document his time off request in the “green book” in accordance with Dartmouth Police procedure.

There is not even a dispute concerning the conversation which took place between the Appellant and Lt. Soares at Firearm Qualifications on April 24, 2007. The Appellant admitted that Lt. Soares was correct when he testified that the Appellant had merely informed him of the “possibility” that the Appellant would be taking time off on April 28, 2007 and that this did not fulfill the Appellant’s obligation to list the time off in the Green Book. Lt. Soares was credible in his testimony that, during the discussion between the Appellant and Lt. Soares on April 24, 2007, the Appellant indicated that he was considering taking time off on April 28th, but did not indicate to Lt. Soares that it was definite.

Further, the Appellant does not dispute that he still had the obligation to document his time off request in the “green book” in accordance with departmental policy. In fact, the Appellant stated that he realized his neglect of this obligation on the morning of April 28th and, “having concerns” about said neglect, called into the Police Department.

The Appellant was rightly concerned about his failure to document his time off request. As a result of the Appellant’s failure to report for duty on April 28th, the administration of the department was significantly impacted. Lt. Soares was compelled to call another officer to fill the Appellant’s shift, and the Town was required to pay overtime wages to that other officer. In addition, a substantial amount of departmental resources were expended on attempts to locate the Appellant and to fill his shift, rather than upon public service.

Had this been an isolated occurrence, the disciplinary action taken by the Town would have likely been too severe. However, the Appellant's chronic failures to report for duty in a timely manner, despite consistent discipline by the Town, and the resulting significant impact on the Police Department's efficient administration and operations, lead the Commission to conclude that the April 28th incident constituted substantial misconduct by the Appellant which adversely affected the public interest. Thus, we find that there was reasonable justification for the 90-day demotion and corresponding decrease in pay imposed by the Town.

For all of the above reasons, the Appellant's Appeal under Docket Number D-07-203 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Chairman Bowman, Guerin, Henderson, Marquis, and Taylor, Commissioners) on February 14, 2008.

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:

William M. Straus, Esq.

Anthony C. Savastano, Esq.