



Fairhaven Board of Selectmen

July 16, 2012 Meeting Minutes

Present: Selectman Brian Bowcock, Selectman Charles Murphy, Selectman Bob Espindola, Executive Secretary Jeffrey Osuch and Administrative Assistant Anne Kakley.

Also Present: Director of Finance John Nunes; Members of the Historical Commission: David Despres, Wayne Oliveira, Debra Charpentier; Tourism Director Christopher Richard; members of the Historical Society; Harbormaster David Darmofal; Shellfish Warden Timothy Cox

Chairman Brian Bowcock called the meeting to order in the Town Hall Banquet Room at 6:34 p.m.

MINUTES

- The Board voted to accept the minutes of the **June 26, 2012** meeting, **open** session. Mr. Murphy motioned. Mr. Espindola seconded. Vote was unanimous. (3-0).
- The Board voted to accept the minutes of the **June 26, 2012** meeting, **executive** session, with an attachment at the request of Mr. Espindola. Mr. Murphy motioned. Mr. Espindola seconded. Vote was unanimous. (3-0).
- The Board voted to accept the minutes of the **July 10, 2012** meeting, **open** session. Mr. Murphy motioned. Mr. Espindola seconded. Vote was unanimous. (3-0).

EXECUTIVE SECRETARY'S REPORT

In his report, Mr. Osuch updated the Board on some important upcoming meetings and events:

- Tuesday, July 17 –
 - 9:00 a.m. – Negotiations with WES Construction
- Thursday, July 19 –
 - 7:30 to 9:00 a.m. – Quest Forum meeting at the Celtic House in New Bedford
 - 10:00 a.m. to noon – Retirement Board training
 - 1:30 p.m. – New School job meeting
- Thursday, July 26 –
 - 8:30 a.m. – Department of Revenue visit – Review of Town finances with department heads
 - 10:00 a.m. – T-Mobile to meet with department heads
 - 1:30 p.m. – New School job meeting

BRIGGS CONTRACT

The Board reviewed a Contract for Services agreement with Briggs Engineering and Testing for soil testing at the New School site. Briggs was selected by Daedalus for the soil analysis and Mr. Osuch said that there was no “grand total” because the work would be broken down by the test.

Mr. Murphy motioned to approve the chairman to sign the Contract for Services with Briggs Associates. Mr. Espindola seconded. Vote was unanimous. (3-0). See Attachment A.

CIVIL SERVICE DECISION – DEMELLO

Mr. Osuch told the Board that in a decision rendered on July 12, 2012, the Civil Service Commission voted to dismiss an appeal made by Fairhaven Officer Walter DeMello regarding his suspension for three days for failure to follow a direct order from a superior officer. See Attachment B.

DEP MEETING

Mr. Osuch told the Board that the DEP had tentatively scheduled a meeting with the Board of Health for Monday, July 23, to discuss sound testing and analysis in the wind turbine area. Mr. Osuch said that the testing could take a month or more to complete, because it is dependent on weather conditions and wind direction.

NSTAR GAS PERMITS

The following gas permit applications, all previously approved by the Board of Public Works, were also approved by the Board of Selectmen:

- NSTAR gas permit for 124 Alden Road, between Pequod Road and Whaler’s Way
- NSTAR gas permit for 23 Milton Street, between Harding Street and dead end
- NSTAR gas permit for 84 Laurel Street between Church and South Streets
- NSTAR gas permit for 18 Hamlet Street between Babbitt and Stephen Streets
- NSTAR gas permit for 22 Holiday Drive between Sconticut Neck Road and Summit Drive
- NSTAR gas permit for 28 and 36 Evergreen Street between Hill and Stephen Streets

VACATION CARRYOVER

The Board read a request from Recreation Director Warren Rensehausen to carry over two vacation days past his anniversary date of August 11. Mr. Murphy motioned to approve the request. Mr. Espindola seconded. Vote was unanimous. (3-0).

WASHBURN AVENUE EASEMENT

The Board read a request from Town Planner William Roth for a utility and access easement at Washburn Avenue. The Board reviewed the easement and voted to approve the utility and access agreement. Mr. Murphy motioned. Mr. Espindola seconded. Vote was unanimous.

OFFICE OF TOURISM MOVE

The Board re-opened the topic of finding an office for the Tourism Department. Present at the meeting were the Tourism Director, Christopher Richard, members of the Historical Commission: Wayne Oliveira, Debra Charpentier and David Despres, and members of the Historical Society, including President Barbara Acksen.

Mr. Richard opened up the conversation by repeating that he thought that the location of the Academy Building would make it an ideal spot for his office, with visibility on Route 6. He also said that he had spoken with the Building Commissioner and learned that it would be relatively simple to make the first floor of the Academy Building handicap accessible.

Resident Sharon Challingsworth said that the Tourism department had received an offer for a free office rental in the new "Art on Center" building on the corner of Center Street and Middle Street, in the old National Bank building. She said that the location would be ideal because it was free, with free WiFi and adequate parking. Ms. Challingsworth claimed that the Academy Building was inadequate because she thought there was not enough parking.

Ms. Charpentier disagreed with Ms. Challingsworth, and said that the parking at the high school would be adequate for visitors coming to the Academy Building.

Several residents spoke out in favor of moving the Office of Tourism into the Academy Building, including Mark Badwey, Phil Washko, Wayne Oliveira, Historical Commission Chairman David Despres.

Historical Society President Barbara Acksen claimed that the move would be disruptive to the Society's "Period Room" and the artifacts that have been collected over the years.

Mr. Murphy asked Mr. Richard to elaborate on potential "liability issues" that Mr. Richard saw with moving to the Art on Center building. Mr. Richard said that the owners of the building, Stacey and Russell Frates, had not even made an official offer to the Board of Selectmen. He said that if that move was considered, all volunteers for the Tourism Office would have to be CORI checked on an annual basis due to the proximity of the office to the children at the Art on Center. Additionally, he said that the Office of Tourism's hours would be different than the Art on Center's hours, and there would be liability upon the Town if something got damaged while Tourism was the sole occupant.

Mr. Espindola noted that with no formal offer from the Frates family, there was no Art on Center office to deliberate. He said that he looked at the Town Hall as a potential spot for the Office of Tourism, but realized that there were many reasons why the Town Hall would not suffice. He noted that Mr. Richard was willing to cooperate with the Historical Society and that he was willing to keep the Period Room intact.

Dr. Bowcock motioned to relocate the Office of Tourism to the Academy Building, as of January 21, 2013. Mr. Espindola seconded the motion. Vote was unanimous. (3-0). Mr. Espindola noted that he would like to revisit the topic in a year to see if the Historical Society and the Office of Tourism were co-existing well. It was also agreed that Mr. Richard would provide data on whether the move garnered more foot traffic.

DOWN THE HATCH

The Board met with Matt Hebert, owner of Down the Hatch, a bar and restaurant on Goulart Memorial Drive. At a previous meeting, the Board had held a hearing for a Sunday Entertainment license. Based on noise complaints from neighbors on West Island, the Board asked Mr. Hebert to improve sound blocking from the establishment.

In a continuation of the hearing, the Board heard from abutters Rob Rizzo and Sid Martin that the noise was continuing to be an issue.

Dr. Bowcock opened the public hearing up to comment. Resident Linda Ferreira said that the noise was loud enough to wake her up and kept her from sleeping well at night. She said that the noise was an issue every weekend in the summer.

Terry Perreira said that the noise on the evening of July 14 was particularly bad. Mr. Hebert said that there was a chance that the noise they heard was actually coming from a wedding at Wilbur's Point.

Mr. Murphy said that he had visited Down the Hatch to see how loud the music was. He said that Mr. Hebert should consider placing a sound blocking curtain on top of the tent until a more permanent structure can be considered. He asked Mr. Hebert to turn the music down every night at 11:00 p.m. to give neighbors some relief.

The Board voted to resolve the problem by asking Mr. Hebert to put the additional sound proofing in place and turn the music down each night at 11:00 p.m. Dr. Bowcock motioned. Mr. Murphy seconded. Vote was unanimous. (3-0).

Additionally, the Sunday Entertainment license was approved, with license hours being 1:00 to 8:00 p.m. on Sundays. Mr. Murphy motioned. Dr. Bowcock seconded. Vote was unanimous.

LOO/KIRKWOOD AQUACULTURE APPLICATION

The Board reviewed an application from Matthew Loo and Ashlee Kirkwood for an aquaculture farm in the area south of Round Island. Mr. Loo said that they needed approval from the Town in order to complete state permitting. The aquaculture application involved a one-acre area that is free of eel grass and is not currently farmed for shellfish.

Mr. Loo and Ms. Kirkwood would be farming the Eastern Oyster and quahogs.

Shellfish Warden Timothy Cox said that he has been monitoring the area and he does not see it used for recreational shellfishing. Harbormaster David Darmofal said that he did have some concerns regarding navigation for recreational water users. He said that he would require that the applicants mark the area at their own cost, have the coordinates verified on an annual basis, and be subject to fines for the following: if a line extends 100 feet beyond the operation, if navigational lights are non-functioning, if winter sticks are not installed, if the coordinates change. The fine would be \$100 per violation and seven violations or more in one year would prompt a hearing to review and/or revoke their license.

Dr. Bowcock said that the provisions set forth by Mr. Darmofal were similar to the provisions followed by the Taylor Seafood aquaculture operation.

The applicants agreed to pay an escrow amount between \$200-300 for the location, to be used if the operators ever abandoned the farm. Mr. Darmofal confirmed that there would be a moratorium on aquaculture applications following the approval of the Loo/Kirkwood license.

Mr. Murphy motioned to approve the three-year aquaculture license for Mr. Loo and Ms. Kirkwood, contingent upon a contract that reflected their agreements with the Town. Mr. Espindola seconded. Vote was unanimous. (3-0).

SELECTMEN'S OFFICE VACANCY

The Board discussed a vacancy in the Town Hall. Principal Clerk Bernice Alves officially retired on July 13, leaving a vacancy in the Selectmen's Office. Mr. Osuch told the Board that the Union position had been advertised internally for seven working days as required, but no one in the Union had applied. Instead of advertising the position, he said that there was the possibility to combine the position with the part-time Veteran's Office secretary position to make one full-time position. He said that Veteran's Office secretary Ivey Winkler had been filling in the position and was picking it up quickly.

The Board voted to appoint Ms. Winkler to the full-time position of Selectmen's Office Principal Clerk/Veteran's Office secretary, with pay set at Principal Clerk Level 7 Step 1, \$16.26/hour. Mr. Murphy motioned. Mr. Espindola seconded. Vote was unanimous. (3-0).

SOLAR STUDY WITH CADMUS GRANT

Upon request of Mr. Espindola, the Board discussed the possibility of using the balance of a recently acquired solar study grant from Cadmus Group on a Town-owned lot of land on Alden Road, adjacent to the landfill.

Mr. Murphy asked Mr. Espindola if there would be a commitment of any kind if the Town agreed to use the grant to investigate the potential to place solar arrays on the site. Mr. Espindola said no. Mr. Espindola motioned to authorize use of Cadmus grant funding to investigate the 124 Alden Road as a potential location for a solar farm. Mr. Murphy seconded. Vote was unanimous. (3-0).

After the vote, Mr. Osuch said that he hoped the study would take into consideration the value of the property at 124 Alden Road, which is assessed at approximately \$502,000.

SELECTMEN LETTERHEAD

In a request from Mr. Espindola, the Board discussed use of Selectmen's Office letterhead. The Board agreed that letterhead should remain in the office and all communication from the office should be under the purview of the Selectmen's Secretary and the Selectmen's Office staff. Dr. Bowcock motioned to make this protocol a Standing Rule. Mr. Murphy seconded. Vote was unanimous.

TEMPORARY ALCOHOL LICENSES

The Board voted to send a letter to certain businesses that regularly apply for One-Day, All-Alcohol licenses, asking those businesses to give the Selectmen's Office 30 days prior to the event to process the request. The request includes all temporary All-Alcohol licenses, from one to five days long. Mr. Murphy voted to send the letter (see Attachment C). Mr. Espindola seconded. Vote was unanimous. (3-0).

PLEASANT/FARMFIELD INTERSECTION

The Board read a letter of concern from Jeannie Fernandes regarding the intersection at Pleasant and Farmfield Streets. Ms. Fernandes said that safety has been a concern in that area, because drivers go too fast and the visibility is poor at that corner. She said that a four-way stop would help alleviate safety concerns. The Board voted to forward Ms. Fernandes' letter onto the Police Department for their review and consideration. Mr. Murphy motioned. Mr. Espindola seconded. Vote was unanimous.

OTHER BUSINESS

In other business:

- Mr. Murphy thanked everyone for their kindness after his recent surgery.
- Mr. Murphy said that the recent fundraiser for the Matty Oliveria fund was a great success.
- Mr. Murphy said that Debra Perrin of the Fairhaven Business Association wished to remind residents that the Second Annual Antiques Appraisal to benefit the FBA would occur on July 22, to coincide with the Farmer's Market from 1:00 to 4:00 p.m.
- The Board praised the Town and those involved with the Bicentennial events of early July. Dr. Bowcock said that the Bicentennial Committee set a high standard for the next Town celebration.

- Mr. Murphy read a note from COA director Anne Silvia regarding a COA van ribbon cutting scheduled for July 18, 2012.

At 8:34 p.m., Mr. Murphy motioned to enter into Executive Session to discuss an ongoing neighborhood conflict at Courtlyn Way, the anaerobic digester, and use of office letterhead, not to reconvene into open session. Mr. Espindola seconded. Vote was unanimous. Roll call vote: Mr. Murphy in favor. Dr. Bowcock in favor. Mr. Espindola in favor. (3-0).

Respectfully,



Anne Kakley

Selectmen's Secretary

(Minutes approved 7/30/2012)



Briggs Engineering & Testing
A DIVISION OF PK ASSOCIATES, INC.

Attachment A

Mr. Jeffrey Osuch, Executive Secretary
Town of Fairhaven
40 Center Street
Fairhaven, MA 02719

11 July 2012
Proposal 09.12.109
Page 1 of 5

RE: Quality Assurance Construction Inspection and Materials Testing Services for the
Fairhaven Elementary School Project, Fairhaven, MA.

UNIT PRICE FEE SCHEDULE / CONTRACT FOR SERVICES

I. SOILS & EARTHWORK

- | | |
|--|----------------|
| 1. <u>Soil Compaction Testing Technician</u> | \$130/half day |
| The technician will determine the soil moisture content (ASTM D 3017) and perform field compaction tests in accordance with ASTM D2922 (Nuclear Method), document the compaction procedures followed and daily report findings. | \$224/full day |
| 2. <u>Electronic Nuclear Moisture-Density Gauge</u> usage charge. | N/C |
| 3. <u>Mechanical Gradation Analysis</u> (ASTM D422) inc #200 wash | \$60/each |
| 4. <u>Modified Proctor</u> (4-pt. moisture-density relationship, ASTM-D1557) | \$80/each |
| 5. <u>Standard Proctor</u> (ASTM D698) | \$80/each |
| 6. <u>Field Geotechnical Engineer</u> (25 years experience) | \$296/half day |
| Who will visually inspect the excavated sub-grade, verify the suitability of the bearing strata, monitor removal of any unsuitable material, estimate the bearing capacity and/or verify consistency with the boring logs from the original geotechnical report. Once suitability is verified, he will write a letter of acceptance accordingly. | \$556/full day |
| 7. <u>Registered Professional Geotechnical Engineer</u> | \$380/half day |
| | \$760/full day |

www.briggsengineering.com

100 Weymouth Street - Unit B-1
Rockland, MA 02370
Phone (781) 871-6040 • Fax (781) 871-7982

100 Pound Road
Cumberland, RI 02864
Phone (401) 658-2990 • Fax (401) 658-2977

II. CAST IN-PLACE CONCRETE

1. ACI Certified Grade 1 Concrete Field Technician \$130/half day
who will sample the fresh concrete (ASTM C172), test the mix for slump \$224/full day
(ASTM C143) and air content (ASTM C173), fabricate concrete cylinders
(ASTM C31); record temperature (ASTM C1064), concrete mix duration,
workability, site added water, appearance, placement procedures & location,
total yardage placed; and daily report to all concerned.

2. Concrete Test Cylinders \$8.50/each
Includes casting in molds (furnished by Briggs), removal from molds, labeling,
entering into our database, curing and storage in proper CCRL approved curing
facilities, compressive strength testing per specified schedule (ASTM C39),
reporting results and disposal.

3. Appropriate Site Specimen Curing Environment By Contractor

III. STRUCTURAL & REINFORCING STEEL, LIGHT GAUGE & MISC. METAL

1. Visual Inspection \$164/half day
Visual Inspection of all steel components and/or connections to include \$292/full day
concrete reinforcing and structural steel. Scope will address torque testing
of any bolted connections, witnessing of impact wrench calibrations by a
Skidmore Wilhelm Torque Tension Gauge, inspection of steel joist and/or
trusses, metal deck, shear studs, light gauge metal framing & shear wall
fasteners, misc. metals (such as steel pan stairs & railings), curtain wall
framing, metal wall panels or veneers and any pre-cast connections.

2. AWS Certified Welding Inspector \$216/half day
\$396/full day

3. Nondestructive Examination by an ASNT Certified Level II Technician to include:
 - a. Ultrasonic evaluation of full penetration welds. \$196/half day
\$356/full day

 - b. Magnetic Particle or Dye Penetrant evaluation of fillet welds. \$188/half day
\$340/full day

IV. CMU & MASONRY CONSTRUCTION

1. Masonry Field Sampling Technician \$148/half day
who will monitor grout and/or mortar mix proportions, mixing procedure, prevailing temperature, document block or brick placement location, fabricate mortar and/or grout test specimens and witness fabrication of CMU prisms for compliance w/ ASTM Standards. \$260/full day

2. ICC Certified Structural Masonry Special Inspector \$196/half day
in order insure all of the masonry work (including reinforcing, insulation and air/vapor barrier) conforms in all respects to industry standards and the approved shop drawings and/or other contract documents. \$356/full day

3. Laboratory Services
 - a. Mortar or Non-Shrink Grout Test Cubes (ASTM C-109) \$8/each
 - b. Grout Prisms (ASTM C-1019) or cylinders (Field Fabricated by Briggs) \$10/each
 - c. Strength Test CMU Prisms (ASTM C-1314) (Field Fabricated by Mason) \$40/each

V. BUILDING ENVELOPE & MOISTURE PROTECTION

(Roofing, Air/Vapor Barrier, Siding, Waterproofing, Windows & Curtain walls).

1. Visual Insp of the various Envelope &Moisture Barrier Components \$196/half day
An experienced technician who will check all materials and procedures for strict conformance to project specifications. The technician will inspect application of waterproofing/damp proofing, air & vapor barrier systems, flashings, thermal & sound insulation, EIFS, roofing and windows/curtain wall. \$356/full day
Scope includes pull testing of caulking or other joint sealants as applicable.

2. Senior Building Envelope Technical Specialist (20+ yrs experience) \$256/half day
\$476/full day

3. Applicable Field Testing (typical):
 - a. Water Leakage Check via AAMA 501.2 (utilizing a 2 man crew) \$80/hour
Field hose test on metal framed windows & curtain walls.

 - b. Air and Water Infiltration Test \$1600/day
via ASTM B 783 and ASTM E1105 (includes all testing equipment and a 2 man crew). Field determination of air infiltration and water penetration of installed exterior windows, curtain walls and doors by uniform or cyclic static air pressure difference. Note: Any carpentry needed to field fabricate any specialized wooden test chambers is to be supplied by the GC.

VI. ROADWAYS & BITUMINOUS CONCRETE

1. **Bituminous Field Technician** \$148/half day
\$260/full day
who will make certain that the preliminary paving surface is properly prepared for paving, check the delivery temperature of the mix, inspect the paving and rolling operation, check the pavement thickness, determine in place density in accordance with ASTM D-2950 utilizing a thin lift nuclear-density gauge and daily report findings to all concerned.
2. **Thickness Evaluation** and/or coring of Pavement Mixture Field Specimens for lab analysis (in accordance with ASTM D-3549)
Coring Technician(s) & Equipment \$296/half day
\$556/full day
Bit Wear and patching w/ cold patch (6 inch diameter specimens) \$15/each
3. **Laboratory Services (typical)**
- a. Bulk Specific Gravity of Mixtures (AASHTO T166) \$35/each
 - b. Theoretical Maximum Specific Gravity (AASHTO T209) \$65/each
 - c. Extraction of Bitumen from Mixtures & Gradation (AASHTO T164) \$260/each

VII. MISCELLANEOUS

- 1. Department Director or QA/QC Project Manager \$45/hour
- 2. Senior Cross Trained Tech to perform multiple inspection disciplines \$172/half day
in a single visit (to incl Soil Comp, Rebar, Concrete, Masonry, Asphalt) \$308/full day
- 3. Inspector's mileage reimbursement per site visit Inc in rates
- 4. Parking at jobsite By Client
- 5. Dedicated courier service to transport test specimens from the site to the lab \$50/trip
- 6. Normal turn around time for Laboratory results is five (5) working days. Requested "Rush" Laboratory Results will be charged at twice the per test cost.

1. Quality Assurance and Quality Control Engineering Services will be performed by Briggs Engineering & Testing as directed by the Client or his duly authorized representative.
2. Tech rates require a half day minimum per site visit. 0-4 hours on site constitutes a half day. 4-8 hours on site constitutes a full day. Overtime (over 8 hours/day) Mon-Fri, Client requested Special Shifts (other than 0730-1600) or Saturdays will be charged at base rate x 1.5; Sundays and Holidays will be charged at the base rate x 2.
3. Requests for inspection services must be received by 12:00pm the previous workday to guarantee service. Cancellation of scheduled inspection services will receive no surcharge if we are notified by 5:00pm the work day prior. Short notifications (after 4:00pm the work day prior) or same day notifications will be subject to a \$50 surcharge. Same day cancellations will be subject to a \$50 surcharge unless the cancellation is called in after the technician has already left for the jobsite in which case it will result in the respective minimum charges for that service.
4. Briggs agrees to supply competent, qualified personnel, satisfactory equipment and laboratory facilities as required by the project specifications and applicable legal and engineering standards to perform the Quality Assurance and Quality Control Engineering services outlined on the preceding pages of this contract. Additional services called for by the Client or his representative will be charged at our standard Briggs fees. Briggs also agrees to distribute written reports via e-mail to all concerned parties for every service performed for the Client at no charge.
5. The Client agrees to furnish all materials to be evaluated and access thereto, plans, specifications and any special requirements for the project.
6. Payment Terms:
 - A. Invoices rendered are due and payable within thirty (30) days of the date the invoice is received and the Client agrees to pay Briggs all monies owed within thirty (30) days of the date the invoice is received.
 - B. The Client agrees to pay all reasonable attorney fees and costs incurred in the collection amounts due and owing to Briggs if this matter shall be referred to an attorney for collection.
7. Default: Non-payment by the Client within thirty (30) days shall be considered Client default and Briggs reserves the right to cease work and to be paid for that work performed. Late payments: 1.5% per month (18% per annum) on balances out beyond original terms.
8. Exceptions: If Briggs shall be unable to perform or be prevented from performing hereunder or if the Client should be forced to stop Briggs work due to public emergency or necessity, breach of ethics, legal restrictions, labor disputes, strikes, boycotts, acts of God or for any other reason beyond the control and without fault of Briggs or Client, Briggs or the Client shall not hereby incur liability or be penalized except that the charge for the particular services not performed shall be abated by Briggs and the Client shall pay for work performed.
9. Prices quoted in this proposal are firm for the duration of the project. In the event that Briggs is required to pay prevailing wage pursuant to a change in Federal, State and/or Municipal law and/or regulations, the prices under this contract shall be adjusted accordingly.
10. Client agrees not to hire Briggs personnel for at least one (1) year after completion of this contract.
11. This contract is subject to all applicable Federal, State and Municipal laws and regulations now in force, or which may be enacted in the future.

Client Name: Board of Fairhaven Briggs Engineering & Testing

Accepted By: [Signature] Submitted By: [Signature]
(Signature) Kenneth M. Oliver, Vice President

Title: CHAIRMAN Bd of Supervisors Date: 07/11/12

Date: _____

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

WALTER DEMELLO,
Appellant

CASE NO. D-10-176

v.

TOWN OF FAIRHAVEN,
Respondent

Attorney for the Appellant:

Diane S. Byrnes
Law Office of Michael Hanley, LLC
1495 Hancock Street, Suite 300
Quincy, MA 02169

Attorney for the Respondent:

Michael J. Kennefick
Law Office of Thomas P. Crotty
388 County Street, 3rd Floor
New Bedford, MA 02740

Commissioner:

Paul M. Stein¹

DECISION

Officer Walter DeMello, the Appellant, acting pursuant to G.L. c.31, §41-43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Fairhaven (Fairhaven), the Appointing Authority, to suspend him for three days as a police officer for failing to obey a direct order of a superior officer in violation of General Order G02-02. An evidentiary hearing was held on May 27, 2011 at the University of Massachusetts School of Law in Dartmouth, MA. The hearing was declared public by the Appellant under G.L. c.31, §43. By agreement of the parties, no witnesses were sequestered. Nine (9) exhibits were received in evidence. The hearing was digitally recorded. Both parties submitted post-hearing briefs.

¹ The Commission acknowledges the assistance of Law Clerk Ashley Francisque in the preparation of this decision.

After the hearing, it was suggested to the parties to consider settlement rather than proceeding with the case. The parties reported they had reached a settlement and the Commission dismissed the case, which was to be effective on a future date after Officer DeMello's retirement. However, there was miscommunication between the parties as to the terms of the settlement. Officer DeMello believed his suspension would be eradicated from his personnel file while Fairhaven did not believe that was part of the agreement. As a result, Officer DeMello asked the Commission to vacate the dismissal order and have the case go forward to a decision. Fairhaven opposed this action claiming that the settlement was final. The Commission agreed to vacate the dismissal order without prejudice. This decision addresses the issue of the settlement as well as the merits of Officer DeMello's appeal from his suspension.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the testimony of Officer Walter DeMello (Officer DeMello), Fairhaven Police Chief Michael Meyers (Chief Meyers) and Fairhaven Police Sergeant Michael Botelho (Sgt. Botelho) as well as inferences reasonably drawn from the evidence, I make the following findings of fact:

1. The Appellant, Officer DeMello, served as a duly appointed police officer for the Fairhaven Police Department ("FPD") for over 25 years. (*Testimony of Appellant*)
2. The Respondent, Chief Michael Meyers, (Chief Meyers), is the Chief of Police for FPD and has served in the department for approximately 18 years and has served as the Chief since 2009. (*Testimony of Chief Meyers*)
3. On April 12, 2010, Chief Meyers sent out an interdepartmental email calling for a General Meeting under Article III, Section F of the police contract to be held on May 23, 2010 at 8:30 a.m. (*Testimony of Officer DeMello, Chief Meyers and Sgt. Botelho*)

4. Chief Meyers sent a second interdepartmental email prior to the general meeting on May 18, 2010 instructing all officers to bring their Class A uniform shirts and hats for a departmental photograph. *(Testimony of Officer DeMello, Chief Meyers and Sgt. Botelho)*
5. A professional photographer was hired for the photographs, which were individual shots of each officer from the chest up. Officer Macy Joseph was concerned about the purposes of the photographs and Sergeant Michael Bothelo (Sgt. Botelho) had the photographer sign a release form stating that he would not disseminate the pictures and their only purpose was for the collage in the department classroom. *(Testimony of Chief Meyers and Sgt. Botelho)*
6. Officer DeMello was late to the general meeting and did not have his Class A uniform with him and did not take his picture that day. *(Testimony of Officer DeMello and Chief Meyers)*
7. Chief Meyers approached Officer DeMello and asked him why he did not have his Class A uniform to take his picture. Officer DeMello told Chief Meyers that he had his reasons for not taking the picture. Chief Meyers then advised Officer DeMello to speak to him sometime later if he had a problem regarding the photographs. *(Testimony of Officer DeMello and Chief Meyers)*
8. Officer DeMello never went to speak to Chief Meyers to explain why he would not take his picture for the collage. *(Testimony of Officer DeMello and Chief Meyers)*
9. There were three or four other officers who did not take their picture that day due to previously scheduled vacations. *(Testimony of Chief Meyers and Sgt. Botelho)*

10. Sergeant Michael Botelho (Sgt. Botelho) scheduled a make-up day for June 16, 2010 for those who were unable to have their pictures taken during the general meeting and sent an interdepartmental email out informing those officers on June 3, 2010. *(Testimony of Chief Meyers and Sgt. Botelho)*
11. During the week of June 6, 2010, Chief Meyers had a conversation with Officer DeMello concerning the make-up day. Chief Meyers told Officer DeMello to be present that day to take his picture. *(Testimony of Chief Meyers and Officer DeMello)*
12. Officer DeMello did not appear at the station to have his picture taken on June 16, 2010. Chief Meyers had Sgt. Botelho call Officer DeMello and ask him if he was coming in to have his picture taken. When Sgt. Botelho called Officer DeMello, Officer DeMello told him he was "tied up with fish," meaning he was working at his second job as a commercial fisherman. *(Testimony of Officer DeMello, Chief Meyers and Sgt. Botelho)*
13. Sgt. Botelho reported the conversation to Chief Meyers, at which point Chief Meyers told Sgt. Botelho to call Officer DeMello back and tell him it was an order and that he would be disciplined if he disobeyed. Officer DeMello replied, stating he would not come in to take his photograph and disregarded the order. *(Officer DeMello, Chief Meyers and Sgt. Botelho)*
14. Within thirty minutes of that telephone conversation, Officer DeMello testified that he had finished fishing and called into the station and accepted a police detail to work a road job for that day. Officer DeMello then *(Testimony of Officer DeMello and Chief Meyers)*
15. Officer DeMello testified that he believed Chief Meyers' order was unlawful or conflicting because he had already told Chief Meyers he would not take the picture. *(Testimony of Officer DeMello)*

16. If an officer believes an order is unlawful or conflicting, they must follow a procedure outlined under the department's General Orders, which Officer DeMello did not follow.

(Exhibit 7 and testimony of Officer DeMello)

17. On June 23, 2010, Chief Meyers served Officer DeMello with a notice of a three-day suspension without pay for "Failure to Obey the Lawful Order of a Superior Officer on or about June 16, 2010." *(Exhibit 1)*

18. In Chief Meyers' notice of suspension, he stated it was his belief that Officer DeMello's "failure to appear at the police station on June 16, 2010 at 9:00 a.m. as ordered by the Chief of Police constituted failure to obey a direct order of a superior officer in violation of General Order G02-02 (Chapter 2 §IV (A) of the Fairhaven Police Manual)". The notice was properly served in accordance with G.L. c.31 §41. *(Exhibit 1)*

19. The three-day suspension was in part based on Officer DeMello's personnel file which showed that:

- a. "on March 28, 1987 [he] received a one (1) day suspension for failure to appear at a meeting called by the Chief of Police"; and
- b. "on July 9, 1989 and July 10, 1989 [he] received a two (2) day suspension for sick time abuse." *(Exhibit 1)*

20. The suspension was served from Thursday, June 24, 2010 through Saturday, June 26, 2010. *(Exhibit 1)*

21. Chief Meyers notified the Fairhaven Board of Selectmen of the suspension by letter, dated June 23, 2010. *(Exhibit 2)*

22. On June 24, 2010, Officer DeMello filed a timely request for a suspension review hearing with the Board of Selectmen pursuant to G.L. ch. 31, §41. The hearing was scheduled for July 12, 2010 at 7:10 p.m. (*Exhibit 3 and 4*)
23. After the hearing, the Selectmen voted unanimously to uphold the Chief's suspension. Thereafter, Officer DeMello filed a timely appeal to the Commission. (*Exhibit 5 and 6*)
24. After hearing the case, this Commissioner suggested that the parties consider a settlement on the matter based on representations that Officer DeMello intended to retire in a few months.
25. The parties reported to have reached an agreement and the Commission dismissed the case, which was to be effective at a future date after Officer DeMello would have retired. (*Order of Dismissal Letter*)
26. Due to miscommunication, Officer DeMello believed that the terms of the settlement expunged his suspension while Fairhaven did not believe that was part of the settlement. Officer DeMello then "rescinded" the settlement and requested that the Commission to vacate the dismissal order and issue a decision. (*Brief for Appellant's motion to revoke order of dismissal*)
27. Fairhaven opposed the dismissal order stating the settlement was final and Officer DeMello should adhere to the terms of the settlement. (*Brief for Respondent's opposition to Appellant's Motion to Revoke order of Dismissal*)
28. The Commission's dismissal order was vacated without prejudice.

CONCLUSION

Applicable Legal Standards

Under G.L.c.31, § 43, a permanent civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, § 41, may appeal to the Commission. The duty 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 considered “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighted 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, rev. den., 426 Mass. 1102 (1997); Selectman of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1982). 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, rev. den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). 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.’”

Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31, §1.

The appointing authority's burden of proof 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); Selectman of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abbati, 434 Mass. 256, 264-65 (2001).

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." E.g., Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1998); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dept of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony 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).

In performing its function, "the commission does not view a snapshot of what was before the appointing authority...the commission hears evidence and finds facts anew...[after] 'a

hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer'...For the commission, the question is...‘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.’” Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003) (affirming Commission decision rejecting evidence of appellant’s failed polygraph test and domestic abuse orders and crediting appellant’s exculpatory testimony) (*emphasis added*). cf. Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (inconsequential differences in facts found insufficient to hold appointing authority’s justification unreasonable); City of Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 303-305, rev. den., 428 Mass. 1102 (1007) (commission arbitrarily discounted undisputed evidence of appellant’s perjury and willingness to fudge the truth); Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission improperly overturned discharge without substantial evidence or factual findings to address risk of relapse of impaired police officer). See generally Villaire v. Town of North Reading, 8 MCSR 44, reconsid’d, 8 MCSR 53 (1995) (discussing need for de novo fact finding by a “disinterested” Commissioner in context of procedural due process); Bielawski v. Personnel Admin’r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same).

“Likewise, 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.’ ” Town of Falmouth v. Civil Service Comm’n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735 (2004) quoting Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594,600

659 N.E.2d 1190 (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., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006).

Motion to Vacate Dismissal Order

Before giving the analysis of this case, the issue of the vacated dismissal order must be addressed. The Commission may, but is not required to, vacate a prior dismissal order at its discretion. Ung v. Lowell Police Dep't, 22 MCSR 471, 473 (2009); see Adams v. Billerica Police Dep't, 10 MCSR 56 (1997) (Denying motion to reopen, applying prior Commission Rule 4.3 (o)). Fairhaven claims the settlement was final and therefore Officer DeMello should adhere to the agreement. However, since the parties did not agree to the same terms, they never had an agreement because there was never a "meeting of the minds." Consequently, the Commission need not consider the terms of the disputed settlement and will decide the appeal solely on the merits.

Justification for Discipline

Applying the above principles to the facts of this case, I find that Fairhaven has met its burden of proving reasonable justification for administering a three-day suspension to Officer DeMello for disregarding an order to appear at the police station for a photograph. Furthermore, I find Officer DeMello's suspension reasonable considering his failure to obey Chief Meyers' order. Although Officer DeMello's personnel file contains two other disciplinary actions, the

Commission will not weigh those two previous actions in this decision and finds Officer DeMello's action in the present case sufficient to uphold the suspension.

Officer DeMello never gave a justified reason for refusing to take his photograph for the department collage. At the general meeting, which was the first scheduled day for photographs, Officer DeMello was late and came without his Class A uniform as directed by the interdepartmental email. When Chief Meyers approached Officer DeMello to ask him why he was not prepared to take a picture, he responded that he would not submit to taking a photograph and did not elaborate any further. Although Chief Meyers had advised Officer DeMello to speak to him if he did have any issues with the photographs, Officer DeMello never tried to discuss with Chief Meyers any concerns he may have had.

Officer DeMello testified that since he had already told Chief Meyers he would not submit to the photographs, the matter was resolved. However, it is significant that he never explained his reason for not submitting to the photograph. Had he given Chief Meyers a reason for not taking the picture, he may have been excused or Chief Meyers may have tried to alleviate the situation as he did for Officer Joseph. Also, it is less likely that Officer DeMello did believe the matter was resolved since Chief Meyers approached him before the make-up day to ask him if he would be present. Furthermore, on the make-up day, Officer DeMello's excuse changed. Although he testified that he reiterated the same excuse to Sgt. Botelho, I find it more credible that he told Sgt. Botelho he was fishing that morning because there would have been no need for Officer DeMello to bring up the fact that he was fishing unless that was his reason for not being able to have his photograph taken. When Sgt. Botelho questioned Officer DeMello on the make-up day whether he would be present at the station, Officer DeMello said he would not be present because he was preoccupied at his second job as a commercial fisherman. Within a half hour

after this conversation, Officer DeMello accepted a police detail job. This shows that he was fully capable of arranging to come into the police station that morning even if he planned to work at his second job that day.

Additionally, Chief Meyers ordered Officer DeMello to appear for a photograph.

Although Officer DeMello argues an order was not given to him on June 6, 2010 when Chief Meyers asked him if he was aware of the make-up day, nothing in the FPD regulations requires a superior to specifically use the word "order" to issue a command when the obligation to comply is otherwise clear. And even if Officer DeMello reasonably believed Chief Meyers did not give him an order on June 6, 2010, an order was made the morning of the make-up day, of which Officer DeMello was made fully aware of by Sgt. Botelho. It is unclear what Officer DeMello's response was in regard to the order, but it is apparent that he acknowledged the order and the warning of disciplinary action and chose to disregard Chief Meyers' command.

Officer DeMello stated at his hearing that he did not believe the photographs were mandatory and that he believed it was an unlawful or conflicting order, yet this argument is unpersuasive. Furthermore, there are guidelines in the FPD Regulations which direct officers on actions they should undertake if they do receive an unlawful or conflicting order. Chapter 2, Section IV, subparagraph B and C of the Department Manual state respectively,

"Employee shall respectfully request clarification of any order which reasonably appears unlawful and then request to confer with the person issuing that order if it is not retracted. It is the duty of the person receiving an unlawful order to bring the matter to the attention of the Chief of Police as soon as possible." (Exhibit 7).

"Employees who receive a lawful order which is in conflict with a previously issued lawful order shall inform the superior issuing the latter order of the conflict and request

clarification. If the conflicting order is not withdrawn, the employee shall follow the more recent instruction then notify the superior issuing the first order as soon as practical." (Exhibit 7).

Office DeMello had access to the regulations and failed to take such steps. From these facts it can be inferred Officer DeMello did not believe the order to be unlawful or conflicting.

There is also the issue of Officer DeMello's concern over the photographs being disseminated to third parties. Though this may have been a valid excuse; Officer DeMello never discussed this concern with Chief Meyers or any other specific issues he had about the photographs even though Chief Meyers welcomed him to communicate any of his concerns. Also, this matter was settled after Officer Joseph brought the matter to Chief Meyers' attention, which Officer DeMello would have been informed of had he spoken to Chief Meyers.

Moreover, Officer DeMello had already decided he would not take his picture before Officer Joseph expressed his concern over the purpose of the photographs since he showed up without his Class A uniform the morning of the general meeting.

It is inferred from Officer DeMello's testimony that there was an issue concerning whether the officers would receive compensation for appearing at the station for the make-up date. This does not justify Officer DeMello's refusal because had he asked, he would have been notified that officers could be compensated for the make-up day. If Officer DeMello believed he would have been unpaid for the rescheduled date he should have asked for clarification.

Moreover, the collective bargaining manual, which Officer DeMello admitted he keeps in his police bag, articulates when a public employee can receive compensation.

Clearly there is an underlying reason why Officer DeMello was adamant about refusing to have his picture taken as none of his excuses were consistent nor were they justifiable. When

this commissioner questioned Officer DeMello at the hearing, he expressed his opinion that senior officers were not respected in the department and that he no longer felt part of the department, which was his main reason for not agreeing to take his picture. It seems that his true reason for not following the order was to challenge a new chief and this type of behavior cannot be tolerated in a paramilitary organization such as a police department. Obedience is necessary in order to run a paramilitary organization. For such organizations to function, orders must be followed and disciplinary actions are just when a member disobeys a superior. Smith v. Town of Falmouth, 20 MCSR 544, 545 (2007). In his testimony, Chief Meyers stated that Officer DeMello's behavior did affect the morale of the department which is foreseeable when an order is disregarded. Officer DeMello's suspension was in part an example to the rest of the department which was necessary in order to preserve the stability of the police department.

The Commission takes note that Officer DeMello's behavior in no way reflects the service he provided to the FPD in his 25 years as a police officer. Fairhaven, however, has the right to hold its employees accountable for any missteps that are related to their work.

For the reasons stated above, the appeal of the Appellant, Walter DeMello, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein, Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman [ABSENT], Marquis, McDowell, and Stein, Commissioners) on July 12, 2012.
A true record. Attest:

Commissioner

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.

Notice to:

Diane S. Byrnes, Esq. (Appellant)
Michael J. Kennefick, Esq. (Respondent)



Town of Fairhaven
Massachusetts
Office of the Selectmen

40 Center Street
Fairhaven, MA 02719

Tel: (508) 979-4023
Fax: (508) 979-4070

Attachment C

July 17, 2012

~~████████████████████~~
~~████████████████████~~
110 Middle Street
Fairhaven, MA 02719

Dear ~~Mr. Franco~~:

The Selectmen's Office is responsible for issuing One-Day, All-Alcohol licenses for special occasions and events in Town. In order to facilitate the issuance of such licenses, it is important for applicants to follow protocol and give the Selectmen time to approve applications.

As such, the Board is asking that when applying for One-Day, All-Alcohol licenses (or any licenses of fewer than five days), please submit applications 30 days prior to the scheduled event. This will allow adequate time for the Selectmen to post a meeting, include the application on their agenda, review the application, and make a decision. We ask that this protocol be followed with One-Day, All-Alcohol licenses starting on July 20.

We appreciate your cooperation in this matter. Please contact this office if you have any further questions.

Sincerely,

Brian Bowcock
Chairman