

# IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Borough of Punxsutawney, :  
Appellant :  
 :  
v. : No. 484 C.D. 2011  
 : Submitted: September 2, 2011  
Punxsutawney Civil Service :  
Commission and Brian :  
Andrekovich :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

## OPINION NOT REPORTED

### **MEMORANDUM OPINION BY JUDGE SIMPSON**

**FILED: November 10, 2011**

The Borough of Punxsutawney (Borough) appeals an order of the Court of Common Pleas of Jefferson County (trial court) that affirmed the order of the Punxsutawney Civil Service Commission (Commission) reinstating Brian Andrekovich (Officer) with the Borough Police Department (Department). The Borough terminated Officer pursuant to Section 1190 of the Borough Code for “neglect or violation of any official duty” and “conduct unbecoming an officer.”<sup>1</sup> The Borough contends Officer acted unreasonably. Upon review, we affirm.

### **I. Background**

Officer, a member of the Department since 1993, responded to a call from Goodwill Store Manager Dawn Yount about an intoxicated male (Suspect). When Officer arrived, Suspect slurred his speech when giving two different first

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<sup>1</sup> Act of February 1, 1966, P.L. (1965) 1656, as amended, 53 P.S. §46190(2) and (4).

names. When asked about taking any medications, he replied “mental.” Reproduced Record (R.R.) at 230a. As Suspect could not walk unaided, Officer slid Suspect, who was seated in a chair, to the back of the store to transport him into the police cruiser parked at the loading dock. Officer guided Suspect and employed a fireman’s carry to assist him to the cruiser. Officer pulled Suspect for a couple feet in order to get him to the cruiser. Officer returned to the station and left the sleeping Suspect in the cruiser, parked just outside the warden’s station. Warden Jan Scott monitored and documented Suspect’s condition every half-hour, and Officer and other police periodically checked on Suspect. Nevertheless, the relieving officer discovered Suspect dead five hours later (Incident). Officer left 15 minutes early that day.

The Department has Standard Operating Procedures (SOPs) and Rules and Regulations. The Borough Statement of Charges cited Officer with “failure to take appropriate action when performing duties,” SOPs, Section 5.1.29, and “omitting pertinent information” in an official department investigation, SOPs, Section 5.1.5. R.R. at 397a. Specifically, the Borough faulted Officer’s handling of the Incident in: (1) transporting Suspect without back-up; (2) failing to call medical assistance; and, (3) detaining Suspect in his cruiser for almost five hours.

Pennsylvania State Police (PSP) independently investigated the in-custody death of Suspect to assess Officer’s: (1) transport of Suspect; (2) failure to seek medical assistance; and, (3) use of his police cruiser to detain Suspect for an extended period. The Borough terminated Officer for “neglect or violation of any official duty” and “inefficiency, neglect, intemperance, immorality, disobedience

of order or conduct unbecoming an officer.” R.R. at 323a-326a; 53 P.S. §46190. Officer appealed to the Commission.

The Commission held a hearing at which a number of witnesses testified regarding Officer’s handling of the Incident and alleged omission of facts in his report. Officer submitted the expert report of Officer Robert Swartzwelder.

## **A. Evidence of Charges**

### ***1. Transport***

Transporting Suspect to his cruiser, Officer testified he pulled Suspect while in a chair to the back of the store. From the back deck, he put Suspect in a fireman’s carry position to get him to his cruiser. Officer testified he did not recall dropping or dragging Suspect. When advised the video from the surveillance camera revealed that Officer dragged Suspect for a couple feet, Officer deferred to store manager Yount, an eyewitness.

Yount testified Officer attempted to carry Suspect and guided him to his cruiser. In the course of transport, Officer aided Suspect when he could not carry his own weight and went down in a “crumple” to the floor twice, while Officer held him so he would not fall. R.R. at 18a (Yount).

Officer was the only Borough officer on duty at the time; therefore, he would need to call PSP to assist in moving Suspect. Officer testified he would have called PSP for back-up for something “serious.” R.R. at 227a. Officer did not consider moving Suspect across the loading dock for about 10 feet to his cruiser serious. Id.

## ***2. Medical assistance***

Officer and Yount testified that Suspect appeared very intoxicated, slurred his words, urinated himself and was unable to walk unaided. Yount smelled alcohol on the Suspect. In response to being asked his name, Suspect responded “John” or “Tom.” R.R. at 210a. In response to whether he was taking any medications, Suspect replied he took two medications for “mental.” R.R. at 230a. Officer was able to understand Suspect. Though he slurred his words, Suspect appeared responsive. Officer checked on Suspect several times during the day, and he woke Suspect on three occasions to ask questions. Officer did not think to call for medical assistance because throughout his many checks Suspect was sleeping comfortably or was responsive to his questions. R.R. at 228a.

Officer Kirk Brudnock, a veteran officer who observed Suspect at Officer’s request to try to identify him, was not concerned by his condition. R.R. at 100a. He testified that if he saw “cause for concern,” he would have taken appropriate action. Id. Officer Brudnock also testified that arrest of an intoxicated person does not necessarily trigger a call for medical assistance as it depends upon whether the person appears injured or “just to take the burden off [him]self.” Id. Officer Sean Weaver, a new part-time officer, noticed Suspect in the sally-port and described Suspect as “your typical public drunk.” R.R. at 154a.

## ***3. Detention***

Officer left Suspect in the police cruiser for approximately five hours. R.R. at 67a. Arrestees are generally placed in a holding cell unless they are not going to be kept very long. Officer testified that the back seat of the cruiser, parked in the sally-port, was the best place for Suspect because it was gated with a

video surveillance camera viewed from the warden's desk. He advised that with the window and doors of the cruiser open, Suspect could lie on his side in a confined area so he would not throw up and aspirate. R.R. at 53a, 216a.

Warden Scott monitored Suspect every half hour, starting with his intake at 10:08 a.m., until 2:30 p.m., noting his condition in the prisoner log as normal. Warden documented Suspect as "snoring" or "sleeping." R.R. at 197a, 200a. Officer asked Officer Brudnock and the Mayor whether they could identify Suspect as he slept in the cruiser. Neither raised any concerns with leaving Suspect in the cruiser. At approximately 2:30 p.m., Officer asked another officer on duty, Officer Weaver, to follow-up with Suspect when he woke and to get his information for issuance of citations.

Officer claimed to have detained other suspects in a similar fashion in a police car. R.R. at 69a. At the hearing before the Commission, Officer could not recall other specific instances. Chief of Police, Tom Fedigan, noted in his review of Officer's reports that Officer never before indicated he detained others in a police cruiser. Chief Fedigan testified Officer's explanation about his reason for keeping Suspect in the car made sense for avoiding vomit or aspiration, but concluded Suspect could have been placed in the same position in a jail cell.

#### ***4. Omitting Pertinent Information/Leaving Early***

The Borough contended Officer violated SOP Section 5.1.5 regarding the completion of his report because he omitted material facts regarding transport. Officer represented he used a fireman's carry to transport Suspect when, the Borough asserts, Officer dropped Suspect twice during transport and dragged him

by his ankles to the cruiser. Officer's report omitted any reference to dropping Suspect or dragging him to the cruiser.

Store manager Yount observed Officer transport Suspect to the cruiser. Yount testified that Officer attempted to carry Suspect and did not drop him. The surveillance video showed that Suspect crumpled under his own weight, and Officer lowered him to the loading dock in a controlled fashion. The video shows Suspect being dragged on the concrete loading dock for a couple feet. Officer did not recall dragging Suspect during transport. The Borough did not have any policy governing when to seek back-up in transporting a suspect under these circumstances.

Officer left approximately 15 minutes early. Before leaving, he asked Officer Weaver to follow-up with Suspect, but he did not speak with his relieving officer. The Borough did not have a policy requiring approval for leaving early.

## **B. Commission Conclusions**

The Commission noted the Borough has no policies, procedures, rules or regulations as to the exercise of discretion in calling for a medic or back-up in transporting a suspect or for detaining a prisoner. Thus, the Commission reasoned the decisions regarding whether to call for a medic or assistance with transport are within the complete discretion of Officer. Because the Borough had no policies governing Officer's handling of Suspect during the Incident, the Commission held Officer did not violate any established legal duty as a predicate to the charges. The Commission credited Officer's testimony that he did not omit material facts from

his report as he did not recall dragging Suspect. As to leaving early, the Commission found Officer did not violate policy since a relieving officer was present and noted the Borough accepted officers leaving 15 to 20 minutes early.

The Commission concluded the Borough did not have substantial evidence in support of the Statement of Charges and reinstated Officer with back-pay. The Borough appealed to the trial court.

Based on the record before the Commission, the trial court agreed the evidence did not sustain the charges against Officer, and it affirmed the Commission. The Borough appealed to this Court.<sup>2</sup>

## **II. Discussion**

The Borough had the burden to prove the charges by clear and convincing evidence. Crawford v. Borough of Lewisburg, 401 A.2d 385 (Pa. Cmwlth. 1979). The Commission concluded the Borough did not meet its burden. We agree.

The Borough charged Officer with violations of Section 1190 of the Borough Code, including “neglect” and “conduct unbecoming a police officer.” “[C]onduct unbecoming a police officer [] has been defined to include conduct that

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<sup>2</sup> In a civil service proceeding involving the suspension of a police officer where, as here, the trial court took no additional evidence, review by this Court is to determine whether the Commission committed an error of law or abused its discretion. Borough of Jenkintown v. Civil Serv. Comm’n of Jenkintown, 478 A.2d 941 (Pa. Cmwlth. 1984); Brooks v. Civil Serv. Comm’n of Shaler Twp., 755 A.2d 115 (Pa. Cmwlth. 2000).

adversely affects the morale and efficiency of the police force or tends to destroy public respect for, and confidence in, the police force.” Feliciano v. Borough of Norristown, 758 A.2d 295, 297 (Pa. Cmwlth. 2000). Our Supreme Court defined “neglect” in the police removal context as “leaving things “undone or unattended to especially through carelessness.” Clites v. Township of Upper Yoder, 506 Pa. 349, 355, 485 A.2d 724, 727 (1984).

While the Borough is correct that “borough council has the primary responsibility and discretion for determining whether or not and how a police officer should be disciplined,” charges must be supported by substantial evidence. Borough of Jenkintown v. Civil Serv. Comm’n of Jenkintown, 478 A.2d 941, 942 (Pa. Cmwlth. 1984); see also Moore v. Borough of Ridley Park, 581 A.2d 711 (Pa. Cmwlth. 1990). “‘Substantial evidence’ has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Clites, 506 Pa. at 354, 485 A.2d at 726 (dismissal lacked substantial evidence).

The Commission concluded the charges were not supported by substantial evidence. The Commission, as the fact-finding tribunal, is in the best position to pass upon elements of fact dependent upon oral testimony, and this Court may not substitute its judgment for that of the agency. Borough of E. McKeesport v. Special/Temp. Civil Serv. Comm’n of Borough of E. McKeesport, 942 A.2d 274 (Pa. Cmwlth. 2008); Powell v. Middletown Twp. Bd. of Supervisors, 782 A.2d 617 (Pa. Cmwlth. 2001); Gallagher v. Civil Serv. Comm’n of the City of Philadelphia, 330 A.2d 287 (Pa. Cmwlth. 1974). This Court must weigh the Commission’s reasons for overriding the Borough’s primary disciplinary discretion



to determine whether the Commission abused its discretion in reinstating Officer. Borough of Bristol v. Downs, 409 A.2d 467 (Pa. Cmwlth. 1979).

The Borough contends the Commission erred in finding Officer did not violate any duty given the absence of policies setting forth a duty. As the Commission concluded, to discipline Officer for derogation of duty, the Borough must first show he violated an established legal duty. Clites. The Borough asserts that Section 5.1.29 of its SOPs, requiring “appropriate conduct,” sets forth the legal duty Officer allegedly violated. But the Borough admittedly does not have any policies governing the specific conduct at issue to explain what is “appropriate.”

Absent a policy, the Borough trusted Officer to exercise his discretion developed during 18 years of experience. The Borough argues that, despite lack of a written policy, the Commission should have found Officer’s conduct was not appropriate because it contradicted basic police training in routine handling of suspects. Reasonable police behavior is guided by a number of things, including “experience, the law, policies, [and] regulations.” Comm’n Hr’g Tr., 4/28/10, at 130. This Court acknowledges that a “violation of a specific written directive is not a prerequisite to a finding of neglect of official duty.” Borough of Edgeworth v. Blosser, 672 A.2d 854, 857 (Pa. Cmwlth. 1996). However, the unwritten duty at issue must be clear on its face such that any reasonable officer would recognize it.

The Borough relies upon Moore and Blosser to support its position that lack of a policy is not fatal to the charges. In both cases, this Court held that “to require a written directive on the most basic of job requirements would be

inane.” Moore, 581 A.2d at 713; Blosser, 672 A.2d at 857. In Moore, the officer did not maintain radio contact with dispatch and was unavailable for calls for 32 minutes while on duty. In Blosser, the officer was specifically ordered not to speak with anyone about a suspected listening device he believed had been placed there by supervisors, but the officer violated that express order. Unlike the situations presented in Moore or Blosser, the alleged duties here are not so fundamental that enactment of a policy would border on the ridiculous.<sup>3</sup>

In Moore, the civil service commission, trial court and this Court held no written policy was necessary as a predicate to discipline because an officer must be available to respond to calls while on duty. In Blosser, the commission held lack of a policy precluded an officer’s dismissal for a violation of duty. This Court disagreed, holding there is no need for a department to publish a written policy stating that “employees shall refrain from spreading accusation of criminal wrongdoings by supervisors” as that is a fundamental duty and easily recognized. Blosser, 672 A.2d at 857. By contrast, it is not inane for a department to enact a policy outlining criteria for seeking medical assistance when presented with an intoxicated suspect.

The Borough asks this Court to follow Blosser, and overturn the Commission’s holding that lack of a policy precluded Officer’s dismissal. We decline because this case is more analogous to Appeal of Appel, 606 A.2d 977 (Pa. Cmwlth. 1992). In Appel, the borough charged the arresting and monitoring

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<sup>3</sup> Also, unlike the officers in Moore or Blosser, Officer did not have a history of reprimands or failures to follow procedures.

officers with neglect when a suspect hung himself by his belt in a holding cell. The borough argued the failure of the arresting officer to remove the suspect's belt and shoelaces contradicted standard procedure. This Court reversed, thereby negating the discipline. The Court noted that the decision to remove belts was not governed by a policy or common understanding; rather, it was a matter left to the discretion of the arresting officer. Absent a duty to remove the belt, failure to do so could not be the predicate for a breach of legal duty—no matter how tragic the consequences.

When a duty is fundamental to an officer's obligations, failure to perform that duty may be a finding for neglect even when the duty is unwritten. That was the case in Moore and Blosser. That was not the case in Appel, however, and it is not the case here. The consequences of an officer's exercise of discretion may illuminate gaps in policies, but consequences alone do not give the Borough license to penalize Officer as though he should have anticipated Suspect's death. Appeal of Leis, 455 A.2d 1277 (Pa. Cmwlth. 1983) (error in judgment does not rise to the level of official neglect or conduct unbecoming to warrant termination).

The Borough argues Officer abused his discretion because his decisions did not comport with training or common sense. The credited testimony, however, did not support findings that there was a common practice or understanding with regard to when to call for back-up in transport or when to call medical assistance for an intoxicated suspect or where to detain an intoxicated suspect.

Here, Officer did not call a medic because he did not see any injuries, and he considered Suspect responsive when asked questions. Three other officers observed Suspect snoring in the cruiser, and none saw fit to move him or call for medical attention. Officer Brudnock testified he would consider inability to walk, talk, identify himself and control bodily functions as grounds for calling a medic, but deemed it “reasonable” not to call a medic here. R.R. 121a. Chief Fedigan testified he believed an intoxicated suspect’s inability to identify himself, lack of control over mobility or urination and taking “mental” medications merited calling for a medic. The record is clear that no one questioned Officer’s judgment at the time. Even in hindsight, reasonable officers disagreed.

The charges, lacking written policies, require evaluation of Officer’s discretion and whether the exercise of that discretion was reasonable under the circumstances. This Court agrees with the trial court that “absent a consensus that any reasonable officer would have acted differently in a given situation, [] it is difficult to conclude that Officer performed his duties inappropriately in a wholly discretionary situation.” Tr. Ct., Slip Op. at 8. As the evidence does not substantiate any consensus by the officers on handling the Incident, this Court discerns no violation of duty.

Moreover, the other officers had a duty under SOP Section 5.1.6, Reporting of Violations, to report suspected violations if they found any of Officer’s conduct improper. Comm’n Op., p. 10. That no one did so suggests that prior to Suspect’s death the situation did not necessitate a different exercise of discretion.

With regard to Officer's alleged omission of facts from his report, the evidence supports the Commission's conclusion that Officer did not drop Suspect or willfully omit facts from his report regarding Suspect's transport to the cruiser.<sup>4</sup>

The Borough's lack of policies regarding where to detain suspects, when to call for medical assistance or when to call for back-up, coupled with the lack of a common understanding as to how to handle the situation, supports the Commission's reinstatement of Officer. Accordingly, the order of the trial court affirming the Commission is affirmed.

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ROBERT SIMPSON, Judge

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<sup>4</sup> In its brief, the Borough failed to argue Officer violated a duty by leaving early on the date of the Incident, and thus waived the issue as per Pa. R.A.P. 2119.

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Borough of Punxsutawney,	:	
Appellant	:	
	:	
v.	:	No. 484 C.D. 2011
	:	
Punxsutawney Civil Service	:	
Commission and Brian	:	
Andrekovich	:	

**ORDER**

**AND NOW**, this 10<sup>th</sup> day of November, 2011, the Order of the Court of Common Pleas of Jefferson County is hereby **AFFIRMED**.

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ROBERT SIMPSON, Judge