# COMMONWEALTH OF MASSACHUSETTS
# CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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| JOVAN J. LACET,<br><br>Appellant<br><br>v.<br><br>BOSTON POLICE DEPARTMENT,<br>Respondent | D-05-4 |
| Appellant's Attorney: | Joseph G. Sandulli, Esq.<br>Sandulli Grace, PC<br>One State Street, Suite 200<br>Boston, MA 02109 |
| Respondent's Attorney: | Margaret M. Buckley, Esq.<br>Office of the Legal Advisor<br>Boston Police Department<br>1 Schroeder Plaza<br>Boston, MA 02119 |
| Commissioner: | John J. Guerin, Jr. |

## DECISION

Pursuant to G.L. c. 31, §§ 41, 42, and 43, the Appellant, Jovan J. Lacet (hereinafter "Appellant"), is appealing the decision of the Respondent, Boston Police Department (hereinafter "Respondent" or "BPD"), to terminate him as a Police Officer for violations of Rule 102, § 3 (Conduct, Three Counts), Rule 102, § 8 (Directives and Orders), Rule 102, § 23 (Truthfulness), Rule 102, § 25 (Reporting Law Violations), Rule 102, § 35 (Conformance to Laws), Rule 113, § 5 (Public Integrity Cannons 1 and 10) of the Rules and Procedures of the Boston Police Department. (App. 1, 74). The Appellant claims he did not receive proper notice

from the Respondent. The Appellant also claims he is immunized for the acts. The appeal was timely filed. A Pre-Hearing Conference was held on April 6, 2005 at the offices of the Civil Service Commission (hereinafter "Commission") where the parties agreed a decision would be issued on Cross Motions for Summary Decision. No audiotapes were made during the Pre-Hearing Conference. The Commission's decision is to be made on the Cross Motions. The parties submitted their motions by April 27, 2005, as instructed.

**FINDINGS OF FACT:**

Based upon the exhibits entered into evidence by the parties, including the Appendix of Documents and Exhibit A, I make the following findings of fact:

1. The record is unclear as to the Appellant's work history and job description at the Boston Police Department, including any previous disciplinary action taken against him. However, it is undisputed that the Appellant worked at the BPD at "all relevant times" in regard to the stated matter. (Memorandum in Support of Appellant's Motion for Summary Judgment 1).
2. On March 1, 1999, the Appellant testified under oath to a Suffolk County Grand Jury concerning activities of his brother, Besher Lacet, in relation to the homicide of Moses Landais. The Appellant testified that his brother was present at the scene of a murder. (App. 1, 1).
3. On November 18, 2002, the Appellant notified the Suffolk Superior Court of his intention to assert his Fifth Amendment privilege if called as a witness for the trial of his brother who was accused of committing the homicide. (App. 1, 1)
4. On November 21, 2002, Judge Donovan granted the Appellant judicial immunity under G.L. c. 233, §§ 20C-20E. (App. 1, 2).

5. On November 25, 2002, the Appellant testified at his brother's murder trial at the Suffolk Superior Court, Commonwealth v. Besher Lacet. (App. 2, 3)
6. During Commonwealth v. Besher Lacet, the Appellant testified that he graduated from Hofstra University School of Law in 1995 and was a practicing member of the Massachusetts Bar as a solo-practitioner (App. 2, 36) (admitted 1997 to the bar) (App. 2, 8). The Appellant entered the Police Academy on June 10, 1998 (App. 2, 36), graduated on January 31, 1999 (App. 2, 36), and was duly sworn in as a Boston Police Officer on November 26, 1998 (App. 2, 36).
7. The record does not support a finding that the Appellant had official criminal charges brought against him in regard to his testimony on November 25, 2002.
8. On November 25, 2002, at trial in the Suffolk Superior Court, the Appellant testified that his brother, Besher Lacet, was not at the scene of the homicide. This testimony was materially inconsistent with his prior statements provided to the Suffolk Grand Jury on March 1, 1999 (App. 2, 62).
9. The Appellant explained his testimony at the Suffolk Grand Jury may have been coerced as shown in the following quotes: "Sergeant Keeler and the other detectives at Boston Police, grilled me for, like, four days. You all grilled me so much, I probably would have said, you know, what, I did the murder. You all know that. You all grilled me for, like four days. Threatened my job, threatened my attorney barship. You all did everything you all could." (App. 2, 17).
10. The Appellant failed to notify law officials that he had contact with his fugitive brother, for whom an arrest warrant had been issued. (App. 2, 17)
11. On March 16, 2004, The Appellant received a Notice of the Respondent's contemplated disciplinary action. (App. 3, 73)

12. On March 11, 2004, the Respondent made a formal complaint against the Appellant for violations of Rule 102, §3 (Conduct, Three Counts), Rule 102 § 8 (Directives and Orders), Rule 102 §23 (Truthfulness), rule 102 § 25 (Reporting Law Violations), Rule 102 § 35 (Conformance to Laws), Rule 113, § 5 (Public Integrity Cannons 1 and 10) of the Rules and Procedures of the Boston Police Department. Essentially, the Respondent charged that the Appellant committed perjury, failed to notify the Respondent that he had contact with his brother who was sought for murder and failing to submit a report as ordered by the BPD's Internal Affairs Division ("IAD") regarding his failure to appear for an IAD interview. (App 3, 74).
13. On March 25, 2004, the Appellant submitted a Request to Withdraw charges. (App. 4, 77).
14. On April 15, 2004, the Respondent rejected the Appellant's Request to Withdraw and revised the specifications of the Appellant's charge by replacing "committed perjury before the Grand Jury in connection with Commonwealth v. Besher Lacet" (App. 3, 74) with "committed perjury in connection with Commonwealth v. Besher Lacet" on Specification III, IV, and V (App. 5, 79-80).
15. On April 15, 2004, the Respondent included Specification IX stating, "Jovan J. Lacet did falsely report to the Boston Police Department Internal Affairs Division that the sergeant Detective Daniel Keeler harassed him by ordering him to discuss a pending homicide case. Such behavior constitutes conduct which reflects negatively upon the Department, tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department. Such conduct is in violation of Rule 102, §3 (Conduct)." (App 6, 80).

16. On April 21, 2004, the Appellant requested a Motion for a More Definite Statement and a Motion to Dismiss. (App. 6, 82-84).
17. On April 29, 2004, the Respondent filed a Response to Motion for a More Definite Statement stating, "On March 1, 1999, Officer Lacet testified under oath, before the Suffolk County Grand Jury in connection with the case of Commonwealth v. Besher Lacet. On November 25, 2002, Officer Lacet testified under oath, before a judge and jury in the criminal murder trial in Commonwealth v. Besher Lacet. Officer Lacet's testimony differed materially in these two forums in response to the same question." (App. 8, 88). The Respondent also made an Opposition to Motion to Dismiss in the same Response. App. 8, 88).
18. On April 30, 2004, the Appellant's motions were dismissed by the Hearing Officer. (App. 7, 85).
19. May 12, 2004, a Departmental Disciplinary Hearing was held before Hearing Officer, Superintendent William M. Casey. One witness, Sergeant Detective William Chinetti, was the only witnessed called during the Hearing. The Appellant did not testify and 16 Exhibits were entered into the record. (Exhibit A).
20. In a letter dated December 30, 2004, the Respondent informed the Appellant that the charges against the Appellant were sustained, terminating the Appellant from the Boston Police Department effective December 30, 2004. (App. 10, 93). The original March 11, 2004 Specifications were included as reasons for the Appellant's termination. (App. 10, 94).
21. The Appellant filed an appeal with the Civil Service Commission on January 6, 2005. The Appellant admits that he lied under oath at the Suffolk County Grand Jury

proceedings but asserts that he was immunized under Judge Donovan's judicial order to have done so. (App. 11, 96).

22. The Appellant subsequently filed this Motion for Summary Decision, "Because all relevant evidence is documentary and because there is no material issue of fact, the case . . . can be substantially resolved on motion as an issue of law, without an evidentiary hearing." The Respondent submitted its opposition to the motion thereafter.

**STANDARD OF REVIEW**

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." City of Cambridge v. Civil Service Commission. 43 Mass. App. Ct. 300, 304 (1997). In order to show reasonable justification, the appointing authority must demonstrate that "the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be proven by a preponderance of the evidence. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). The Commission does not possess the authority "to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Id.

The Standard Rules of Adjudicatory Procedure allow a party to move for summary decision when it "is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law." 801 CMR 1.01 (7)(h). The

rules permit a party to move for summary decision with or without affidavits and other materials in support of its motion. This rule's parallel in the Massachusetts Rules of Civil Procedure, Rule 56(e), contains an additional provision which states the following:

> "When a motion for summary judgment is made and supported (by affidavit) as provided for in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or otherwise provided in this rule must set forth specific facts showing that there is a general issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Mass. Rules Civ. Pro. 56(e*)*.

Examples of the Court applying this standard occur in Community National Bank v. Dawes, 369 Mass. 550 (1976). Baker v. Monga, 32 Mass. App. Ct. 450, 453 (1992). Foster v. Hurley, 444 Mass. 157, 159 (2005). Although the CMRs do not apply a similar burden upon the non-moving party in an adjudicatory proceeding such as this, the Commission notes that case law has found that the requirement of Rule 56(e) reflects the intent behind the existence of summary decisions. As the Court stated in Community National Bank, "the parties' respective burdens are designed to discourage both 'utterly unjustified motions for summary judgment' and 'specious denials or sham defenses.'" Community National Bank, at 554, quoting W.W. Barron and A. Holtzoff, Federal Practice & Procedure Section 2712, at 370 (1973). "Motions for summary judgment supported by affidavits and other materials serve a 'salutory purpose' which should not be 'set at naught where the opposing party merely raises vague and general allegations of expected proof.'" Community National Bank, at 555-556, quoting Albre Marble & Tile Co. v. John Bowen Co., 338 Mass. 394, 397 (1959). These decisions stand for the proposition that a legitimate, material issue of fact must exist in order for a case to survive a motion for summary decision. Therefore, even though the procedural rules used by the Commission do not explicitly require a non-moving party to submit affidavits or other materials demonstrating a genuine tri-able issue in response to a motion to dismiss, the Commission must still have some confidence that such an issue exists.

**DISCUSSION:**

The Appellant filed this appeal with the Commission on January 6, 2005. On April 4, 2005, the parties agreed that the Commission could issue a decision made on the pleadings. The Appellant, within his Motion for Summary Judgment, argues that the Appellant has immunity from the offenses charged and that the Appellant's immunized testimony was wrongfully used against him by the Respondent. Furthermore, the Appellant argues that the Notice of Reasons was inadequate to effectuate effective counsel and the specifications were not detailed to include the Appellant's specific acts of perjury.

The Respondent opposes, stating that the Appellant's perjury is specifically excluded from immunity by statute, and there is no prohibition of the use of compelled testimony in an Administrative Hearing. The Respondent asserts that "discipline" does not constitute a "penalty or forfeiture" within the statutory construction of G.L. c. 233, § 20G, and any grant of Immunity to the Appellant would violate public policy. Lastly, the Respondent believes the Appellant was given proper Notice. The Appellant argues his termination is a "prohibited penalty or forfeiture by statute."

**The Appellant is not immune from self-incrimination in Disciplinary Hearings**

G.L. 233, §20G states:

> "A witness who has been granted immunity as provided in section 20E shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal or civil proceeding against him in any court of the commonwealth, except in a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion, pursuant to section 20C or 20E."

The privilege against self-incrimination offers no protection against administrative sanctions which are not criminal or penal in nature, such as loss of a job, United States v. Indorato, 628 F.2d 711 (1st Cir. 1980) (State Police Lieutenant discharged while asserting privilege for perjured, whose testimony was not coerced).

**Public Policy Holds Police Officers to the Highest Duty of Conduct to Order to Protect the Best Interest**

The Commission finds the Respondent's Memorandum of Law in Support of Opposition to Appellant's Motion for Summary Judgment significantly persuasive:

> "One of the most important police functions is to create and maintain a feeling of security in communities. To that end, it is extremely important for the police to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials" City of Boston v. Boston Police Patrolmen's Association, 443 Mass. 813, 819-20 (2005).

Furthermore, a high demand is placed on police officer's conduct and character, whereby any misconduct calls their fitness for duty into question that could engender public mistrust of law enforcement personnel. Police Commissioner of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986) (discharge of officer engaged in sexual misconduct while on-duty affirmed). This conduct extends to conduct outside of employment. In one instance, the Court upheld the suspension of an off-duty officer who berated an individual in a public place in front of citizens who were aware of his title. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2001). This standard of responsibility is so high, conduct suggesting public indiscretion is sufficient to support the discharge of a police officer. School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 492 (1997) (dicta).

**The Commission is not persuaded by the Appellant's improper notice argument.**

G.L. c. 31, § 41 states:

> "Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning the reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof . . . ."

Under Section 42, the Commission will decide if there was proper notice given by measuring if 1.) the Appointing Authority has failed to follow the requirements and 2.) the rights of said person have been prejudiced thereby.

**CONCLUSION:**

The Commission finds that the Appointing Authority has followed the requirements set forth by G.L. c. 31, § 41 and relevant case law. "Proceedings for discharge of persons in the classified service are often conducted by laymen. The requirements of substantial justice must be observed, but the technical accuracy or indictment and trial in a criminal court cannot be expected." Powers v. District Court, 2 Mass. App. Ct. 816, 817 (1974). In a Sullivan v. Municipal Court of Roxbury Dist., the Commission affirmed the action of city police commissioner, discharging petitioner from police force for conduct unbecoming an officer when the specifications of misconduct were not detailed. Sullivan v. Municipal Court of Roxbury Dist., 322 Mass. 566 (1948).

The Commission finds that the notice was proper; the Respondent wrote a notification letter March 16, 2004 with a complaint including 8 specifications of charges in the proceeding matter. These specifications included the "action contemplated" (discipline including dismissal or suspension) and "specific reason or reasons for such action." The list of specifications was revised April 15, 2005 in a similar matter.

The Appellant acknowledged the revised list in a Motion for More Definite Decision dated April 21, 2004, and further pointed out that the difference between the specifications was a source of confusion for "the perjury allegations [were] more general and more vague." (App. 82). The Respondent responded,

> "On March 1, 1999, Officer Lacet testified under oath, before the Suffolk County Grand Jury in connection with the case of Commonwealth v. Besher Lacet. On November 25, 2002, Officer Lacet testified under oath, before a judge and jury in the criminal murder trial in Commonwealth v. Besher Lacet. Officer Lacet's testimony differed materially in these two forums in response to the same questions."

Therefore, the Appellant was notified of the scope of the specifications, the dates of the Appellant's suspected conduct and the Appellant's conduct that was going to be investigated during the Appellant's scheduled Hearing with the Commission.

As seen in the Sullivan case, Civil Service Law allows "less technical" charges to be made compared to the charges made in criminal proceedings. Sullivan v. Municipal Court of Roxbury Dist. During the Appellant's Disciplinary Hearing, the Appointing Authority stated, "[In] the past, when I've had similar charges, these are how the Specifications have been made. At this point, I'm just going to let the Department try to prove its position." Moreover, "[t]here is every presumption in favor of the honesty and sufficiency of the motives actuating public officers in actions ostensibly taken for the general welfare." Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 293-294, 407 N.E.2d 363 (1980). Furthermore, "Due process requires that, in any proceeding to be accorded finality, notice must be given that is reasonably calculated to apprise an interested party of the proceeding and to afford him an opportunity to present his case." Strasnick v. Bd. of Registr. In Pharmacy, 562 N.E.2d 1333 (Mass. 1990), citing LaPointe v. License Bd. Of Worcester, 389 Mass. 454, 458, 451 N.E.2d 112 (1983), citing Konstantopoulos v. Whatley, 384 Mass. 123, 133, 424 N.E. 2d 210 (1981).

The Commission finds that the Appellant understood the specifications and was prepared for his Disciplinary hearing. He filed an Appendix of Documents with the trial transcript, which included statements that appeared, at the very least, inconsistent on their face, demonstrating that the Appellant had requisite knowledge to develop a defense. The Respondent's charges were specific in reference to a general document, the trial transcript. The Appellant was aware of the nature of the evidence contained in the transcript and should have been prepared to defend all statements that he made during the trial. Therefore, the Commission finds that the Appellant's rights were not prejudiced and find that the procedural requirements of G.L. c. 31, § 41 were followed in this case.

Moreover, the Appellant has not demonstrated that the reasons listed for termination were inaccurate. The Commission finds that the Appointing Authority had just cause to terminate the Appellant for his undisputed action of testifying untruthfully while under oath. For all of the reasons stated herein, the Appellant's Motion for Summary Decision is denied, and the appeal on Docket No. D-05-4 is hereby ***dismissed***.

Civil Service Commission

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John J. Guerin, Jr.
Commissioner

By a 4 – 1 vote of the Civil Service Commission (Bowman, Chairman; Taylor, Guerin, Marquis, Commissioners voting - Yea) [Henderson, Commissioner voting – Nay] on March 27, 2008.

A true record. Attest:

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Commissioner

Either Party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with 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 section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice To:
Joseph G. Sandulli, Esq.
Margaret M. Buckley, Esq.