

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MICHAEL MULCAHY,
Appellant
v.

D-17-059

CITY OF SOMERVILLE,
Respondent

Appearance for Appellant:

Douglas I. Louison, Esq.
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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

The City has not shown, by a preponderance of the evidence, that Lt. Mulcahy engaged in the alleged misconduct that formed the basis of his five (5)-day suspension, which is overturned. Specifically, the City, in the hearing before the Commission, failed to call any percipient witnesses regarding the underlying events and instead asked the Commission to effectively adopt the credibility assessments of an outside investigator who interviewed these witnesses, which, for the reasons stated in the decision, I have chosen not to do.

DECISION

On March 23, 2017, the Appellant, Michael Mulcahy (Lt. Mulcahy), pursuant to the provisions of G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Respondent, the City of Somerville (City) to suspend him for five (5) days from his position as Police Lieutenant in the City's Police Department. On May 2, 2017, a pre-hearing was held at the offices of the Commission and a full hearing was held in the same location on July 10, 2017.¹ As no written notice was received from either party, the hearing was declared private. All witnesses, with the exception of Lt. Mulcahy, were sequestered. A CD was made of the hearing.² The Commission received proposed decisions from the parties on August 9, 2017 (Appellant) and August 18, 2017 (Respondent).

FINDINGS OF FACT:

On the day of the hearing, I entered twelve (12) Exhibits (1-12) from the City into evidence and left the record open for the City to respond to my request to submit the recorded interviews of each City employee interviewed as part of the investigation into this matter. I received those recordings from the City on August 1, 2017 and entered them as Exhibit 13.

Based upon these exhibits, stipulated facts, and the testimony of:

Called by the City:

- Timothy Mitsakis, Police Lt. assigned to the Office of Professional Standards;
- Alfred P. Donovan, APD Management, Inc.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

²Subsequent to the hearing, the City had the recording transcribed and a copy of the transcript was provided to counsel for Mr. Wolski and the Commission. That transcript is deemed to be the official record of the proceedings.

- David R. Fallon, Somerville Police Chief;

Called by Lt. Mulcahy:

- Lt. Michael Mulcahy, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. Lt. Mulcahy has been employed by the City's Police Department for over thirty (30) years. (Testimony of Lt. Mulcahy)
2. Lt. Mulcahy is currently a Police Lieutenant. Since 2015, he has served as the Administrative Lieutenant, Division Commander of the Patrol Division. He serves as a shift commander responsible for overall patrol operations, including the 911 dispatch operation. (Testimony of Lt. Mulcahy and Chief Fallon)
3. On November 11, 2015, a Police Captain who serves as a District Commander penned a letter to Lt. Mulcahy stating that the Department had received a complaint regarding ongoing harassment by Lt. Mulcahy against a male police sergeant. While the letter specifically states that "this is not a disciplinary action", the Captain issued the following orders to Lt. Mulcahy:
 - a) Treat all members of the Police Department with dignity and respect;
 - b) Refrain from speaking negatively about the police sergeant while acting in your official capacity;
 - c) Direct any complaints regarding the police sergeant to the Deputy Police Chief;
 - d) Discontinue driving by the home of the police sergeant's girlfriend, who lives in the same town as Lt. Mulcahy. (Exhibit 7)

4. On November 7, 2016, two (2) complaints were filed against Lt. Mulcahy via email; one complaint was filed by a female civilian dispatcher (female dispatcher) and the other was filed by her brother who is the police sergeant (police sergeant) referenced in the Police Captain's above-referenced November 15th letter to Lt. Mulcahy.

(Exhibit 1)

5. Lt. Mulcahy's father at one point served as the President of the Somerville Housing Authority's Clarendon Hills apartment complex. The (now deceased) father of the female dispatcher and police sergeant worked at the apartment complex as well and the two (2) families knew each other. (Exhibit 13)
6. In her November 7th complaint, the female dispatcher wrote in part that Lt. Mulcahy, while on duty in the dispatch room on November 3, 2016, was engaging in political conversations throughout the day (the 2016 General Election occurred five (5) days later on November 8th) and:

“around 1pm, he was sitting in the 911 room. At this time he stated to me ‘your Dad used to drive dead people to the polls all the time to vote’. I responded ‘excuse me’. He said ‘they did it all the time.’ I said ‘do not slander my father, that’s where I draw the line’. He replied ‘I had nothing but respect for your father, you and the rest of your family are another story.’” (Exhibit 1)

7. That same day (November 7th), the police sergeant, who is the brother of the female dispatcher, filed his own complaint via email against Lt. Mulcahy writing in part that he had been victimized [by Lt. Mulcahy] “for well over a year by several physical and verbal attacks against myself, my family and my girlfriend as well as her children.” (Exhibit 1)
8. The police sergeant's written complaint stated in part that: “... Lt. Mulcahy had several tasteless, unprofessional and slanderous statements to make about my

deceased father and my family in genera (sic) on Thursday, November 3, 2016 ...”

(Exhibit 1)

9. The police sergeant’s written complaint contained specific allegations against Lt. Mulcahy including that:
 - a) Over the past Memorial Day weekend, Lt. Mulcahy told other officers that he (the sergeant) had called the FBI on another supervisor who was on a suspension, which the police sergeant labeled “not true and slanderous against me”;
 - b) On November 3rd (the same day as the alleged incident with his sister), Lt. Mulchay “became obsessed with my schedule and my taking a detail. He spent several hours asking other supervisors what they thought of my actions.” (Exhibit 1)
10. The two (2) complaints were investigated by: a) Lt. Timothy Mitsakis, the Lieutenant assigned to the Office of Professional Standards; and b) a former municipal Police Chief and owner of APD Management, Inc., Alfred Donovan, who was contracted by the City’s Police Department to assist Lt. Mitsakis with the investigation. (Testimony of Lt. Mitsakis, Mr. Donovan and Chief Fallon)
11. Lt. Mitsakis and Mr. Donovan jointly interviewed the following witnesses:
 - a) The female dispatcher who filed a complaint against Lt. Mulcahy;
 - b) The police sergeant who is the brother of the female dispatcher and who also filed a complaint against Lt. Mulcahy;
 - c) Two (2) other dispatchers (one male; one female) who were on duty on November 3rd;

- d) A Police Lieutenant who was on duty on November 3rd when Lt. Mulcahy allegedly made comments about the police sergeant working a detail.
- e) Another police sergeant who was on duty when Lt. Mulcahy allegedly made comments about the police sergeant working a detail and was on duty when Lt. Mulcahy allegedly stated that the police sergeant was behind the discipline imposed on a police officer. (Exhibit 13)
- f) Lt. Mulcahy.

12. By letter dated December 9, 2016, Lt. Mitsakis attached an “investigative report” completed by Al Donovan and summarized the findings in a cover letter. The cover letter, which is somewhat difficult to follow, stated that the investigation had “sustained” various allegations against Lt. Mulcahy, effectively concluding that the following events did occur:

- a) On November 3, 2016, Lt. Mulcahy made derogatory and slanderous comments about members of the female dispatcher’s family.
- b) Over Labor Day weekend [2016], Lt. Mulcahy implied to other supervisors that the police sergeant had indicated that the “Feds” were looking into another Somerville Police Officer who was out on suspension at the time and that the police sergeant was behind the suspension.
- c) On November 3, 2016, Lt. Mulcahy was “going off” about the fact that the police sergeant had swapped a shift to work a detail.
- d) Lt. Mulcahy violated the directives in the November 11, 2015 letter from the Police Captain. (Exhibit 5)

13. On December 13, 2016, the Police Chief issued a letter to Lt. Mulcahy notifying him of a five (5)-day suspension for the above-referenced actions which the Police Chief concluded violated Department Rules and Regulations, Policies and Procedures related to: Conducting Unbecoming an Officer; Discourtesy; Insubordination; Sexual Harassment and Other Forms of Harassment. (Exhibit 10)
14. On February 15, 2017, a hearing officer appointed by the City's Mayor (who serves as the Appointing Authority), conducted a hearing to hear Lt. Mulcahy's appeal of his five (5)-day suspension. (Exhibit 12)
15. The local hearing officer did not hear from any of the percipient witnesses, but, rather, heard only from Lt. Mitsakis, Mr. Donovan and the Police Chief. There is no reference in the hearing officer's decision that he reviewed the recorded interviews of the percipient witnesses. (Exhibit 12)
16. Based largely on the credibility assessments made by Mr. Donovan regarding the percipient witnesses, the hearing officer recommended that the charges against Lt. Mulcahy be upheld and that the five (5)-day suspension stand. (Exhibit 12)
17. On March 21, 2017, the City's Mayor accepted the hearing officer's report and upheld the five (5)-day suspension. (Exhibit 12)
18. On March 23, 2017, Lt. Mulcahy filed the instant appeal with the Commission.
(Stipulated Fact)
19. At the full hearing before the Commission on July 10, 2017, the City did not call any of the percipient witnesses to the alleged events, including the female dispatcher or the police sergeant.

20. The City indicated that these witnesses were not being called to testify before the Commission as the Police Chief based his decision on the report of Al Donovan without hearing from the percipient witnesses.

21. I kept the record open for the City to produce the recorded interviews of the percipient witnesses. I have received and reviewed those recordings.

Legal Standard

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. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (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 (1956).

Under section 43, 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. However, "[t]he 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, Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

By virtue of the powers conferred by their office, police officers are held to a high standard of conduct. "Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question, their ability and fitness to perform their official responsibilities." Police Commissioner of Boston v. Civil Service Commission, 22 Mass.App.Ct. 364, 371 (1986).

Analysis

The outcome of this appeal depends heavily on the credibility of the percipient witnesses regarding the alleged underlying events. The City inexplicably failed to call any percipient witnesses to testify before the Commission. Rather, the City called Mr. Donovan and Lt. Mitsakis and effectively asked me, as part of the de novo proceedings before the Commission, to accept their credibility assessments of the percipient witnesses in order to uphold the discipline imposed on Lt. Mulcahy.

This case is strikingly similar to Daly v. Department of Revenue, 7 MCSR 92 (1994). In that case, DOR did not call any percipient witnesses before the Commission. Rather, DOR put forth the testimony of an internal investigator who interviewed various employees and, based on those interviews, concluded that Ms. Daly's attitude, conduct and demeanor during an audit was unprofessional. DOR also submitted the written statements of the complaining employees. The [DALA] Magistrate who heard the case on behalf of the Commission wrote in part:

“Many of the indicia of reliability were obviously absent from this hearsay evidence. I could not observe the demeanor of the employees. Their statements were not given under oath. It was clear that certain of the employees had no direct knowledge of Ms. Daly's conduct but were basing their statements on what others in the company had told them. Ms. Daly's attorney could not cross-examine the employees.” Id.

I face the same problems here, even after reviewing the recorded statements of the Department employees, which were only provided by the City upon my request at the close of the hearing. For example, the police sergeant's statement *to Mr. Donovan and Lt. Mitsakis* was based almost entirely on hearsay. Specifically, the police sergeant: a) *heard from his sister* about the allegedly disparaging comments about his deceased father; b) *heard from another police sergeant* that Lt. Mulcahy was allegedly making

comments about him working a detail after requesting a shift swap; and c) *heard from that same sergeant* that Lt. Mulcahy was making allegations that the sergeant was behind the discipline of a police officer. A complete review of the record shows the perils associated with relying on this type of hearsay evidence as there appears to be evolving accounts of what Lt. Mulcahy actually said about the disciplinary matter facing another police officer. Even the police sergeant, during his statement to Mr. Donovan and Lt. Mitsakis, appears to retract his allegation that Lt. Mulcahy accused him of “calling the Feds” as the police sergeant initially alleged in his email.

Further, the police sergeant explicitly stated in his email that he had been victimized [by Lt. Mulcahy] “for well over a year by several physical and verbal attacks against myself, my family and my girlfriend as well as her children.” During his statement to Mr. Donovan and Lt. Mulcahy, he casually retracted any allegation related to physical attacks or any attacks against his girlfriend or her children by Lt. Mulcahy. Had the police sergeant been called as a witness by the City, that troubling about-face likely would have been the subject of strenuous cross-examination by counsel for Lt. Mulcahy – as well as my own questions.

Further, the employee statements provided to Lt. Mitsakis and Mr. Donovan were, in some cases, inconsistent. For example, the male dispatcher present in the dispatch room on November 2nd effectively recalls (in his recorded statement) a spirited back-and-forth political conversation between Lt. Mulcahy and the female dispatcher regarding the respective (opposite) candidates they were supporting in the then-upcoming Presidential Election. That same dispatcher remembers Lt. Mulcahy stating that the female dispatcher’s father drove “old people” to the polls when he worked at the Clarendon

Hills apartment complex with Lt. Mulcahy's father. While that male dispatcher remembers the female dispatcher stating that Lt. Mulcahy shouldn't bring her father into the conversation, he does not recall her being particularly upset, nor does he recall Lt. Mulcahy saying that he doesn't have any respect for her or her brother. Obviously, parts of that statement directly conflict with the statement made by the female dispatcher, only reinforcing the need for me to make in-person credibility assessments of both witnesses before making a finding regarding what did – or did not- happen that day.

I had other problems with the employee statements. Instead of asking open-ended questions (i.e. –“ walk me through what you remember being said”), the employees were asked highly leading questions, including the employee being read an alleged statement and then being asked words to the effect, “do you remember that being said?”. Absent a pronouncement that the witnesses had exhausted his/her memory, that is not the type of examination that would be permitted as part of a de novo hearing before the Commission, further undercutting the reliability of those statements.

For all of the above reasons, I have not relied on the prior recorded statements of these employees who did not testify before the Commission.

That turns to the testimony of Lt. Mulcahy, who, in addition to testifying before the Commission, provided a statement to Lt. Mitsakis and Mr. Donovan as part of the City's investigation. Not surprisingly, his account of events differs, sometimes significantly, from that of the City employees who made statements during the investigation, including the statements of the female dispatcher and the police sergeant.

In regard to the political conversation shortly before the election, Lt. Mulcahy remembers a spirited, and not uncommon, debate in the dispatch room which the female

dispatcher, according to Lt. Mulcahy, was an active participant, calling his preferred candidate a “criminal”. Lt. Mulcahy testified that he responded by telling the female dispatcher that both of their fathers “drove dead people to the polls” referring to their days working at Clarendon Hills. Further, Lt. Mulcahy denies saying that he didn’t respect her family, but, rather, testified that he told the female dispatcher that he had the “utmost respect” for her family “unlike the disdain your family had for my father.”

It is (very) possible that, had I heard from other percipient witnesses, I may not credit this testimony by Lt. Mulcahy. However, standing on its own, Lt. Mulcahy offers a plausible account of an ill-advised politically-tinged back and forth in the workplace in which both parties raised the ire of each other.

Similarly, standing alone, Lt. Mulcahy’s testimony provided a sufficiently plausible rebuttal regarding the other alleged statements made by him which the City considered to be a violation of various policies and rules. For example, he denied ever saying that the police sergeant “called the Feds” regarding another officer and that his inquiry about working a detail after swapping a shift were not meant to disparage the police sergeant.

For all of the above reasons, the City has failed to show, by a preponderance of the evidence, that Lt. Mulcahy engaged in the alleged misconduct and/or violated the Department rules cited by the City.

This conclusion is based on the evidence (or lack thereof) in the record before me. It would be a mistake for Lt. Mulcahy to view the decision here in any other context. Rather, he would be well-advised to understand that the Commission, when presented with sufficient evidence, has not hesitated to uphold discipline, up to and including termination, for police officers who harass their subordinates and co-workers. (See Keyes

v. City of Pittsfield, 21 MCSR 33 (2008) (Commission upheld termination of police officer who engaged in harassment of other female police officers, all of whom were called to testify before the Commission).

Conclusion

Lt. Mulcahy's appeal under D-17-059 is hereby **allowed**. He shall be restored to his position for these five (5) days without any loss of pay or benefits.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 29, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:
Douglas Louison, Esq. (for Appellant)
Shannon Phillips, Esq. (for Respondent)