

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Douglas Drwal, :  
Appellant :  
v. : No. 2251 C.D. 2007  
Borough of West View : Submitted: June 13, 2008

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

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: October 23, 2008

Douglas Drwal (Drwal) appeals from an order of the Court of Common Pleas of Allegheny County (trial court), which affirmed the West View Civil Service Commission's (Commission) decision affirming Drwal's termination by the Borough of West View (Borough). We affirm.

Drwal was a police officer for ten years with the Borough Police Department (Department). On December 29, 2005, the Borough placed Drwal on administrative leave, with pay, pending an investigation. A due process hearing<sup>1</sup> was held by Borough Council on January 3, 2006. The charges against Drwal were: (1) neglect of duty and conduct unbecoming an officer for failure to follow

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<sup>1</sup> Pursuant to Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), a public employee must be given oral or written notice of the charges against him, an explanation of the evidence against him and the opportunity to present his version of the matter. See Delaware County Lodge No. 27 v. Township of Tinicum, 908 A.2d 362 (Pa. Cmwlth. 2006).

the Department's policy in processing Driving Under the Influence (DUI) cases involving four separate persons, and (2) spending excess break time resulting in a missed call and filing a falsified report. On January 19, 2006, Borough Council voted to remove Drwal from his position as a police officer as a result of conduct unbecoming an officer and neglect or violation of official duty. By notice dated January 20, 2006, Drwal was terminated.

Drwal timely appealed his termination to the Commission. Hearings were held on August 17, 2006 and August 24, 2006. At the hearing, the Commission heard testimony from Charles M. Holtgraver, the Borough's Chief of Police; Barbara O'Lare, the Borough's record-keeping clerk; Randall Freedman, Borough police lieutenant; Matthew Holland, Borough police officer; and Drwal. Based upon the testimony presented, the Commission made the following findings of fact and conclusions of law.

The Commission found the testimony offered by the Borough's witnesses – Chief Holtgraver, Ms. O'Lare, Lieutenant Freedman, Officer Holland, – to be credible. The Commission found that the testimony offered by Drwal was not credible noting that his demeanor on the witness stand did not inspire any confidence that he was being straightforward, frank, or willing to deal directly with the matter at hand. The Commission further noted that Drwal's testimony was self-serving and contradictory. No corroboration witnesses were offered by Drwal.

The Commission found that it is the policy of the Department for any officer who places an individual under arrest to file criminal charges against that individual during the shift in which the arrest took place or at the very next shift worked by the officer. On four separate occasions, Drwal arrested four individuals for DUI, but never filed criminal charges against them. Three individuals had

blood alcohol levels above the legal limit; one individual was a minor who was driving with alcohol in his system when not of legal age to drink.

The Commission further found that Drwal failed to remain in contact with the police dispatcher and failed to respond to a 911 dispatch while on duty on December 24, 2005 during the 11:00 pm to 7:00 am shift. During this time, Drwal was at his private residence. The Commission found that Drwal submitted a false activity log involving his actions during that shift.

The Commission concluded that Drwal failed to follow Department procedures and neglected his duties by not filing criminal charges after he arrested four individuals for DUI. Drwal engaged in conduct unbecoming an officer by showing favoritism towards one of the individuals arrested for DUI. Drwal failed to follow Department procedures regarding break periods during his shift. Drwal failed to follow Department procedures by engaging in conduct which is contrary to the moral standards of the community and which tended to discredit or diminish the reputation of himself, the Department and his fellow officers. He did this by failing to evenly and fairly enforce the laws of the Commonwealth with regard to the individuals suspected of DUI. He also did this by falsifying Department records, and failing to respond when called by dispatch and stranding a fellow officer in the line of duty. Drwal neglected his duty and abandoned his fellow officer by not responding to the 911 call while at his private residence.

The Commission ultimately determined that the Borough met its burden of proving that Drwal was guilty of conduct unbecoming an officer and neglect or violation of official duties and that the Borough's termination of Drwal was justified. By adjudication adopted November 16, 2006, the Commission affirmed the decision of Borough Council and sustained the charges against Drwal.

From this decision, Drwal filed a timely appeal with the trial court. No additional evidence was presented. The parties agreed to have the case decided on the record established before the Commission and briefs. By order dated November 20, 2007, the trial court affirmed the Commission's findings and determination. This appeal now follows.<sup>2</sup> Drwal raises the following questions for our review:

1. Did the Borough offer substantial evidence to prove the charges against Drwal;
2. Did the Commission err in concluding that the testimony of Officer Matthew Holland was credible when his testimony was clearly impeached and contradicted by a written statement he had given to the chief of police dated December 27, 2005;
3. Did the Commission err in disregarding the case of Municipality of Monroeville v. David P. Jones, 454 A.2d 1153 (Pa. Cmwlth. 1983) that police officers do have discretion in deciding whether to prosecute criminal DUI complaints; and
4. Did the Commission err in refusing Drwal's request to submit evidence by deposition of witnesses who were subpoenaed but did not appear at the hearing.

First, Drwal contends that the Commission's findings are not supported by substantial evidence. We disagree.

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<sup>2</sup> In reviewing adjudications of municipal civil service commissions, this Court's scope of review "is limited to determining whether constitutional rights have been violated, an error of law has been committed or findings of fact necessary to support the adjudication are not supported by substantial evidence." Lewis v. Civil Service Commission, City of Philadelphia, 518 Pa. 170, 174, 542 A.2d 519, 522 (1988).

In deciding issues of substantial evidence, “a reviewing court will examine, but not weigh the evidence since the factfinding tribunal is in a better position to find the facts based upon the testimony and the demeanor of the witnesses. The court may not substitute its judgment for that of the agency.” Civil Service Commission v. Poles, 573 A.2d 1169, 1172 (Pa. Cmwlth. 1990), petition for allowance of appeal dismissed, 530 Pa. 31, 606 A.2d 1169 (1992); accord In re Thompson, 896 A.2d 659 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 591 Pa. 669, 916 A.2d 636 (2007); McNaughton v. Civil Service Commission of Borough of Camp Hill, 650 A.2d 1157 (Pa. Cmwlth. 1994), petition for allowance of appeal denied, 540 Pa. 634, 658 A.2d 797 (1995). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, [but must be] ... more than a scintilla and must do more than create a suspicion of the existence of the fact to be established.” Lewis, 518 Pa. at 175, 542 A.2d at 522 (citations omitted). The existence of conflicting evidence does not indicate that there is a lack of substantial evidence. Barr v. Pine Township Board of Supervisors, 341 A.2d 581 (Pa. Cmwlth. 1975).

Pursuant to Section 1190 of the Borough Code,<sup>3</sup> no person employed in any police or fire force of any borough shall be suspended, removed or reduced in rank except for the following reasons:

- (1) Physical or mental disability affecting his ability to continue in service, in which cases the person shall receive an honorable discharge from service.
- (2) *Neglect or violation of any official duty.*
- (3) Violation of any law which provided that such violation constitutes a misdemeanor or felony.

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<sup>3</sup> Act of February 1, 1966, P.L. (1965) 1656 as amended, 53 P.S. §46190.

(4) Inefficiency, neglect, intemperance, immorality, disobedience of orders, or *conduct unbecoming an officer*.

(5) Intoxication while on duty.

(6) Engaging or participating in conducting of any political or election campaign otherwise than to exercise his own right of suffrage.

(Emphasis added). A written statement of any charges made against any person so employed shall be furnished to such person within five days after the same are filed. Section 1190 of the Borough Code. Our Supreme Court has defined conduct unbecoming an officer as “any conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. It is not necessary that the alleged conduct be criminal in character nor that it be proved beyond a reasonable doubt.” Zeber Appeal, 398 Pa. 35, 43, 156 A.2d 821, 825 (1959); accord Eppolito v. Bristol Borough, 339 A.2d 653, 654 (Pa. Cmwlth. 1975).

Drwal challenges the Commission’s finding that the Department had a policy for handling DUI matters. Although the Department did not produce a written policy, the existence of a policy was established through the testimony of Chief Holtgraver, which the Commission credited. Chief Holtgraver testified that while officers have discretion in arresting a person for DUI, once the arrest is made, they have no discretion not to file charges. Reproduced Record (R.R.) at 211a-212a. Chief Holtgraver further testified that officers must file a DUI criminal complaint immediately after making an arrest and are not permitted to wait for the crime lab blood tests to come back before filing charges. R.R. at 215a. Chief Holtgraver explained that it may take more than five days for the blood tests to

return, which is more than the time allowed under the Rules of Criminal Procedure for filing charges; there is no requirement under the Rules of Criminal Procedure for the blood test to come back before the charge is made; charges are filed at the minimum reading; once the blood work comes back, the district attorney will adjust the charges accordingly at the preliminary hearing. Id. Chief Holtgraver testified that all officers should know not to wait for the blood alcohol test because they should be familiar with the Rules of Criminal Procedure and they go to mandatory training every year. R.R. at 216a. Chief Holtgraver admitted on cross examination that there was no written policy in the Department concerning the handling of DUI cases and there has never been a meeting of the entire Department where these policies were verbally communicated to the police officers. R.R. 284a-286a. While Drwal testified that officers could wait until the blood tests were returned before filing charges, the Commission did not credit this testimony.

This Court has held that a violation of a specific written directive is not a prerequisite to a finding of neglect of official duty, warranting removal of public employee, since requiring written directive on most basic job requirements would be inane. Borough of Edgeworth v. Blosser, 672 A.2d 854 (Pa. Cmwlth.), petition for allowance of appeal denied, 546 Pa. 648, 683 A.2d 885 (1996); Moore v. Borough of Ridley Park, 581 A.2d 711 (Pa. Cmwlth. 1990). Chief Holtgraver's testimony constitutes substantial evidence to support the Commission's finding that the Department did have a policy on handling DUI cases, which required officers to file charges following a DUI arrest and did not permit officers to hold charges pending BAC results or permit them to use their discretion in determining whether or not to file charges once an arrest was made.

Drwal also asserts that the Commission's findings that Drwal neglected his duties and engaged in conduct unbecoming an officer by failing to

file charges in four DUI cases are not supported by substantial evidence. In support of this argument, Drwal cites to his own testimony and version of the facts. As stated above, the Commission found Drwal's testimony to be self-serving, contradictory and ultimately not credible. Such credibility determinations are beyond our scope of review. Poles. Based upon our review, the Commission's findings are amply supported by the testimony offered by the Borough's four witnesses, whom the Commission found credible.

Drwal further contends that the Commission erred in concluding that the testimony of Officer Matthew Holland was credible when his testimony was clearly impeached and contradicted by a written statement he provided to the chief of police dated December 27, 2005 regarding the 911 dispatch, wherein Officer Holland responded to the call and Drwal did not. We disagree.

The Commission has the exclusive authority to assess witness credibility and resolve evidentiary conflicts and a reviewing court must defer to the Commission's determinations regarding the credibility and weight of the evidence. Poles. In this case, Drwal calls to our attention Officer Holland's statements regarding whether two brothers were "fighting" and whether he had to "separate" them. Contrary to Drwal's contention, Officer's Holland's testimony was not contradicted or impeached by the written statement. Review of the transcript reveals that Officer's Holland's testimony was consistent that he separated two men who were fighting. When questioned regarding a written statement given to the Chief of Police concerning this incident, Officer Holland clarified that the men were no longer physically fighting when he arrived on the scene but were engaged in a verbal altercation and he separated the men by directing them to sit on opposite sides of the street. The Commission specifically found that "Officer Holland testified "credibly" and "[h]is demeanor indicated that he was



straightforward, frank and non-deceptive in his responses to questions.” R.R. at 12a. This Court will not disturb the credibility determinations made by the Commission.

Drwal further argues that the Commission erred in disregarding the case of Jones that police officers do have discretion in deciding whether to prosecute criminal DUI complaints. We disagree.

In Jones, a police officer arrested a driver for DUI and took him to the police station where a breathalyzer test was administered which showed that the amount of alcohol by weight in the driver's blood was in excess of the weight, which by statute raises a presumption of drunken driving. Thereafter, the officer took the driver to a restaurant, remained with him until the officer was satisfied that the driver was fit to drive and then released him from custody rather than taking him before the issuing authority. Upon filing the police report detailing his actions, the officer was questioned by his superiors. On April 4, 1980, only two days after the event, the officer responded in writing that he had not filed charges because the driver had been cooperative, had caused no damage, and as a member of the bar would be injured in reputation and in the practice of his profession by prosecution. The officer also expressed concern as to the legality of the arrest because the police vehicle he had been using was not currently registered. The officer also remarked that if his superiors directed him to do so he would prosecute, noting that there was ample time in which to file a complaint. Jones.

The officer's superiors did not instruct the officer to prosecute the driver, but instead charged him with “failure to take police action when necessary while on duty,” which constituted neglect of duty in the department's rules. Id. The officer was suspended for two days, which was reduced to one day following a hearing before the personnel board. Id.

The officer appealed to the trial court, which without taking additional evidence, reversed the action of the board. The trial court held that the officer as the arresting officer was vested with discretion in the circumstances and that the facts did not support the board's conclusion that he was guilty of the charge made against him. Id.

On appeal to this Court, we affirmed. Id. Pursuant to Section 130(b) of the Rules of Criminal Procedure, “[w]hen a defendant has been arrested without a warrant for driving under the influence of alcohol or controlled substances, the arresting officer may, when he deems it appropriate, promptly release the defendant from custody rather than taking him before the issuing authority.” Pa.R.Crim.P. 130(b).<sup>4</sup> Thus, we determined that the officer was not required by law to take the driver before the issuing authority immediately; deeming it appropriate to do so he might, as he did, release the driver from custody. Jones. While noting that the officer did not file a complaint as required by Pa.R.Crim.P. 130(d),<sup>5</sup> the officer filed a report of the incident and stated that if he were instructed to do so he would prosecute. Id. We opined, “[c]ertainly on the day of the incident he did not fail to take a necessary police action; nor, in the absence of an order of his superiors to file a complaint, does it appear to us that he failed to take a necessary police action thereafter.” Id. at 1154

The present matter, however, is distinguishable. Jones primarily deals with whether the officer had discretion to release a driver from custody and is based upon a provision in the Rules of Criminal Procedure that no longer exists.

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<sup>4</sup> Rule 130 was renumbered and amended and no longer contains the language quoted in Jones.

<sup>5</sup> Rule 130(d) provided if the defendant is released “a complaint shall be filed.”

While the officer in Jones also did not file a complaint as required by law, the officer immediately filed a report with his superiors detailing the incident and indicated a willingness to file a criminal complaint while there was still time to do so if his superiors deemed it appropriate. That is not the case here.

Here, the current and relevant provision of the Rules of Criminal Procedure clearly provides that “[w]hen a defendant is released ..., a complaint *shall* be filed against the defendant *within 5 days* of the defendant's release.” Pa.R.Crim.P. 519 (emphasis added). Drwal failed to file complaints in four DUI cases, not just one. Despite blood alcohol tests indicating that the arrested three individuals who had been driving with blood alcohol levels in excess of the legal limit, and one individual who admitted to underage drinking, Drwal never filed appropriate criminal charges against any of them. Drwal did not notify his superiors about the four DUI drivers he released. The five-day period within which to file a complaint had lapsed in all four cases. We, therefore, conclude that the Commission appropriately distinguished the present matter from Jones.

Finally, Drwal contends that the Commission erred in refusing his request to submit evidence by deposition of witnesses who were subpoenaed, but did not appear at the civil service hearing. We disagree.

Drwal wanted to present the testimony of former Department police officer, John Sweeney, and the former Chief of Police of Kilbuck Township, Jack Lennon. When neither of these witnesses appeared at the hearing, Drwal requested permission to submit their testimony by deposition at a later date, but the Commission denied this request. Drwal did not ask the Commission to enforce the subpoenas. See Section 1179 of the Borough Code, 54 P.S. §46179.<sup>6</sup> Drwal did

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<sup>6</sup> Section 1179 provides, in relevant part:

(Continued...)

not request a continuance due to any difficulty subpoenaing witnesses. See Section 1191 of the Borough Code, 54 P.S. §46191<sup>7</sup>; Appeal of Darney, 428 A.2d 276 (Pa. Cmwlth. 1981) (difficulty subpoenaing witnesses can constitute cause for granting a continuance).

According to Drwal, Officer Sweeney was to testify that while a police officer in West View he had discretion to wait until blood tests came back before filing a DUI complaint; Chief Lennon was to testify that it was common practice in Kilbuck Township and other communities in Allegheny County for officers to wait until the blood results came back before making a decision as to whether to prosecute a DUI. R.R. at 474a.

The Commission determined that the proffered testimony would be collateral and not essential to the issue. Testimony regarding the Department's policies concerning DUIs was presented by three *current* Department police officers. Testimony about practices and policies of another municipality is irrelevant to the issue of whether Drwal violated the Department's policies. We, therefore, conclude that the Commission did not err or abuse its discretion in refusing Drwal's request to submit deposition testimony.

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If any person shall refuse or neglect to obey any subpoena issued by the commission, it may apply by petition to the court of common pleas of the county for its subpoena, requiring the attendance of such persons before the commission or the court there to testify and to produce any records and papers necessary, and in default thereof, shall be held in contempt of court.

54 P.S. §46179.

<sup>7</sup> Section 1191 provides the commission shall hold a hearing within ten days from the filing of charges in writing, "unless continued by the commission for cause at the request of the council or the accused."

Accordingly, the order of the trial court is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Douglas Drwal,	:	
	:	
Appellant	:	
	:	
v.	:	No. 2251 C.D. 2007
	:	
Borough of West View	:	

**ORDER**

AND NOW, this 23rd day of October, 2008, the order of the Court of Common Pleas of Allegheny County, at No. SA06-1293, filed November 21, 2007, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge