

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

RAYMOND O'BERG,
Appellant
v.

D-07-166

CITY OF TAUNTON,
Respondent

Appellant's Attorney:

Austin M. Joyce, Esq.
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397 Grove Street
Worcester, MA 01605

Respondent's Attorney:

Peter J. Berry, Esq.
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Commissioner:

John E. Taylor

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Raymond O'Berg (hereafter "O'Berg" or "Appellant"), timely appealed the decision of the City of Taunton (hereafter "the City" or "the Appointing Authority") to suspend him without pay for five (5) days for coercing a citizen into signing a civilian complaint against two Patrolmen. A hearing was held on January 30, 2008 and April 10, 2008 at the offices of the Commission. As no written notice

was received from either party, the hearing was declared private. The witnesses were sequestered. Four (4) audiotapes were made of the hearing.

FINDINGS OF FACT:

Based on the twenty (20) exhibits entered into evidence by the Appellant and the Appointing Authority, including an affidavit from Officer Joseph Marques in lieu of his live testimony (by stipulation of the parties) and the testimony of Teresa M. Boyd, Sgt. Robert Bianchi, Officer Eric Moura, Officer James McGovern, Officer Shawn Smith, and Chief Raymond O'Berg:

I make the following findings of fact:

1. Appellant commenced employment with the Department in 1982 as a Patrol Officer. He was promoted to Sergeant in 1986, to Lieutenant in 1992 and to Chief of Police in 2000. (Testimony of Appellant)
2. On November 2, 2006, Teresa Boyd, a resident of Taunton, went to the Department at approximately 6:30 PM. She went to the window of the station and asked to speak with an officer. (Testimony of Boyd)
3. Ms. Boyd testified that she went to the station after receiving a phone call from her daughter's ex-boyfriend¹, asking her to have her daughter drop a restraining order (209A) she had taken out on him. (Testimony of Boyd)
4. While at the station, Ms. Boyd saw Officer Eric Moura, whom she knew as a neighbor and who was on duty. Officer Moura was standing behind the window

¹ The parties agreed that they would not name Ms. Boyd's daughter or ex-boyfriend and simply refer to them as "daughter" and "daughter's ex-boyfriend."

and asked Ms. Boyd what was wrong. She informed Officer Moura that her daughter's ex-boyfriend had called her and told her to call her daughter, who did not live with her, and tell her to drop a restraining order. (Testimony of Boyd)

5. Officer Moura spent approximately twenty minutes speaking with Ms. Boyd. He asked her whether she could get her daughter to come to the station that night so that he could obtain a written affidavit about the incident from her and take out charges against the ex-boyfriend for violating 209A. (Ex. 4 and testimony of Moura and Boyd)
6. Officer Moura consulted with Sgt. Bianchi, the patrol supervisor on duty the evening of November 2, 2006 in order to determine what Ms. Boyd's options were and to make sure his own actions in responding to Ms. Boyd were appropriate. After speaking with Sergeant Bianchi, Officer Moura told Ms. Boyd that her daughter needed to come down to the station herself to take action against the ex-boyfriend with respect to the restraining order. (Testimony of Boyd, Moura, and Bianchi)
7. Ms. Boyd spoke with her daughter by telephone that night and stated that her daughter would come into the station the following day to fill out a complaint. (Testimony of Boyd and Moura)
8. The following day, November 3, 2006, Ms. Boyd returned to the police station with her daughter to speak with the domestic violence officer. When she saw the Appellant, she reminded him how they were acquainted, and informed him that she had been at the station the night before. Appellant asked her who she had seen and she responded that she had spoken with Officer Moura. Ms. Boyd also informed

Appellant that she was afraid that the officers would not do anything because her daughter's ex-boyfriend owned a gym in Taunton to which numerous Taunton officers belonged, including Officer Moura. (Testimony of Appellant and Boyd)

9. Appellant checked the police blotter but did not see any incident involving Ms. Boyd listed from the previous night. The Appellant stated that he found the missing log entry unusual because G.L. c. 41, §98F requires that all complaints of crimes, arrests and other specified matters be entered into the log. Appellant testified that he thought Mrs. Boyd's problem was significant enough to require a log entry because she was reporting a crime: a violation of an abuse prevention order. (Testimony of Appellant)
10. Appellant went to his office to get a citizen's complaint form. After Ms. Boyd informed Appellant which officers she had seen the previous night, he asked her to fill in her name and address on the citizen complaint form and he said he would take care of filling in the rest of the document. (Testimony of Appellant)
11. Ms. Boyd testified that she signed and dated the citizen complaint form, but at Civil Service hearing she did not recognize the handwriting for "personnel complained about" nor did she recognize the writing for "date, time and place." (Testimony of Boyd)
12. Ms. Boyd testified that she informed Appellant she did not want to sign the complaint form, but he insisted, telling her he could not do anything unless she signed it. (Testimony of Boyd)
13. Ms. Boyd was a credible witness who answered question in a straight-forward manner.

14. Prior to Ms. Boyd leaving the police station on November 3, 2006, Officer Shawn Smith spoke with Ms. Boyd's daughter and confirmed that there was a restraining order against the daughter's ex-boyfriend and that the ex-boyfriend had been served with that restraining order. Smith initiated a complaint against the ex-boyfriend for violating the restraining order. (Testimony of Smith)
15. Officer Smith testified that he overheard Ms. Boyd tell Appellant that she hoped "Eric" would not get in trouble. (Testimony of Smith)
16. Appellant filled in the information on the citizen complaint form about the personnel complained about, and the date, time and nature of the complaint after Ms. Boyd left the station. He filled in the names of Moura, McGovern, and Bianchi. Sgt. Bianchi's name was later removed as he was in a different bargaining unit. Appellant wrote the date, time and nature of the complaint as "11/2/06, 6:30 pm, TPD, Failure to take action on 209A violation, Failure to document on blotter." He signed the complaint and dated it November 2, 2006. (Ex. 2 and testimony of Appellant)
17. After November 3, 2006, the Appellant called Ms. Boyd and told her that there was a meeting scheduled for Wednesday at 10:00 AM because of the complaint she filed against police officers. Ms. Boyd told Appellant that she did not want to be involved in a complaint against an officer. Ms. Boyd told the Appellant that she never filed a complaint against any police officers. (Testimony of Boyd)
18. On November 6, 2006, Officer Joseph Marques, a Domestic Violence Officer, was instructed by the Appellant to visit Ms. Boyd at her home to advise her on her options regarding protecting herself from her daughter's ex-boyfriend. Ms. Boyd

informed Officer Marques that she was unaware when she signed the form that she was filing a complaint against Officer Moura and thought that she was filing a criminal complaint against her daughter's ex-boyfriend. Boyd stated that she did not intend to file a complaint against Officer Moura. (Marques Affidavit)

19. After her visits to the police station, Officer Moura visited Ms. Boyd at her house.

Ms. Boyd told Officer Moura that she did not think anyone did anything wrong.

(Testimony of Boyd)

20. On November 3, 2006, Appellant e-mailed Officers Moura, Bianchi and McGovern to submit reports on what each knew about Boyd and her daughter requesting action on a 209A violation on November 3, 2006 and why no blotter item was entered.

(Exhibit 3)

21. Officer Moura's report indicates that he spoke with Boyd and advised her to have her daughter come to the police station so he could obtain a written affidavit on the incident. (AA Ex. 4)

22. Sgt. Bianchi did not believe Officer Moura did anything wrong in his interaction with Ms. Boyd and did not believe Officer Moura violated the domestic violence policy. (Ex. 6 and testimony of Bianchi)

23. Officer James McGovern is a patrolman who was on duty as a dispatcher on November 2, 2006. He was seated in the designated area, behind the commanding officer and had no involvement or information about the incident with Ms. Boyd. Officer McGovern was upset that he was ordered by the Appellant to write a report about an incident that he knew nothing about. After he wrote a response to the Appellant's order, Appellant spoke to him while he was working a detail on

November 7, 2006 and told him he had been cleared. (Ex. 5 and testimony of McGovern)

24. On November 7, 2006, Appellant spoke with Ms. Boyd and asked her how she wanted to proceed. She told him that she did not want to proceed with the complaint. Appellant then closed the matter. (Testimony of Appellant)
25. Sgt. Bianchi and Officers Moura, McGovern, and Smith testified credibly.
26. The Taunton Municipal Council conducted a hearing and on April 25, 2007 and informed the Appellant it had voted to suspend him without pay for a period of five days. The Municipal Council found that there was just cause to suspend the Appellant pursuant to M.G.L. c. 31, § 41 for his actions on November 2, 2006, when he coerced a citizen into signing a civilian complaint against Patrolman Moura and Patrolman McGovern in spite of the fact that the citizen said she did not wish to file a complaint against any officer. These actions by the Appellant exhibited poor judgment, constituted improper and intemperate personal conduct, and led to the submission of an inaccurate citizen complaint. The Municipal Council found that the Appellant's actions reflected discredit upon himself and the Taunton Police Department. (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).

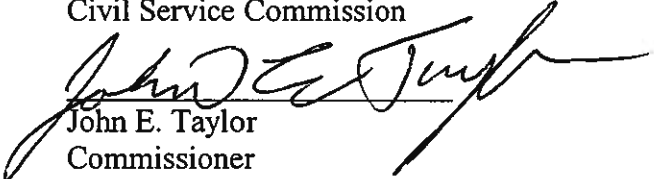
The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when 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).

The Appointing Authority has established through a preponderance of the evidence that it had reasonable justification for suspending the Appellant for five days. Documentary evidence and credible testimony demonstrated that Ms. Boyd's intention in going to the police station on November 3, 2006 was to protect her daughter and see that action was taken against the daughter's ex-boyfriend and that Appellant talked her into signing a citizen complaint against Patrolman Moura and Patrolman McGovern in spite of the fact that Ms. Boyd stated she did not wish to file a complaint against any officers. Specifically, evidence indicated that Appellant insisted Ms. Boyd sign a blank form, without information filled in indicating the personnel complained about or the date, time and nature of the complaint and subsequently wrote in the names of the Patrolmen and the date, time and nature of the complaint. Ms. Boyd repeatedly testified that she did not mean to file a complaint against any officers and stated she did not understand that she was signing a complaint against Officer Moura or another officer. Further, she told Officer Marques that she never meant to file a complaint against Officer Moura. Although Appellant may have had reason to be concerned that his officers had not reacted

appropriately to a reported violation of a court imposed abuse prevention order, for the purposes of Appellant's suspension, it is irrelevant whether the officers who spoke with Ms. Boyd did anything wrong. That is a separate issue. The issue for the Commission is whether the Appointing Authority had reasonable justification for suspending the Appellant for five days because of his conduct in talking a citizen into signing a complaint that she did not wish to sign. Based on the above, the decision of the Appointing Authority was justified.

For all of the above reasons, the appeal under Docket D-07-166 is hereby *dismissed*.

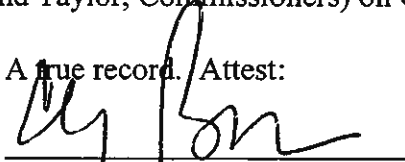
Civil Service Commission



John E. Taylor
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor, Commissioners) on October 30, 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:
Austin M. Joyce, Esq.
Peter J. Berry, Esq.