

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
617.727.2293

DANIEL DESMOND,
Appellant

v.

D1-14-50

TOWN OF WEST BRIDGEWATER,
Respondent

Appearance for Appellant:

Timothy M. Burke, Esq.
David B. Fisher, Esq.
Law Offices of Timothy M. Burke
160 Gould Street, Suite 100
Needham, MA 02494-2300

Appearance for Respondent:

David T. Gay, Esq.
John L. Holgerson, Esq.
Gay & Gay, P.C.
73 Washington Street
P.O. Box 988
Taunton, MA 02780

Commissioner:

Christopher C. Bowman

DECISION

On February 27, 2014, the Appellant, Daniel Desmond (Mr. Desmond), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of West Bridgewater (Town) to terminate him from his position as a police officer with the West Bridgewater Police Department (Department) for his “continued pattern of lying / perjury, conduct unbecoming [a police officer] and harassment.” A pre-hearing conference was held at the offices of the Commission on March 25, 2014. A full hearing was held on June 23, 2014 and June 24, 2014 at the West Bridgewater Town Hall, 65 North Main

Street in West Bridgewater, Massachusetts.¹ A digital recording was created of the hearing and both parties were provided with a CD of the proceeding.² The hearing was declared to be private. Other than Mr. Desmond, the witnesses were sequestered. Following the close of the hearing, proposed decisions were submitted by both parties on August 4, 2014.

FINDINGS OF FACT

The Town submitted thirty-four (34) exhibits and I accepted all of them into evidence with the exception of proposed Exhibit 27.³ Mr. Desmond submitted four (4) exhibits and I accepted all of them into evidence. I also asked Mr. Desmond to submit additional records which I marked as Appellant Exhibits 5 through 10.⁴ Based upon the documents admitted into evidence, the testimony of:

Called by the Town:

- Michael Bunker, police officer, Brockton Police Department;
- Christopher Perez, police officer, Brockton Police Department;
- Edward Abdelnour, police officer, Brockton Police Department;
- Sergeant Kenneth Lofstrom, Brockton Police Department;

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript. The Town has already had the hearing transcribed using the CDs provided to them. At my request, the Town submitted that transcript to me and it is now part of the record.

³ I initially accepted a June 23, 2014 Brockton Police Incident Report submitted by the Town as an additional Exhibit. I subsequently allowed Mr. Desmond's motion to strike this document and I did not consider it as part of my decision.

⁴ Appellant Exhibit 5: Three administrative log entries made by the Brockton Police Department dated January 9, 2014, January 15, 2014 and January 18, 2014. Appellant Exhibit 6: Brockton District Court decision dated January 10, 2014. Appellant Exhibit 7: Text messages dated December 11, 2013. Appellant Exhibit 8: Text messages dated December 18, 2013. Appellant Exhibit 9: Text Messages sent between Mr. Desmond and Mr. A on December 21, 2013. Appellant Exhibit 10: Email from Mrs. A. to Lt. Flaherty dated December 20, 2013.

- Jonathan Craven, police officer, West Bridgewater Police Department;
- Timothy Pope, police officer, West Bridgewater Police Department;
- Lieutenant Victor Flaherty, West Bridgewater Police Department;

Called by Mr. Desmond:

- Mrs. A, now-girlfriend of Mr. Desmond⁵;
- Daniel Desmond, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. Mr. Desmond is single, forty-one (41) years old and resides in Brockton. At the time of his termination on February 20, 2014, he had been a permanent full-time police officer with the Town of West Bridgewater for approximately seventeen (17) years. (Testimony of Mr. Desmond)
2. In May 2013, Mr. Desmond met Mrs. A, a married mother of three young children, at a local donut shop in West Bridgewater while she was working there. Over the next several months, a relationship developed between Mr. Desmond and Mrs. A. Mrs. A. also resides in Brockton. (Testimony of Mr. Desmond)
3. The relationship initially began as conversational when Mr. Desmond would go to the drive-through window of the donut shop during his patrol shift. It later developed into an emotional connection and, subsequently, in early December 2013, became a sexual

⁵ For the purposes of this decision, Mr. Desmond's now-girlfriend, is referred to as "Mrs. A." There are also numerous references to "Mr. A", her husband." Mrs. A. was called to testify by Mr. Desmond on the second day of hearing. After a colloquy with Mrs. A. regarding her Fifth Amendment Rights, Mrs. A. opted not to testify and neither party sought to compel her testimony. Subsequent to the close of the hearing, Mr. Desmond filed a motion to re-open the hearing and recall Mrs. A. who, according to Mr. Desmond, was now willing to testify. I denied this motion.

relationship. (Testimony of Mr. Desmond)

4. From the outset of their relationship, Mrs. A told Mr. Desmond that this was her first job since getting married and that she was having problems with her husband (Mr. A).

(Testimony of Mr. Desmond)

5. At some point in the Summer of 2013, Mrs. A. told Mr. Desmond that she received a traffic ticket related to not having an inspection sticker. Mr. Desmond ran a computer inquiry and informed Mrs. A. that there was no record of a citation. Mrs. A. then informed Mr. Desmond that the automobile was registered under her husband's name. Mr. Desmond ran a second computer inquiry regarding Mr. A's registration and determined that a citation was issued.

(Testimony of Mr. Desmond)

6. On or about the night of Saturday, September 7, 2013, Mr. Desmond and Mrs. A were together at the Charlie Horse restaurant in West Bridgewater when Mrs. A received a telephone call from her husband, Mr. A, during which call Mr. Desmond heard Mr. A threaten physical violence and harm to his wife. (Testimony of Mr. Desmond)

7. As a result of the September 7, 2013 incident at the Charlie Horse restaurant, pursuant to G.L. c. 209A, Mrs. A sought a restraining order against her husband. (Testimony of Mr. Desmond)

8. Sometime shortly after midnight on Sunday, September 8, 2013, Mr. Desmond placed a telephone call to the Brockton Police Department and spoke with a Sergeant Kenneth Lofstrom. He informed Sgt. Lofstrom that his (Mr. Desmond's) girlfriend would be coming into the station to seek a restraining order against her husband. (Testimony of Sgt. Lofstrom)

9. Mrs. A. came to the Brockton Police Department sometime between 12:00 Midnight and 8:00 A.M. and obtained an emergency restraining order against her husband via an on-call

Judge. Sgt. Lofstrom served the restraining order on Mr. A. (Testimony of Sgt. Lofstrom)

Mr. A was required to surrender multiple firearms as a requirement of that restraining order.

(Testimony of Officer Bunker)

10. The hearing on the application for this 209A restraining order occurred in the Brockton District Court on Monday, September 9, 2013. (Testimony of Mr. Desmond)
11. Mr. Desmond drove Mrs. A to the Brockton District Court on September 9, 2013 for the 209A hearing, walked into the Brockton District Court with her, and escorted her to the Clerk's office in the courthouse. He then walked back outside the building. (Testimony of Mr. Desmond)
12. Mrs. A was not granted an extension of the emergency restraining order by the Court on September 9, 2013. (Testimony of Mr. Desmond)
13. On October 5, 2013, Mr. Desmond conducted an "Interstate Identification Index" (referred to as a "Triple I" or "III" search) of Mrs. A. This inquiry provides an index of individuals who have been arrested or indicted for a serious crime anywhere in the United States with a list of the states that have a criminal history record on any given individual. (Exhibit 8; Testimony of Lt. Flaherty)
14. On November 2, 2013, Mrs. A contacted Mr. Desmond and informed him that she had told Mr. A. about her romantic feelings for Mr. Desmond and that their marriage was over. Mrs. A. told Mr. Desmond that, upon hearing this, Mr. A. made threatening remarks directed at her and Mr. Desmond. (Testimony of Mr. Desmond)
15. Mr. Desmond encouraged Mrs. A. to report this information to the Brockton Police Department. (Testimony of Mr. Desmond)
16. Mr. Desmond then called Brockton Police Officer Michael Bunker, who was working the

8:00 A.M. to 4:00 P.M. shift at the Brockton Police Department on November 2nd. Officer Bunker previously worked as a West Bridgewater police officer and considers himself to be a friend of Mr. Desmond. They have been to each other's homes over the years. (Testimony of Officer Bunker)

17. During their phone conversation, Mr. Desmond asked Officer Bunker if someone from the Brockton Police Department could go to Mrs. A's home, instead of her coming to the police station, as Mrs. A. had three (3) young children. Officer Bunker told Mr. Desmond that Mrs. A. would need to come to the Brockton police station. (Testimony of Officer Bunker)
18. On the morning of November 2, 2013, Mr. Desmond and Mr. Desmond's sister accompanied Mrs. A to the Brockton Police Department where Mrs. A completed an Affidavit in support of an application for a restraining order against her husband. (Exhibit 9; Testimony of Mr. Desmond)
19. Mrs. A drafted the Affidavit in support of the application for the restraining order at a counter to the left of the entrance into the lobby of the Brockton Police Department. (Testimony of Officer Bunker; Exhibit 9)
20. During her completion of the paperwork for the restraining order at that counter, Mr. Desmond stood next to her. (Exhibit 9)
21. At 11:20:16, Mrs. A motions for Mr. Desmond, who is standing next to her. Mr. Desmond leans in over Mrs. A's left shoulder and is seen communicating with her verbally. (Exhibit 9)
22. At 11:23:28, Mr. Desmond leaves Mrs. A at the counter working on the paperwork for the restraining order and goes to a window diagonally across from the counter where he obtains at least one piece of paper which he then brings back to Mrs. A. (Exhibit 9)
23. Once she had completed the restraining order paperwork, including the Affidavit in support

of the application, she gave said paperwork to Mr. Desmond while she accompanied Officer Bunker to a room where Mrs. A would speak over the telephone to a judge on call regarding the issuance of an emergency restraining order. (Testimony of Officer Bunker; Exhibit 9)

24. The affidavit completed by Mrs. A. states that her husband threatened to kill Mr. Desmond. Specifically, the affidavit states: “He has continuously told me that he would kill Danny going as far as to say he would sit in a parking lot where Danny couldn’t see him and shoot him in the face and he would have no idea it was coming.” The affidavit also states that Mr. A threatened to stab Mrs. A and Mr. Desmond in the throat. (Exhibit 32)
25. When Mrs. A left the lobby area of the Brockton Police Department with Officer Bunker, Mr. Desmond was holding the restraining order paperwork. Mr. Desmond then took the restraining order paperwork and walked around the lobby of the Brockton Police Department with it in his hands. (Exhibit 9)
26. While he had the restraining order paperwork in hand waiting for Mrs. A’s return to the lobby, Mr. Desmond can be seen looking at various documents in the restraining order paperwork. (Exhibit 9)
27. At one point, Mr. Desmond stops and looks at a page of the restraining order document that is flipped over. (Exhibit 9 where timer running on said exhibit spans 11:27:00 through 11:30:19)
28. A District Court judge, after speaking with Mrs. A on the phone, issued an emergency restraining order for Mrs. A against her husband that day (November 2nd). (Testimony of Officer Bunker)
29. That same day, Officer Bunker asked Mrs. A. if she wanted to pursue criminal charges against Mr. A for the alleged threats he had made against her. Mrs. A was unsure at that time

whether she wanted to pursue criminal charges against her husband. (Testimony of Officer Bunker)

30. Shortly after Mrs. A, Mr. Desmond and Mr. Desmond's sister exited the police station, Officer Bunker noticed that one of the forms had not been signed. Officer Bunker went out to the parking lot to have Mrs. A. sign the form in question. (Testimony of Officer Bunker)
31. While in the parking lot, Mrs. A mentioned that Mr. A had just texted her about an issue related to their children. Although the text was not threatening, it was unnerving for Mrs. A. Officer Bunker assured Mrs. A that he would call Mr. A immediately and inform him that a restraining order had been issued. (Testimony of Officer Bunker)
32. Officer Bunker then called Mr. A on his cell phone and informed him that a restraining order had been issued against him. Mr. A was advised to come to the Brockton police station to go over the details of the order. (Testimony of Officer Bunker)
33. Mr. A subsequently arrived at the Brockton police station and a sergeant by the name of Baroud served the restraining order on Mr. A. While Sgt. Baroud was serving the restraining order on Mr. A., Officer Bunker came out and asked Mr. A. if he had any firearms that needed to be surrendered. Mr. A stated that he now only had one shotgun and that it was at his father's house in Stoughton. (Testimony of Officer Bunker)
34. Mr. A, while being served the restraining order, also complained about Mr. Desmond and stated that he was going to speak to his superiors at the West Bridgewater Police Department. (Testimony of Officer Bunker)
35. Mr. A also told Officer Bunker that, during an argument with Mrs. A the previous night, Mrs. A. had threatened to kill herself but later recanted. (Testimony of Officer Bunker)
36. Hearing this information from Mr. A, Officer Bunker called Mr. Desmond and asked him if

he thought that Mrs. A. was a threat to herself. Mr. Desmond told Officer Bunker that he didn't think Mrs. A. was a threat to herself. (Testimony of Officer Bunker)

37. Mr. A then assisted the Brockton Police Department in retrieving his shot gun from his father's home. (Testimony of Officer Bunker)

38. Later that evening (on November 2, 2013), Mr. Desmond called Officer Bunker and told him that he was with Mrs. A. at her home in Brockton and that someone had been to the home and taken money. Mr. Desmond believed that Mr. A. had been the one who came to the home (which would be in violation of the restraining order). Officer Bunker advised Mr. Desmond to contact someone on duty at the Brockton police station and report it. (Testimony of Officer Bunker)

39. A hearing for an extension of the emergency restraining order that issued on November 2, 2013 was held in the Brockton District Court on November 8, 2013 before Judge James J. McGovern. By the time this hearing took place, Mr. A. had been criminally charged with violating the temporary restraining order. (Exhibit 4) Mr. Desmond was called to testify by counsel for Mr. A. (Testimony of Mr. Desmond)

40. The following is taken from the transcript of the November 8, 2013 hearing before Judge McGovern:

Mr. A's Attorney: I'm just going to show you [Mr. Desmond] an affidavit for This restraining order, if I may show you this.

Mr. Desmond: Sure. Thank you.

Mr. A's Attorney: And do you know [Mrs. A]?

Mr. Desmond: I do.

Mr. A's Attorney: Do you see her in the courtroom today?

Mr. Desmond: I do.

Mr. A's Attorney: And that affidavit I just showed you, have you – have you ever seen that before?

Mr. Desmond: No.

Mr. A's Attorney: You never saw it before today?

Mr. Desmond: No.

Mr. A's Attorney: Did you ever – on November second did you ever assist [Mrs. A] with writing this affidavit?

Mr. Desmond: No.

(Exhibit 4)

41. The following is also taken from the transcript of the November 8, 2013 hearing before Judge

McGovern:

Mr. A's Attorney: On September ninth did you drive [Mrs. A] to the Brockton District Court?

Mr. Desmond: Yes.

Mr. A's Attorney: You testified earlier you – you weren't here.

Mr. Desmond: I did not come in. I drove her here, and I did not come to the court proceeding. I didn't even come into the courthouse.

Mr. A's Attorney: But you were here, correct?

Judge McGovern: I'm sorry. What – excuse me, what?

Mr. A's Attorney: September ninth, the first restraining order.

Judge McGovern: Okay.

Mr. A's Attorney: I asked him if he drove her to the court, and he said yes.

Mr. A's Attorney: Is that correct? Did you drive her to the court?

Mr. Desmond: I did drive her, yes.

Mr. A's Attorney: Yeah, but you testified earlier you weren't here.

Mr. Desmond: You asked if I came to the court proceeding. I did not come into the building, no, I did not. I was not here.

42. Judge McGovern subsequently asked Mr. Desmond a series of questions, many of which were objected to by Mrs. A's counsel, including issues related to: Mr. Desmond appearing in his court room on the prior day of hearing carrying a firearm (which is not permitted); and text messages from October 22nd between Mr. Desmond and Mrs. A. (Exhibit 4)

43. Part of the October 22nd text message exchange reviewed by Judge McGovern included the following:

Mr. Desmond: Can u plz call its very important

Mrs. A.: No I can't. I told you to leave me alone.

Mr. Desmond: No

Mr. Desmond: Call me

Mrs. A: Seriously. you've done enough for a lifetime. I'm DONE.

Mr. Desmond: Call me

Mr. Desmond: Call n ill leave for good

Mrs. A: No I will not

Mr. Desmond: Ok ill come there

Mr. Desmond: I'm at cumbys now

Mr. Desmond: I'm getting gas and then I am coming to ur house

Mr. Desmond: do you want to knock or you going to come out

Mr. Desmond: I'm at the end of your street I can see your home in the garage door is open are you going to come out or should I come up

Mrs. A: Get away from my house
I'm not even there

Mr. Desmond: Ur car is
Mr. Desmond: I'm looking at it
Mr. Desmond: Or call me
Mr. Desmond: listen I know it's over I'm not going to try to talk you out of it I just need to talk to you
Mr. Desmond: Plz
Mr. Desmond: Don't get mad when I pull up

(Exhibit 33)

44. After reviewing these October 22nd text messages, the following exchange occurred between

Judge McGovern and Mr. Desmond at the November 8th restraining order hearing:

Judge McGovern: By the way, Exhibit 1, you say, 'Can you please call me. It's very important.' What was so very important?

Mr. Desmond: The fact that he had called and made those threats to me the previous day.

Judge McGovern: And the response from [Mrs. A], 'No, I can't. I told you leave me alone.' But you weren't leaving her alone, were you?

Mr. Desmond: No, I continued to text her.

Judge McGovern: You weren't leaving her alone, were you, Mr. Desmond?

Mr. Desmond: No I continued the text.

Judge McGovern: I can't hear you.

Mr. Desmond: I continued the text, yes.

Judge McGovern: 'No, call me. Seriously, you've done enough for a lifetime. I'm done.' Do you know what she – [Mrs. A] meant by that?

Mr. Desmond: Yeah, to stop, that she didn't want to talk to me.

[There were a series of exchanges between Judge McGovern and counsel for Mrs. A who objected to the line of questioning. Judge McGovern overruled the objections and continued questioning Mr. Desmond.]

Judge McGovern: Now it says, 'Do you want to knock or you going to come out?'
What does that -- what's that all about?

Mr. Desmond: I just wanted to see if she would talk to me.

Judge McGovern: Well, did you -- had you ever been to [Mrs. A]'s house before
and you knocked, or you just ---

Mr. Desmond: No.

Judge McGovern: -- walked in?

Mr. Desmond: No, I've never been there before.

45. As part of his closing argument in favor of extending the restraining order, Mrs. A's attorney stated in part to Judge McGovern: "There's the threats that you heard today from both Officer Desmond and also the threats that were made directly to [Mrs. A]." (Exhibit 4)

46. The following exchange then ensued between Mrs. A's attorney and Judge McGovern:

Judge McGovern: I don't find the officer credible.

Mrs. A's Attorney: That's your finding, Judge?

Judge McGovern: That's my finding.

Mrs. A's Attorney: I will say the testimony has been had on that.

Judge McGovern: What's that?

Mrs. A's Attorney: The testimony was made, at least on that -- on that -- on that allegation --

Judge McGovern: I don't find the officer credible.
(Exhibit 4)

47. At the conclusion of this November 8, 2013 hearing, Judge McGovern vacated the emergency restraining order that Mrs. A had obtained against her husband. (Exhibit 4)

48. On the evening of November 8, 2013, Mrs. A. came to Mr. Desmond's residence in

Brockton. Based on information she had purportedly received from her husband, Mrs. A accused Mr. Desmond of being an imposter; someone who had a history of stalking women; and who was actually forty-nine years old (as opposed to his actual age of 41). Mr. Desmond showed Mrs. A his license to prove his age and, at some point, Mr. Desmond ran his own CORI and gave it to Mrs. A to prove he had no criminal record. (Testimony of Mr. Desmond)

49. The next day, on November 9, 2013, Mrs. A. sought a Harassment Prevention Order against *Mr. Desmond*. (Exhibit 29)

50. In her sworn affidavit, Mrs. A wrote that Mr. Desmond had: “coerced” her into filing restraining orders against her husband; yelled at her when she refused to press criminal charges against her husband; sent her harassing text messages; and made threats related to Mr. A and Mr. A’s parents. Mrs. A’s request for this Harassment Prevention Order was denied by an on-call Judge. (Exhibit 29)

51. The Department’s investigation of Mr. Desmond began in late November 2013. Lt. Victor Flaherty received information from dispatch that a telephone call was received from the Attorney General’s office regarding a complaint made to them by Mr. A, who alleged that Mr. Desmond was harassing Mr. A and his wife, Mrs. A, and that Mr. Desmond was running unauthorized probation checks on both of them. (Testimony of Lt. Flaherty)

52. Lt. Flaherty returned the call to the Attorney General’s office and spoke to an Assistant Attorney General. He was advised of the complaint made by Mr. A with the added information that the West Bridgewater Police Department allegedly “wasn’t looking into this.” Lt. Flaherty informed the Assistant Attorney General that this was the first he (Flaherty) had heard of Mr. A’s complaint. (Testimony of Lt. Flaherty)

53. Mr. A had apparently contacted the Attorney General's office to complain about Mr. Desmond and the failure of the West Bridgewater Police Department to look into his complaints, but had never actually made a complaint to the police department about Mr. Desmond. (Testimony of Flaherty)
54. Lt. Flaherty was subsequently contacted by Mr. A. via telephone. During this phone conversation, Mr. A told Lt. Flaherty: that he and his wife were being harassed by Mr. Desmond; that he had physical evidence of a BOP that had been thrown at them by Mr. Desmond; and that Mr. Desmond had lied at the November 8th restraining order hearing. Mr. A encouraged Lt. Flaherty to listen to the recording of the November 8th hearing. (Testimony of Lt. Flaherty)
55. As a result of this phone conversation, Lt. Flaherty sent a written request to the Criminal Justice Information System, (CJIS), seeking information on anyone in the West Bridgewater Police Department who had "run" Mr. and Mrs. A. He also requested a recording of the November 8th restraining order hearing. (Testimony of Lt. Flaherty)
56. Lt. Flaherty subsequently received a response from "CJIS" (Exhibits 6 and 7) via email that indicated numerous members of the West Bridgewater Police Department had "run" Mr. and Mrs. A, in addition to Mr. Desmond. Those responses also showed that Mr. Desmond had run an inquiry of Mr. A under the Interstate Identification Index (a "Triple I" or "III"). That Index provides the viewer with a list of the states that have a criminal history record on any given individual. Such records are only meant to be available to law enforcement officials who have a specific, legitimate basis for accessing them. (Testimony of Lt. Flaherty)
57. On December 3, 2010, Lt. Flaherty met with Mr. A and his attorney at the Easton Police Department. At this meeting, Mr. A provided Lt. Flaherty with: a copy of *Mr. Desmond's*

BOP report that had allegedly been thrown at them by Mr. Desmond; 9-10 pages of text messages between Mr. Desmond and Mrs. A; and a copy of the affidavit that Mrs. A had completed when she sought a harassment order against Mr. Desmond. (Testimony of Lt. Flaherty)

58. Subsequent to his meeting with Mr. A and his attorney, Lt. Flaherty listened to the tape of the November 8th restraining order hearing several times. He also received a copy of the lobby video of the Brockton Police Department from November 2, 2013. (Testimony of Lt. Flaherty)

59. On December 10, 2013, Lt. Flaherty penned a letter to Mr. Desmond stating in relevant part:

“This department has received a complaint filed with the Massachusetts Attorney General’s Office. The complaint was in reference to your continued harassment and inappropriate conduct against [Mr. and Mrs. A]. According to representative ..[of] the Massachusetts Attorney General’s Office, [Mr. A] spoke about continued harassment and threatening text messages. [Mr. A] stated you threatened to ‘get him arrested and have his LTC taken away along with his weapons.’ The Attorney General’s office complaint also indicated that you violated their privacy by conducting unauthorized queries utilizing the West Bridgewater Police Department CJIS network connection, and using such information in a threatening manner.

This department also requests any involvement you had in reference to assisting [Mrs. A] in the procedure of requesting an emergency 209A order on or about both September 8, 2013 & November 2, 2013, along with any involvement or contact you had with any Brockton Police Department personnel during these requests and in reference to the alleged violation and November 2, 2013 arrest of [Mr. A].” (Exhibit 11)

60. Also on December 10, 2013, Mr. Desmond was placed on paid administrative leave. (Exhibit 13)

61. On December 11 and 13, 2013, Lt. Flaherty interviewed Mrs. A. Mrs. A. told Lt. Flaherty that the allegations she made against Mr. Desmond in her November 9, 2013 application for a Harassment Prevention Order were untrue and that she only made the allegations against Mr. Desmond because she had been coerced by her husband to do so. (Appellant Exhibit 4:

Videotaped interviews of Mrs. A)

62. On December 12, 2013, Mr. Desmond provided Lt. Flaherty with a nine (9)-page response. On Page 4 of this response letter, Mr. Desmond states the following regarding Mrs. A obtaining a restraining order on November 2nd: “ ... At the station Officer Bunker took [Mrs. A] in a private room and spoke with her. I do not know what happened in the room as I was not present as I waited in the lobby with my sister []. I later learned that [Mrs. A] filed for an emergency 209A order and that an on call judge issued it.” (Exhibit 14, Page 4)
63. On page 5 of this response, Mr. Desmond references going to Mrs. A’s home on November 2, 2013 after the emergency restraining order had been issued and discovering (according to Mrs. A) that money had been taken from the home. (Exhibit 14; Page 5)
64. On Page 6 of his report, Mr. Desmond references multiple calls that he made to the Brockton and Stoughton police departments inquiring as to whether Mr. A had been arrested for violating the restraining order (for allegedly coming to the house and taking money). (Exhibit 14; Page 6)
65. According to Mr. Desmond’s December 12th report, Mrs. A (on the night of November 2nd) “then told me that [Mr. A] has been making threats to harm me for awhile now. She said he had purchased an AR-15 and was putting a scope on it and told her that he could sit in the part lot of [a location across the street from Mr. Desmond’s residence] and shoot me in the face and I would never hear the gun go off.” (Exhibit 14)
66. In his December 12th report, Mr. Desmond also wrote that, on Sunday, November 3, 2013, he contacted an attorney to assist Mrs. A at the upcoming restraining order hearing. (Exhibit 14)
67. Also in his December 12th report, Mr. Desmond wrote: “I did not make any unauthorized CORI inquiries.” He recounted one occasion in August 2013 in which he ran the license

plate of an unoccupied car parked at the donut shop where Mrs. A. worked. Mr. Desmond wrote: “The owner came back to [Mr. A]. I did not know who he was at that time or that this was his car.” (Exhibit 14)

68. Mr. Desmond’s report also references doing an inquiry to check on a traffic citation Mrs. A had received. He also wrote, “Due to the threats [Mr. A] has made to come to my house and cause me great physical harm a check was done to see what type car he may be driving and watching me from. Mr. Desmond’s report did not specifically reference running a “Triple III” inquiry on Mrs. A. (Exhibit 14)
69. On December 20, 2013, Mrs. A. sent an email to Lt. Flaherty. In her email, Mrs. A stated that her husband had conveyed to her several purported conversations he had with Lt. Flaherty in which Mrs. A was discussed. Mrs. A. objected to the purported conversations and wrote in part, “Danny has done nothing wrong Besides befriending a married woman, which I believe is not against the law ...” (Appellant Exhibit 10)
70. On December 23, 2013, while Mr. Desmond was still on paid administrative leave, Officer Christopher Perez of the Brockton Police Department was working the 4:00 PM to Midnight shift as a patrol officer. (Testimony of Officer Perez)
71. During the late night hours of that shift, Officer Perez was dispatched to investigate a suspicious car in a neighborhood where Mr. and Mrs. A. reside. (Testimony of Officer Perez)
72. At least one witness provided Officer Perez with the number plate of the suspicious vehicle. After a computer check regarding that plate was conducted, Officer Perez learned that it was registered to a black Nissan owned by Mr. Desmond. (Testimony of Officer Perez)
73. Shortly thereafter, Officer Perez went to the apartment complex where Mr. Desmond lives and, while in the parking lot of the complex, Officer Perez observed Mr. Desmond arriving at

the complex in his black Nissan and Officer Perez stopped it. (Testimony of Officer Perez)

74. Officer Perez asked Mr. Desmond what he had been doing in the neighborhood where Mr.

Desmond's car had reportedly been seen and Mr. Desmond denied being in that neighborhood that night⁶. (Testimony of Officer Perez)

75. Officer Perez pressed Mr. Desmond by informing him that witnesses had seen Mr.

Desmond's car and had taken down its license plate number. (Testimony of Officer Perez)

76. Mr. Desmond then admitted he had been in the neighborhood in question to visit his

girlfriend, Mrs. A, and had parked a few streets away so that her husband would not know that he was trying to visit her. Officer Perez advised Mr. Desmond to refrain from parking his car in that neighborhood as residents there would consider it a suspicious vehicle. (Testimony of Officer Perez)

77. Approximately twenty (20) minutes later, Officer Perez returned to Mr. and Mrs. A's

neighborhood due to a report of a suspicious party running through back yards. (Testimony of Perez)

78. Although the "suspicious party running through back yards" was not caught and never

identified as Mr. Desmond, Officer Perez decided to go to the home of Mrs. A to corroborate Mr. Desmond's earlier remarks to him and to check on her welfare. (Testimony of Officer Perez).

79. In checking on Mrs. A, Officer Perez learned from her that Mr. Desmond had come to her

house.⁷ (Testimony of Officer Perez)

⁶ In his testimony before the Commission, Mr. Desmond stated that he never denied being in Mr. and Mrs. A's neighborhood on the night of December 23, 2013. For the reasons stated in the analysis, I credited Officer Perez's version of the conversation, including that Mr. Desmond initially denied being in the neighborhood.

⁷ Mrs. A also told Officer Perez that, despite telling Mr. Desmond to leave, he returned, banged on the door and rang the doorbell, scaring her and her three children. Based on a review of the police incident report and the testimony of Officer Perez, it is clear that Officer Perez was the individual banging on the door and ringing the doorbell, trying to check on the welfare of Mrs. A. She mistakenly thought that Mr. Desmond had returned and was banging on the

80. Mrs. A told Officer Perez that she was concerned that Mr. Desmond was going to hurt himself as he had told her that he “had nothing to live for” and that he wasn’t going to wake up in the morning. Mrs. A said that Mr. Desmond was despondent about her reconciliation with her husband, the fact that she no longer wished to see him, and the fact that he was having family and work problems. (Testimony of Officer Perez)
81. As a result of Mrs. A’s statements regarding Mr. Desmond’s well-being, Sergeant Green of the Brockton Police Department went to Mr. Desmond’s apartment and, after a discussion with him regarding having himself psychologically evaluated, Mr. Desmond agreed to do so. (Testimony of Mr. Desmond)
82. Mr. Desmond was then psychologically evaluated at Good Samaritan Hospital during the early morning hours of December 24, 2013 and discharged immediately after that evaluation concluded that he was not a threat to himself. (Testimony of Mr. Desmond)
83. On the morning of December 24, 2013, Mrs. A sent an email to Lt. Flaherty regarding a “major incident” at her home the prior night with Mr. Desmond. (Exhibit 30)
84. Also on December 24, 2013, Mrs. A sought a restraining order against Mr. Desmond based on Mr. Desmond visiting her home the previous night and, according to her affidavit, acting “hysterical” and “completely erratic” and allegedly telling her that he “had nothing to live for.” There is no indication that this restraining order request was allowed. (Exhibit 34)
85. On December 24, 2013, Mr. Desmond, by telephone, reported to Lieutenant Flaherty that there had been another incident with Mrs. A and that two Brockton Police officers had come to his home and requested that he undergo a medical evaluation because Mrs. A believed him to be suicidal. Lieutenant Flaherty requested Mr. Desmond to provide him with a full written report of this incident. (Testimony of Lt. Flaherty and Officer Desmond)

door.

86. On Friday, December 27, 2013, Mr. Desmond emailed a written report to Lieutenant Flaherty dated December 25, 2013 in which he set forth his version of the events of December 23-24, 2013. (Exhibit 15)
87. In his December 25th report to Lieutenant Flaherty, Mr. Desmond did not make any reference to his encounter with Officer Perez in his apartment complex parking lot. (Exhibit 15)
88. On January 8, 2014, Chief Donald Clark of the West Bridgewater Police Department informed Mr. Desmond in writing that he would request the West Bridgewater Board of Selectmen to commence disciplinary hearings against Mr. Desmond for a series of violations including: perjury; unauthorized use of CJIS and CORI information; and harassment. (Exhibit 24)
89. The Town's Board of Selectmen conducted a disciplinary hearing regarding this matter on January 30th and February 6th, 2014. (Exhibit 28)
90. During the disciplinary hearing before the West Bridgewater Board of Selectmen on February 6, 2014, Lieutenant Flaherty testified that he had turned over to the Plymouth County District Attorney's office the information regarding Mr. Desmond's November 8, 2013 testimony in Brockton District Court before Judge McGovern so that the District Attorney's office could determine if any charges should be brought against Mr. Desmond as a result of his testimony in court on that date. (Exhibit 26)
91. As part of its February 20, 2014 termination letter to Mr. Desmond, the Board of Selectmen referenced the adverse inference it was drawing as a result of Mr. Desmond not testifying when it stated in relevant part: "As a Board, we were eager to hear your side of the story. We wanted to hear you tell us why the evidence before us was incorrect or that maybe there were misunderstandings during the investigation. However, while you had the opportunity to

speaking at the hearing, your attorney never made you available to do so.” (Exhibit 28)

92. In the section headed “Conclusion” in its February 20th letter, the Board of Selectmen notified Mr. Desmond that they were upholding the recommendation of the Police Chief and terminating his employment as a police officer for his “continued pattern of lying / perjury, conduct unbecoming and harassment.” (Exhibit 28)

93. Rule 4.1-CONDUCT UNBECOMING AN OFFICER of the Manual of Rules and Regulations for the Government of the West Bridgewater Police Department of the County of Plymouth, Massachusetts (hereinafter “the Manual”) states:

Officers shall not commit any specific act or acts of immoral, improper, unlawful, disorderly or intemperate conduct whether on or off duty, which reflects discredit or reflects unfavorably upon the officer himself, upon his fellow officers or upon the Police Department. Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department and its members. Conduct unbecoming an officer shall include that which tends to indicate that the officer is unable or unfit to continue as a member of the Department, or tends to impair the operation, morale, integrity, reputation or effectiveness of the Department or its members. Conduct unbecoming an officer shall also include off-duty conduct where there is a nexus or connection between the act or acts committed by the officer and his continued fitness or ability to effectively perform his required duties and responsibilities and/or the impact or adverse effect said conduct may have on the operation, morale, integrity, reputation or effectiveness of the Department and the ability of the officer(s) not involved in said act to effectively perform their required duties and responsibilities. (Exhibit 1)

94. Rule 6.9-TRUTHFULNESS of the Manual states: “Officers shall speak the truth at all times.

In cases in which an officer is not allowed by the regulations of the Department to divulge facts within his knowledge, he will decline to speak on the subject” (emphasis added).

(Exhibit 1)

95. Mr. Desmond acknowledged receipt of a copy of the Department’s rules and regulations on February 20, 2008. (Exhibit 2)

96. On April 25, 2014, a Plymouth County grand jury indicted Mr. Desmond for Perjury

pursuant to section 1 of Chapter 268 of the Massachusetts General Laws for allegedly testifying falsely at the November 8, 2013 hearing in the Brockton District Court on Mrs. A's application for a 209A restraining order. (Exhibit 31)⁸

Legal Standard

G.L. c. 31, § 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law,” 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 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). 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 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived

⁸ According to the Trial Court's online tracking system, Mr. Desmond has filed a motion to dismiss the criminal charges against him and that motion is scheduled to be heard on December 19, 2014.

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).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew,” Falmouth v. Civil Service Comm’n, *op.cit.* and cases cited. However, “[t]he commission’s task.. is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘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’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority, Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting internally from Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) and cases cited.

Analysis

Mr. Desmond, a seventeen (17)-year veteran of the West Bridgewater Police Department, was terminated as a police officer based on charges related to untruthfulness; conduct unbecoming a police officer; and harassment. At the core of this matter is whether Mr. Desmond, while under oath, made untruthful statements during a November 8, 2013 hearing in Brockton District Court that was held to determine whether an emergency restraining order should be extended. That restraining order was being sought by Mrs. A, a married woman with three (3) children, against her husband.

Mr. Desmond, who is single, had met Mrs. A. several months earlier at a local donut shop. Mrs. A had begun working at this local donut shop in West Bridgewater that was frequented by Mr. Desmond and other West Bridgewater police officers. Mr. Desmond and Mrs. A. began

chatting when Mr. Desmond would make purchases at the drive-through window and the two (2) of them eventually began socializing, including a weekend night out with friends in September 2013 at a popular bar and restaurant in West Bridgewater called the Charlie Horse. By this time, Mrs. A. had told Mr. Desmond that she was having difficulty with her marriage, which she described as an abusive relationship.

On the night that Mrs. A. was at the Charlie Horse, her husband, Mr. A., stopped by the donut shop and was surprised to learn that she was not working. That prompted a phone call from Mr. A. to Mrs. A's cell phone. Mr. Desmond overheard that cell phone conversation, in which Mr. A. allegedly made threatening statements to Mrs. A. After discussing the matter with Mr. Desmond, Mrs. A. decided to obtain a restraining order against her husband. Mr. Desmond made a call to a police sergeant at the Brockton Police Department and let the sergeant know that his girlfriend would be coming in to seek an emergency restraining order, which she eventually did. The emergency restraining order was entered and a hearing was scheduled for that Monday, September 9, 2013, to determine whether the emergency restraining order would be extended.

In what would ultimately prove to be important regarding the allegations of untruthfulness here, Mr. Desmond: 1) drove Mrs. A to the Brockton District Court on the morning of September 9th; 2) walked into the Brockton District Courthouse with Mrs. A; and 3) escorted Mrs. A. to the clerk's office. He then walked outside the courthouse and waited for Mrs. A. After learning that the emergency restraining order was not extended, he drove Mrs. A away from the courthouse.

Approximately two (2) months later, on November 2, 2013, Mrs. A called Mr. Desmond and told him that her husband had again made threatening statements directed toward both her and Mr. Desmond. Also important to the allegations of untruthfulness here is what actions Mr.

Desmond took in response to this call. It is undisputed that Mr. Desmond and Mr. Desmond's sister accompanied Mrs. A. to the Brockton Police Department on November 2, 2013. Mr. Desmond was fully aware of the purpose of the visit to the police station. That same day, he had called Brockton Police Officer Michael Bunker and asked him whether a police officer could come to Mrs. A's house to assist her with obtaining a restraining order, instead of her making the trip to the police station. When he was told that was not possible, Mr. Desmond accompanied Mrs. A to the Brockton police station.

One of the exhibits entered into evidence here was a videotape of the Brockton police station lobby on the morning of November 2, 2013. Based on my observations, reasonable inferences drawn from it -- and common sense -- I have concluded that Mr. Desmond, in addition to providing Mrs. A with moral support that morning, did, at some point, see the affidavit that Mrs. A prepared in support of the emergency restraining order. He saw it when she was preparing it (while he was looking over her shoulder) and he saw it while Mrs. A. left the lobby area and walked into a separate room with Officer Bunker to speak with an on-call Judge who eventually granted the emergency restraining order.

On that same day, Mr. Desmond accompanied Mrs. A. to her home, where it was discovered that money was missing from the home, raising concerns that Mr. A. had been to the home and possibly violated the just-issued emergency restraining order. A Brockton police officer was dispatched to Mrs. A's home and that police officer spoke with Mr. Desmond. Further, Mr. Desmond himself does not dispute that he was at Mrs. A's home on November 2, 2013.

On November 8, 2013, Mr. Desmond was called to testify at a hearing in Brockton District Court, held to determine whether this most recent emergency restraining order would be extended. He was asked questions by counsel for Mr. A and the presiding Judge. During his

sworn testimony, Mr. Desmond made multiple untruthful statements.

First, Mr. Desmond testified in District Court that he had never seen the affidavit that Mrs. A submitted in support of this most recent restraining order. As referenced above, Mr. Desmond had indeed seen the affidavit when he accompanied Mrs. A. to the Brockton police station on November 2nd. He saw the affidavit both while she was preparing it (and he was looking over her shoulder) and while Mrs. A was in a separate room talking to an on-call Judge.

Second, Mr. Desmond testified in District Court that he never came into the courthouse on the day of the hearing regarding the first restraining order, which was held on September 9, 2013. Specifically, Mr. Desmond testified in District court that, “I did not come in. I drove her here, and I did not come to the court proceeding. I didn’t even come into the courthouse.” Moments later, he testified that, “You asked if I came to the court proceeding. I did not come into the building, no, I did not. I was not here.” As referenced above, Mr. Desmond did indeed come into the courthouse with Mrs. A. on September 9th. Although he never went into the court room, he did walk into the courthouse with Mrs. A and escorted her to the Clerk’s office, before leaving the building and waiting outside.

Third, Mr. Desmond testified in District Court on November 8, 2013 that he had never been to Mrs. A’s house. Specifically, in an exchange with the District Court Judge, Mr. Desmond testified that “No, I’ve never been there before”, referring to Mrs. A’s house. Mr. Desmond argues that he thought the Judge was asking whether he had ever been to Mrs. A’s home prior to November 2nd. Regardless of whether there was any ambiguity in the Judge’s question, Mr. Desmond’s response was unambiguous, emphatically stating to the Judge on November 8th that he had *never* been there before. That was not a truthful statement, as Mr. Desmond had been to the house only six (6) days earlier.

In addition to these untruthful statements in Brockton District Court, Mr. Desmond made untruthful statements or omissions on December 23, 2013 and December 25, 2013.

On December 23, 2013, the Brockton Police Department received calls regarding a vehicle parked in or around Mrs. A's neighborhood. Brockton Police Officer Christopher Perez, who was dispatched to the call, eventually determined, based on the statement of a neighbor who had seen the car, that it belonged to Mr. Desmond. Officer Perez decided to inquire with Mr. Desmond and drove to Mr. Desmond's apartment complex. Officer Perez saw Mr. Desmond drive into the apartment complex parking lot and the two of them had a discussion while sitting in their respective vehicles. When Officer Perez asked Mr. Desmond what he had been doing in Mrs. A's neighborhood, Mr. Desmond denied being in the neighborhood that night. Only after Officer Perez told Mr. Desmond that a neighbor had taken down his license plate number did Mr. Desmond admit to being in the neighborhood that night.

When Mr. Desmond was instructed to write a report about the events that occurred on the night of December 23rd, he omitted any reference to Officer Perez coming to his apartment complex and/or the conversation between the two of them.

In his testimony before the Commission, Mr. Desmond testified that, when speaking with Officer Perez, he never denied being in Mrs. A's neighborhood that night, but, rather, simply told Officer Perez that he had a right to be there. Mr. Desmond suggested that Mr. Perez's testimony before the Commission in this regard was motivated by a personal animus that Mr. Perez has toward him as a result of testimony Mr. Desmond provided in an unrelated matter that painted Mr. Perez in a bad light.

I credit the testimony of Mr. Perez regarding this interaction and do not credit the testimony of Mr. Desmond for the following reasons. First, standing alone, I found Mr. Perez to be a

highly credible witness. While he had a firm recollection of the events that occurred on December 23rd, he was careful to limit his testimony only to what he actually remembered. His demeanor was consistent with someone offering credible, straightforward testimony and his version of events had a strong ring of truth to it. Further, Mr. Desmond, despite having the opportunity to testify at the local appointing authority hearing and dispute the testimony offered by Officer Perez at that hearing, chose not to do so. Similarly, Mr. Perez, during cross examination, was never asked about a purported hearing in which Mr. Desmond offered testimony that was adverse to Mr. Perez.

Instead, for the first time, as part of his testimony before the Commission on the second day of hearing, Mr. Desmond raised the issue about Mr. Perez's alleged animus toward him. I did not find Mr. Desmond's testimony regarding Officer Perez's animus, or the conversation he had with Officer Perez on December 23rd, to be credible. Rather, I have concluded that he was untruthful to Officer Perez when he first denied being in Mrs. A's neighborhood that night and that he erred by omitting any reference to his conversation with Officer Perez in his December 25th report.

An appointing authority is well within its rights to take disciplinary action when a police officer has "a demonstrated willingness to fudge the truth in exigent circumstances" because "[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or embarrass a fellow officer," Falmouth v. Civil Service Comm'n *op.cit.* at pp. 796, 801 citing Cambridge v. Civil Service Comm'n, *op.cit.* at 303.

The Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer, MacHenry v Wakefield, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination, LaChance v.

Erickson, 118 S. Ct. 753 (1998), citing Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens,” Garrett v. Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful,” Royston v Billerica, 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position,” Pearson v. Whitman, 16 MCSR 46, 50 (2003). Consequently, the discharges of police officers based upon their dishonesty have often been upheld by the Commission. The following cases are illustrative:

In Royston v. Billerica, op.cit. at 128-29, the Commission upheld the discharge of a police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct.

In Garrett v. Haverhill, op.cit. at 385-86, the Commission found that there was reasonable justification for the discharge of a police officer who repeatedly presented false testimony during the departmental investigation of the officer’s misconduct.

In Meaney v. Wobum, 18 MCSR 129, 133-35 (2005), the discharge of a police officer was upheld based, in part, on the officer’s consistent dishonesty and “selective memory” during the departmental investigation of that officer’s misconduct.

In Pearson v. Whitman, op.cit. at 49-50, the Appointing Authority’s discharge of a police officer who had “a problem with telling the truth” was upheld.

In Eisenbeiser v. West Springfield, 7 MCSR 99, 104, the discharge of a police officer was upheld based on, inter alia, the officer’s dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement.

And, in Deshamias v. City of Westfield, 23 MCSR 418 (2009), a police officer's discharge was upheld based primarily on the officer's dishonesty about a relatively minor infraction that occurred on his shift.

Mr. Desmond was also charged with conduct unbecoming an officer and harassment. These charges relate to text messages sent from Mr. Desmond to Mrs. A; running the plate numbers on vehicles registered to Mr. A and Mrs. A; running a "Triple III" inquiry on Mrs. A; and using his position as a police officer to influence police activity.

The Town did not show, by a preponderance of the evidence, that it was unlawful or a violation of any rule for Mr. Desmond to run an inquiry on the license plate numbers of vehicles registered to Mr. A or Mrs. A. Based on a review of the testimony of Mr. Desmond and other police officers who testified before the Commission, the license plate inquiries in question do not appear to be out of the ordinary or a violation of any rule.

Mr. Desmond did, however, engage in conduct unbecoming a police officer when he used police department technology to conduct an inquiry of Mrs. A under the Interstate Identification Index (a "Triple I" or "III"). That Index provides the viewer with a list of the states that have a criminal history record on any given individual. Such records are only meant to be available to law enforcement officials who have a specific, legitimate basis for accessing them. Here, there is no evidence that the so-called "Triple I" check that was done had any such basis. Further, while Mr. Desmond is entitled to a copy of his criminal history record, it was inappropriate, at best, for him to run his own criminal history report for the sole purpose of giving it to his girlfriend to rebut alleged statements made against him by her husband.

The Town also did not show, by a preponderance of the evidence, that Mr. Desmond used his position as a police officer to influence police activity. While Mr. Desmond did make multiple

calls to members of the Brockton and Stoughton Police Departments on matters related to the restraining orders that were requested and issued, the record does not show that he sought or received any special treatment as a result of his inquiries.

In regard to whether Mr. Desmond harassed Mrs. A, the preponderance of the evidence does not support such a conclusion. I have reviewed the entire record, including the videotaped interviews of Mrs. A and her multiple sworn affidavits regarding the alleged actions of Mr. A. and Mr. Desmond. Given the starkly contrasting statements in those sworn affidavits and her casual disavowal of those sworn statements during her recorded interviews, I do not give her affidavits or statements any weight. The Town's Board of Selectmen cites a text message exchange to partially support the charge of harassment. While that exchange, standing alone, is troubling, it does not, particularly given the broader context here, sufficiently show that Mr. Desmond harassed Mrs. A.

While I have not reached all of the same findings as the Town in regard to each of the alleged charges, I have, similar to the Town, concluded that Mr. Desmond engaged in untruthfulness and conduct unbecoming an officer, both of which warrant disciplinary action against Mr. Desmond.

Having determined that it was appropriate to discipline Mr. Desmond for his misconduct, I must determine if Town was justified in the level of discipline imposed - termination.

“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.”

Falmouth v. Civ. Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) quoting Police Comm'r v. Civ. Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (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., Falmouth v. Civil Service Commn, 447 Mass. 814, 823 (2006).

The Commission is also 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.” Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006) and cases cited.

Even if there are past instances where other employees received more lenient sanctions for similar misconduct, however, the Commission is not charged with a duty to fine-tune an employee’s discipline to ensure perfect uniformity. See Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 412 (2000).

As referenced above, years of Commission and precedent-setting judicial decisions have reinforced the solemn responsibility of police officers to be truthful. Here, including during sworn testimony before a *District Court Judge*, Mr. Desmond failed to meet that responsibility by making multiple untruthful statements while he was under oath. One of the key functions of a police officer is to testify in Court truthfully and he failed to do so.

Mr. Desmond argues that the Town, in the past, failed to terminate members of the West Bridgewater Police Department who engaged in similar alleged misconduct.

First, Mr. Desmond argues that the Town’s Police Chief was not disciplined after purportedly giving testimony before the Massachusetts Commission Against Discrimination (MCAD) that was deemed not to be credible. After reviewing the MCAD decision in question, I did not find

explicit credibility assessments regarding the Police Chief that are comparable to the instant matter.⁹

The other case cited by Mr. Desmond to show disparate treatment is more troubling. In a 2002 case, a federal district court judge characterized a West Bridgewater police officer's testimony as "perhaps the worst law enforcement witness, who was trying to be candid, assuming he was trying to be candid, that I've ever encountered. I am concerned about the competence and practices ...[the police officer]."

The United States Court of Appeals, in 2006, after reviewing the record of the same case, found that the police officer's testimony was "riddled with implausibilities and inconsistencies, and that it was disbelieved by the district court in important respects and contradicted by law enforcement witnesses in others." As a result, the Court of Appeals vacated the criminal conviction of the defendant, who had previously been sentenced to sixteen (16) years of incarceration.

The facts as outlined in the Federal District Court and Court of Appeals decisions appear to have provided the Town with ample reason to review whether that police officer should be terminated, which he wasn't. Standing alone, however, the Town's perplexing inaction in that case, does not justify overturning their valid decision here to terminate Mr. Desmond.

Mr. Desmond argues that the Town's decision to terminate him, in sharp contrast to the above-referenced officer, was the result of an animus that Lt. Flaherty, the investigating officer, had toward him. In short, Mr. Desmond testified that, sometime in 2013, he exchanged heated words with Lt. Flaherty in which he (Mr. Desmond) blamed Lt. Flaherty for the suicide of a West Bridgewater police officer who was a close friend of Mr. Desmond.

⁹ It is noteworthy, that, as part of the MCAD appeal in question, there is a reference to the Police Chief allegedly treating Mr. Desmond more favorably than the Department employee who filed the MCAD complaint.

Lt. Flaherty denies that the conversation ever took place and states that he has no personal animus toward or bias against Mr. Desmond. Again, Mr. Desmond did not testify at the local appointing authority hearing and, as such, never made this allegation to the Board of Selectmen. Rather, he first raised this allegation, through counsel, at a pre-hearing conference held at the offices of the Commission on March 12, 2014 and later, on November 18, 2014, during his testimony at the Commission's hearing. I was unable to reach a conclusion as to whether this alleged conversation, or a version of it, ever took place. However, although Lt. Flaherty was the lead investigator here, he did not make the decision to terminate Mr. Desmond. Moreover, all of the supportable charges against Mr. Desmond stand independent of any action taken by Lt. Flaherty. I reviewed the charges as part of a de novo proceeding and, based on my own credibility assessments and my own review of relevant documents, concluded that Mr. Desmond was untruthful and engaged in conduct unbecoming a police officer.

For these reasons, Mr. Desmond's appeal under Docket No. D1-14-50 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein) on December 11, 2014.

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)(l), 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:

Timothy M. Burke, Esq. (for Appellant)

David B. Fisher, Esq. (for Appellant)

David T. Gay, Esq. (for Respondent)

John L. Holgerson, Esq. (for Respondent)