COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

GEORGE ASAMOAH,
Appellant
v.

G1-21-102

CITY OF LOWELL,
Respondent

Appearance for Appellant:
Douglas Louison, Esq.
Louison, Costello, Condon & Pfaff
10 Post Office Square
Suite 1330
Boston, MA 02109

Appearance for Respondent:
Christine P. O'Connor, Esq.
Helen Anderson, Esq.
Lowell City Hall
375 Merrimack Street
Lowell, MA 01852

Commissioner:
Christopher C. Bowman[1, 2]
Cynthia A. Ittleman

SUMMARY OF DECISION

The Civil Service Commission upheld the 30-day suspension of the Appellant, finding that substantial credible evidence supported the conclusion that the Appellant had engaged in conduct which constituted impermissible child abuse, violative of LPD rules and regulations. The Appellant's own testimony confirmed the allegations made by the Pepperell Police Department and the Department of Children and Families. As such, the City was justified in finding that the Appellant had engaged in substantial misconduct warranting discipline.

[1] The Commission acknowledges the assistance of Law Clerk Daniel Taylor in the drafting of this decision.

[2] Commissioner Ittleman conducted the remote full hearing regarding this appeal, but she retired from the Commission prior to drafting a decision. For that reason, the appeal was assigned to me. I have reviewed the entire record in this matter, including the audio / video recording of the remote full hearing and all exhibits.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, George Asamoah (Appellant), timely appealed to the Civil Service Commission (Commission) contesting the decision of the City of Lowell (City) to suspend him from his employment as a police officer for 60 days, with 30 days held in abeyance for a period of one year. On October 25 and November 2, 2021, Commissioner Cynthia A. Ittleman conducted a remote full hearing.[3] Both days of the hearing were recorded via Webex, and both parties were provided with a link to the recording.[4] The Commission also retained a copy of the hearing recording. Commissioner Ittleman retired in March 2022, and the appeal was reassigned to me. I have carefully reviewed the hearing recording and the parties' exhibits and submissions. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT:

Fifteen (15) exhibits were offered into evidence at and following the hearing, seven (7) by the Appellant, seven (7) by the City, and one (1) jointly. Both parties submitted post-hearing briefs. Based on these exhibits and the testimony of the following witnesses:

Called by the City:

- Officer Neil Maskalenko, Pepperell Police Department
- Lieutenant Raymond Cormier, Professional Standards Division, Lowell Police Department
- Superintendent Raymond Kelly Richardson, Lowell Police Department
- N.M., Response Worker, Department of Children and Families

[3] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR § 1.01 (formal rules), apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

[4] 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/it wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

Called by the Appellant:

- Officer George Asamoah, Appellant

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

Appellant's Background

1. The Appellant has been employed by the Lowell Police Department (LPD) since 2006. At the time of the discipline, the Appellant held the position of patrol officer. (Stipulated Facts)
2. In his tenure at the LPD, the Appellant has held two "specialty assignments." From 2012 to 2014, the Appellant was assigned to the LPD Family Services Unit. The Family Services Unit investigates cases of child abuse, elder abuse, sexual assault, and missing persons. For several years beginning in 2016, the Appellant was assigned to a local recreational facility as a juvenile safety coordinator. (Testimony of Superintendent Richardson; Testimony of the Appellant)
3. Prior to the events in question, the Appellant had received no formal discipline. However, he was reprimanded twice in 2019, first for his use of sick time, and second for his failure to verify information related to an alleged violation of a restraining order. Both reprimands were verbal and memorialized in written form in the Appellant's personnel file. (Testimony of Superintendent Richardson; App. Exhibit 5)

Incident and Arrest

4. On the morning of May 29, 2020, while at his home in Pepperell, Massachusetts, the Appellant initiated an argument with a juvenile well known to him (the juvenile). The juvenile, as part of an earlier dispute, had been barred from using a personal electronic device to access the internet. The Appellant believed that the juvenile was nevertheless using this device, and

demanded it be returned to his custody. The juvenile denied having possession of the device. (Resp. Exhibit 1; Testimony of Maskalenko; Testimony of the Appellant)

5. At some point during this confrontation, the juvenile made a statement to the effect of, "Go ahead, hit me."[5] (Resp. Exhibit 1; Testimony of Maskalenko; Testimony of Cormier; Testimony of the Appellant)
6. The Appellant then used a belt to repeatedly strike the juvenile on the arms and legs, between five and approximately twenty times. The belt was made of leather, and approximately an inch wide. The juvenile screamed and cried while being struck. (Resp. Exhibit 1; Testimony of Maskalenko; Testimony of Ms. M)
7. The Appellant made several comments during this incident that caused the juvenile to feel more frightened and distressed, including that if the juvenile did not stop screaming and crying, he would hit the juvenile until their skin broke. He also threatened to spank the juvenile until the juvenile died. (Testimony of Ms. M; Resp. Exhibit 5)
8. At the time of the incident, the juvenile was approximately 4'8.5", and slight in stature for their age. (Testimony of Ms. M)
9. Following the incident, the juvenile called a relative, who in turn contacted the police. Officer Maskalenko, accompanied by two other Pepperell police officers, arrived at the Appellant's home a short time later. (Testimony of Maskalenko; Resp. Exhibit 1)
10. Upon arriving at the Appellant's home, Maskalenko spoke first to the Appellant, who assured him when questioned that "nothing" was happening in his home. Maskalenko then asked to speak to the juvenile, who was called to the front door by the Appellant's wife. (Testimony of

[5] The Appellant admitted at the Commission hearing that he had struck the juvenile on prior occasions as a means of discipline. (Testimony of the Appellant)

Maskalenko; Testimony of the Appellant)

11. Maskalenko spoke to the juvenile outside the house, in the Appellant's driveway. The juvenile was visibly upset, afraid, and crying, and Maskalenko observed five or six raised, red marks on the juvenile's arms, consistent with blows from a belt, and swelling around the juvenile's left wrist. It was at this time that the juvenile relayed their version of events, which was consistent with their injuries. (Testimony of Maskalenko; Resp. Exhibit 1)
12. Officer Maskalenko and his supervisor both concluded that there was probable cause to arrest the Appellant for assault and battery. The Appellant was arrested and transported to the Pepperell Police Department. (Testimony of Maskalenko; Resp. Exhibit 1)
13. While the Appellant was transported to the Pepperell Police Department, Maskalenko remained at the scene to speak with the Appellant's wife and another minor who had witnessed the incident. The statements of both parties were consistent with the juvenile's account of the incident. (Testimony of Maskalenko; Resp. Exhibit 1)
14. The juvenile informed Maskalenko that they did not feel safe at the Appellant's home, and Maskalenko, with the approval of the Appellant's wife, arranged for the juvenile to be transported to a relative's house for the next several days. (Testimony of Maskalenko; Testimony of the Appellant; Resp. Exhibit 1)
15. Maskalenko spoke with the juvenile a second time at the Pepperell Police Department, while the juvenile was waiting for a relative to arrive. Maskalenko took several photos of the juvenile's injuries at this time. Shortly thereafter, the juvenile's relative arrived to bring the juvenile to the relative's home, where they remained for the next three days. (Testimony of Maskalenko; Testimony of the Appellant; Resp. Exhibit 1)
16. In a letter dated May 29, 2020, Superintendent Richardson informed the Appellant that his

license to carry firearms had been suspended and required him to turn in his license and all firearms in his possession. The reason given for this suspension was the LPD's investigation into the Appellant's arrest. Upon the conclusion of the LPD's investigation, Superintendent Richardson issued a second letter dated April 20, 2021, suspending the Appellant's license to carry based on his arrest by the Pepperell Police Department. (Testimony of Richardson; Resp. Exhibit 4; App. Exhibit 6)

17. The Appellant has been permitted to continue carrying a firearm while on duty. (Testimony of the Appellant; Testimony of Richardson)
18. The Appellant was placed on paid administrative leave beginning May 29, 2020. The leave lasted until his suspension in June 2021. (Testimony of the Appellant; Joint Exhibit 1)
19. On May 29, 2020, the Appellant was criminally charged with assault and battery on a child, and assault and battery with a dangerous weapon. On December 9, 2020, the charges were dismissed without prejudice after the Commonwealth declined to prosecute.[6] (Testimony of Maskalenko; Testimony of the Appellant; App. Exhibit 3)

Department of Children and Families (DCF) Investigation

20. Maskalenko, aware that he was a mandated reporter of domestic violence, wrote and filed a 51A notification, informing DCF of an allegation of physical abuse by the Appellant. (Testimony of Maskalenko; Resp. Exhibit 5)
21. Ms. M, a response worker for DCF, was assigned to respond to this report on an emergency basis. Ms. M spoke with Maskalenko, then contacted the relative with whom the juvenile was staying to verify that the juvenile was at that relative's home. In the late afternoon on May 29,

[6] The Commonwealth declined to prosecute the Appellant because no eyewitnesses were available to testify. (Testimony of Cormier)

2020, Ms. M arrived at the relative's home accompanied by another social worker. (Testimony of Ms. M; Resp. Exhibit 5)

22. Upon Ms. M's request, the juvenile described the specific incident that had occurred earlier that day, as well as the Appellant's treatment of the juvenile generally. When the juvenile is in trouble, the Appellant either yells at or strikes them, and has struck them with the belt "on and off," on the arms, shoulders, and legs. During this conversation, the juvenile was visibly upset and began to cry. (Testimony of Ms. M; Resp. Exhibit 5)
23. The Appellant had previously demanded that the juvenile not "tell anyone what happens in this house." The juvenile believed this to be a threat, meaning that the Appellant would "do something" if the juvenile told anyone about the physical discipline. (Testimony of Ms. M; Resp. Exhibit 5)
24. Ms. M went to the Appellant's home in Pepperell and was greeted at the door by the Appellant. Ms. M presented the Appellant with DCF's Parent's Guide and explained the reported concerns, which the Appellant acknowledged. When Ms. M attempted to ask about the Appellant's relationship with the juvenile, the Appellant refused to answer and said he would be deferring any and all questions to his attorney. (Testimony of Ms. M; Resp. Exhibit 5)
25. Ms. M spoke with the other minor who was present, as well as the Appellant's wife. Ms. M and her supervisors, with the consent of the Appellant and his wife, then agreed upon a safety plan allowing the juvenile to stay elsewhere while DCF determined how best to ensure the safety of all parties involved. (Testimony of Ms. M; Resp. Exhibit 5)
26. Ms. M also contacted the juvenile's school and learned that the juvenile has been completing work on time, and was considered a "great kid", well-liked by both students and staff. (Testimony of Ms. M; Resp. Exhibit 5)

27. Ms. M called and spoke to the Appellant's attorney[7], who stated that the Appellant was not going to speak to DCF going forward. (Resp. Exhibit 5)
28. Ms. M spoke with the juvenile again on June 1, 2020. She ensured that the juvenile felt safe and ready to return to the Appellant's home. The juvenile was made aware that the Appellant was not permitted to use physical discipline in the future, and that DCF would be checking up on them periodically. If any physical discipline occurred, the juvenile was instructed to report it. (Testimony of Ms. M; Resp. Exhibit 5)
29. In the conclusion section of her report, Ms. M found that the allegations of physical abuse of the juvenile by the Appellant were supported, and that there was reasonable cause to believe that the Appellant struck the juvenile multiple times with a belt, resulting in visible injuries on the juvenile's arms. (Resp. Exhibit 5)
30. In a letter dated June 2, 2020, Ms. M informed the Appellant and his wife that the allegation of physical abuse made against the Appellant were found to be supported. The letter advised the Appellant of his right to request a fair hearing and advised him that DCF would be in touch to develop a plan of action. (Testimony of Ms. M; Resp. Exhibit 5)
31. A safety plan was developed by DCF employees in cooperation with the Appellant and his wife. This plan, dated July 10th, 2020, required, among other things, that the Appellant and his wife refrain from engaging in violent behavior or physical abuse. (Testimony of Ms. M; App. Exhibit 2)
32. In a letter dated December 21, 2020, DCF informed the Appellant that it would be closing his family's case, based on the successful completion of the tasks and skills outlined in the safety plan. (App. Exhibit 1)

[7] The Appellant was represented by a different attorney at the Commission hearing.

Disciplinary Procedure

33. Lt. Raymond Cormier of the LPD's professional standards division was the individual primarily responsible for the City's investigation of the allegations against the Appellant. (Testimony of Cormier; Resp. Exhibit 3)
34. In the course of his investigation, Cormier interviewed the Appellant twice. In the first interview, the Appellant invoked the right against self-incrimination in response to basic questions about his family and employment. Cormier then ended the interview and advised the Appellant to speak to a union representative or an attorney. (Testimony of Cormier)
35. During Cormier's second interview with the Appellant, he and the Appellant discussed the substance of the May 29 incident, and the Appellant admitted to using a belt to strike the juvenile. (Testimony of Cormier)
36. On March 1, 2021, Cormier wrote a letter to Superintendent Richardson informing him that by a preponderance of the gathered evidence, the Appellant had engaged in prohibited criminal conduct, and conduct unbecoming an officer. The evidence gathered included the Pepperell police report, a Lowell Sun article, the Appellant's criminal docket, a letter sent to the Appellant's wife, and recordings of interviews with the Appellant and the two Pepperell police officers who arrested him on May 29, 2020. (Testimony of Cormier; Resp. Exhibit 3)
37. On March 11, 2021, Cormier issued a memo to the Appellant which found that there was sufficient evidence to prove the allegations against him. (Resp. Exhibit 3)
38. Following the LPD investigation, the Appellant received a notice of suspension dated April 14, 2021, signed by City Manager Eileen Donoghue. This notice informed the Appellant that he was suspended, without compensation, for 30 days, with thirty additional days held in

abeyance for a period of one year.[8] (App. Exhibit 4)

39. The Appellant, via his attorney, protested his suspension absent a prior hearing. The City agreed to provide a hearing, and one was conducted remotely on May 18, 2021. (Testimony of the Appellant; Resp. Exhibit 6)

40. At the disciplinary hearing, the Appellant was represented by counsel. The Appellant did not testify or call witnesses but did provide documentary evidence. (Testimony of the Appellant; Resp. Exhibit 6)

41. On May 25, 2021, City Manager Eileen Donoghue, who presided over the May 18 hearing, issued a decision affirming the Appellant's contemplated sixty (60) day suspension. Donoghue found the results of the LPD's internal investigation, and the evidence presented at the hearing to be sufficient for just cause. (Resp. Exhibit 6)

42. Donoghue found there to be "overwhelming and uncontroverted" evidence supporting a finding that the Appellant had struck the juvenile well known to him with a belt, resulting in visible marks and visible distress. The evidence included an admission by the Appellant that he had struck the juvenile with the belt. (Resp. Exhibit 6)

43. Donoghue found that the above conduct amounted to felonious behavior in violation of the LPD's Rules and Regulations, specifically Prohibited Conduct subsection 6, Criminal Conduct, and Prohibited Conduct subsection 4, Conduct Unbecoming an Officer. This finding was made notwithstanding the dismissal of the criminal charges against the Appellant, which Donoghue did not find to be dispositive given the undisputed nature and severity of the

[8] The City maintains that this document was tantamount to a notice of contemplated discipline. It argues that the notice met the requirement to provide the Appellant with an opportunity to request a hearing and answer the charges against him, and that the Appellant was not suspended until after the hearing. (Resp. Exhibit 6; Respondent Post-Hearing Brief)

underlying facts. (Resp. Exhibit 6)

44. The Appellant's suspension began on June 24, 2021, and ended August 6, 2021. The intended duration of the suspension is disputed and discussed in further detail below. (Joint Exhibit 1)

45. Between August 15, 2018, and November 5, 2021, no LPD employee other than the Appellant was investigated, arrested for, or charged with any crime stemming from an incident of domestic violence. Likewise, during that time period, no LPD employee was the subject of an abuse prevention/restraining order. (Resp. Exhibit 7)

Legal Standard

A tenured civil service employee may be discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c. 31, § 43. Under section 43, the appointing authority carries the burden to prove to the Commission by a "preponderance of the evidence" that there was "just cause" for the action taken. Id. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411, *rev. den.*, 726 N.E.2d 417 (2000). In performing its function:

> …the commission does not view a snapshot of what was before the appointing authority…the commission hears evidence and finds facts anew…[after] a hearing de novo upon all material evidence and…not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer… For the commission, the question is . . . "whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision."

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) (emphasis added)). See also Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303-05, *rev. den.*,

428 Mass. 1102 (1997).

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, *rev. den.*, 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. "[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance." Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141 (1997).

"The Commission is permitted, but not required, to draw an adverse inference against an appellant who fails to testify at the hearing before the appointing authority (or before the Commission). Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006)." Clark v. Boston Housing Authority, 24 MCSR 193 (2011), *aff'd*, Suffolk Superior Court, C.A. No. SUCV2011-2554E (Feb. 13, 2015). In a civil case, the Massachusetts courts have held that even a party asserting his or her rights against self-incrimination under the U.S. or Massachusetts Constitutions "may be the subject of a negative inference by a fact finder where the opposing party … has established a case adverse to the person invoking the privilege. Quintal v. Commissioner

of the Dep't of Employment & Training, 418 Mass. 855, 861 (1994), quoting Custody of Two Minors, 396 Mass. 610, 616 (1986)." Town of Falmouth, at 826-27 (citations omitted). While the adverse inference may not be required, in Town of Falmouth, the Supreme Judicial Court found that the Commission erred when it failed to factor into its decision to reduce the Appellant's suspension from 180 days to 60 days that the Appellant failed to testify at the Town's hearing, invoking the privilege against self-incrimination. Id. Finally, an adverse inference "cannot alone meet the plaintiff's burden. See McGinnis v. Aetna Life & Casualty Co., [398 Mass. 37, 39 (1986)]." Frizado v. Frizado, 420 Mass. 592, 596 (1995) (emphasis added).

The Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, *rev. den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principle" which governs Civil Service Law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c. 31, § 1.

The Commission has consistently held police to a high standard of conduct even in the absence of indictable conduct or a criminal conviction. For example, in Zorzi v. Town of Norwood, 29 MCSR 189 (2016), the Commission noted:

> "An officer of the law carries the burden of being expected to comport himself or herself in an exemplary fashion." McIsaac v. Civil Service Comm'n, 38 Mass. App. Ct. 473, 475 (1995) (negligent off-duty handling of firearm). When it comes to police officers, the law teaches that there is a special 'trust reposed in [a police officer] by reason of his employment …. Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.' Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, *rev. den*., 398 Mass. 1103 (1986)."

Section 43 of G.L. c. 31 also vests the Commission with the authority to affirm, vacate or modify a penalty imposed by the appointing authority. The Commission is delegated "considerable discretion" in this regard, albeit "not without bounds" so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. See e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass. App. Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass. App. Ct. 985, 987 (1982) (remanded for findings to support modification). However, the Supreme Judicial Court has added that, in the absence of "political considerations, favoritism, or bias," the same penalty is warranted "unless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way." Town of Falmouth v. Civil Service Comm'n, 447 Mass. at 824.

Analysis

The City has established by a preponderance of the evidence that it had just cause to discipline the Appellant for the conduct leading to his arrest on May 29, 2020. The credible evidence presented to the Commission is more than sufficient to justify the City's actions, clearly establishing that the Appellant's conduct constituted a violation of the cited LPD rules and

regulations prohibiting criminal conduct and conduct unbecoming an officer.

Appellant's May 29, 2020 Conduct

The evidence in the record concerning the Appellant's May 29 conduct is damning, and largely uncontroverted. There is no question that on May 29, 2020, at his home in Pepperell, Massachusetts, the Appellant confronted a juvenile well known to him, believing that the juvenile was accessing the internet using a prohibited device. After a heated argument, the juvenile said something to the effect of "Go ahead, hit me," and the Appellant used an inch-wide leather belt to strike the juvenile between five and approximately twenty times. The juvenile, slight in stature for their age, cried and screamed while they were being struck. The Appellant told the juvenile that if they did not stop screaming and crying, he would hit them until their skin broke.

After this incident, the juvenile called a relative, who in turn contacted the police to request a wellness check. Pepperell Police Officer Neil Maskalenko arrived at the Appellant's home a short time later, accompanied by two other officers. Maskalenko spoke to the Appellant and the juvenile, the latter of whom was visibly afraid and upset, and had raised red marks and swelling on their arms. Maskalenko and his supervisor both reached the conclusion that there was probable cause to arrest the Appellant for assault and battery. The Appellant was arrested and transported to the Pepperell Police Department. Officer Maskalenko then notified DCF of the alleged abuse, and following an emergency response and investigation, DCF found that the allegation of physical abuse against the Appellant was supported by the evidence before them.

This version of events was presented at the Commission hearing, in whole or in part, by the arresting officer, Neil Maskalenko, and Ms. M, a DCF response worker. These accounts vary only in some minor details, and do not contradict each other in any way. Both individuals were clear in their recollections of the incident, and their conversations with the subject juvenile. These accounts

were further corroborated by the Appellant, who unambiguously agreed, when questioned by the City's attorneys at the Commission hearing, that on May 29, 2020, he had struck the juvenile with his belt, and that it was not the first time he had done so.

I find that the City was reasonable in concluding that the Appellant's conduct was unbecoming an officer, and consequently that the suspension was merited. The evidence in the record is more than sufficient to support a description of the Appellant's conduct as "substantial misconduct which adversely affects the public interest by impairing the efficiency of public service," more than sufficient to justify the subsequent discipline. School Comm. v. Civil Service Comm'n, 43 Mass. App. Ct. 486, 488, *rev. den*., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Appellant's own testimony corroborates the specific details provided by Officer Maskalenko and Ms. M.

Since he began his employment with the LPD in 2006, the Appellant has served primarily as a patrol officer, with brief stints as a detective with the Family Services Unit, and as a juvenile safety coordinator. In all of these roles, the Appellant was responsible for making determinations about the safety of minors, and as a patrol officer and detective, investigating reports of abuse against juveniles. Credible allegations of abuse against the Appellant, found to be supported by DCF, and criminal charges to that effect, may compromise both the LPD's reputation,[9] and call into question the judgment of the Appellant in such matters.

That the Commonwealth declined to pursue its criminal charges against the Appellant is not dispositive and does not preclude a finding that the discipline was justified. The Commission has consistently held police officers to a high standard of conduct even in the absence of a criminal

[9] At least one article was published in the *Lowell Sun* about the charges against the Appellant. The article included a picture of the Appellant speaking to a group of juveniles, and a description of the allegations against him.

conviction, or indeed, indictable conduct. See Zorzi v. Town of Norwood, 29 MCSR 189 (2016). In accepting employment by the public in a role that does not cease at the end of the workday, police officers "implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities." Police Comm'r v. Civil Service Comm'n, 22 Mass. App. Ct. 364, 371, *rev. den.*, 398 Mass. 1103 (1986). The Appellant's conduct on May 29, 2020 calls into question his judgment in matters of domestic abuse, and his fitness to investigate reports of the same.

In his filings with and testimony before the Commission, the Appellant has also argued that the "parental privilege" contemplates the conduct at issue in this case. I find that it does not. The parental privilege is an affirmative defense to criminal liability and even if the Appellant's May 29, 2020, conduct was found to be privileged, that would not necessarily negate a civil finding of child abuse by the City, DCF or the Commission itself. Notably, the Appellant was informed of his right to challenge DCF's finding of prohibited physical abuse and chose not to do so.

Disciplinary Procedure

The Appellant further contends that the above issues are moot because his suspension was improperly issued without a just cause hearing, as required by statute. Though in the future the City would do well to distinguish between notices of discipline and notices of contemplated discipline, I find that the Appellant's due process rights ultimately were not violated.

The Appellant is correct that, standing alone, the City's April 14, 2021, notice of discipline would not have been sufficient due process prior to a suspension, but a proper hearing was conducted at his request on May 18, 2021. At this hearing, the Appellant was given the opportunity to present evidence, call witnesses, and testify on his own behalf, but chose only to present some documentary evidence. Consequently, the record before the City was largely the same before and

after the hearing. As such, it is not unreasonable for the May 25, 2021 notice of suspension to closely resemble the April 14, 2021 notice of discipline.

Indeed, the primary difference between the two documents is that the May 25 letter does not purport to suspend the Appellant's license to carry, an action which the Appellant rightfully argued was not within the power of the City Manager. But regardless, the Appellant's license was in fact suspended on the day of his arrest, and he has been permitted to carry a firearm while on duty. If the Appellant wishes to appeal a denial of his application for a license to carry a firearm, that appeal is more properly filed with the district court which exercises jurisdiction over the LPD.

Accordingly, I find that substantial credible evidence present in the record supports a finding that the Appellant's misconduct constituted conduct unbecoming an officer. Both the Pepperell Police Department and DCF found it more likely than not that the alleged physical abuse occurred, and both found sufficient cause to intervene on the juvenile's behalf to prevent further abuse. As such, the City was justified in finding that the Appellant had engaged in substantial misconduct warranting more than de minimis discipline. Given that my findings do not differ substantially from those of the City, and in the absence of political considerations, favoritism, or bias, I also decline to modify the administered discipline.

Indeed, while the Appellant argues that his suspension which began June 24, 2021 should properly have lasted only 30 calendar days, I find that the City was more than justified in suspending the Appellant for the longer period of 30 working days. Not only does common sense dictate that the Appellant could only have been suspended on days which he would otherwise have been working, but the severity of the Appellant's conduct also merits the latter, more stringent penalty. Were the Commission empowered with plenary disciplinary authority, and were the record the same as developed here, it would likely have imposed a significantly heavier penalty,

up to an and including termination.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. G1-21-102 is hereby ***denied***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on October 6, 2022.

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 the 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his/her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Douglas Louison, Esq. (for Appellant)
Christine O'Connor, Esq. (for Respondent)
Helen Anderson, Esq. (for Respondent)