

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Decision mailed: 5/6/11
Civil Service Commission CB

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293**

DONALD BLISS,
Appellant

v.

TOWN OF WAREHAM,
Respondent

CASE NO: D1-09-59

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Donald Bliss (Bliss), duly appealed to the Civil Service Commission (Commission), acting pursuant to G.L.c.31, §43, from a decision of the Town of Wareham (Wareham), the Appointing Authority, to discharge him as Lieutenant in the Wareham Police Department (WPD) based on findings that he misused his authority as a WPD officer to further his personal business endeavors and was not truthful about it during WPD's investigation. A public hearing was held by the Commission at the University Of Massachusetts School Of Law in Dartmouth, on August 28, September 23 and October 7, 2009. Witnesses were sequestered. The hearing was digitally recorded. Nine witnesses were called to testify and 49 exhibits were marked. Post hearing submissions were received by the Commission from each of the parties on December 22, 2009.¹

¹ On March 1, 2010, Wareham moved for a new hearing before a different hearing officer on the grounds that the Appellant made ex-parte contact by letter to this Commissioner. The Appellant opposed the motion and, after hearing argument at a Status Conference on March 12, 2010, Wareham's motion was denied for the reasons stated on the record at that time.

FINDINGS OF FACT

Giving appropriate weight to the exhibits and testimony of the witnesses (the Appellant, Wareham Acting Town Administrator John J. Sanguinet, former Wareham Town Administrator John McAuliffe, retired Wareham Chief of Police Thomas Joyce, Wareham Director of Municipal Maintenance Mark Gifford, Wareham Systems Manager, Matthew Underhill, Wareham resident Lisa Bindas and Intercity Alarms General Manager Steven Marchessault) and to inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

The Appellant

1. The Appellant, Donald Bliss, started his public safety career as a summer seasonal police officer in Wareham in 1985, at the age of 21. He worked for the Marion Police Department (a non-civil service community) from 1985 through March 1987. After taking and passing the entry level civil service examination for police officer, he was appointed a full time police officer with the WPD and rose through the ranks, becoming Sergeant in June 1993, Detective Sergeant in July 1997, and Lieutenant in 2002. (*Exhs. 5 & 7; Testimony of Appellant & Joyce*)

2. Before he was brought up on the charges that give rise to the present appeal, Lt. Bliss had no prior discipline of any kind. He had compiled a distinguished record of public service. A hard worker, he was assigned as supervisor on call over both the evening shift (4pm to midnight) and the night shift (midnight to 8am). It was not unusual for him to log 60 hours or more a week. When he became Lieutenant, he had amassed over 2,500 hours of compensatory time that he was obliged to forfeit in accepting the promotion. (*Exhs. 5 & 22; Testimony of Appellant & Joyce*)

3. Lt. Bliss was described by former WPD Police Chief Joyce as a widely respected police officer upon whom his WPD superiors, peers and subordinates came to depend. To take one example, both Chief Joyce (his long-time mentor and supporter) and former Town Administrator McAuliffe (who had little contact with him to that point) gave the highest praise for his imaginative work with a Neighborhood Action Team ("NAT"), one of his most recent accomplishments through which he brought serious crime problems in a section of Wareham under control by, among other things, targeting known offenders and letting it be known that he or she "belonged" to a particular officer who would shadow them for a day. The NAT program transformed a neighborhood association of skeptics and critics into staunch WPD supporters who enthusiastically applauded Lt. Bliss when he spoke at an association meeting in late fall or early winter of 2007-2008. (*Exh. 5; Testimony of Appellant, Joyce, McAuliffe*)

Wareham and the WPD

4. Wareham is a town of approximately 22,000 residents situated on Buzzard's Bay in Southeastern Massachusetts. In 2007-2008, the WPD employed a force of approximately 48 sworn officers. The command staff consisted of a Chief of Police, three Lieutenants and six Sergeants. (*Testimony of Joyce; Administrative Notice[www.wareham.ma.us [visited 4/15/2011]]*)

5. Thomas Joyce served as WPD Chief of Police for approximately 20 years. He presented as a distinguished gentleman, articulate and possessing an excellent memory. For reasons to be explained below, he resigned in 2008, following the events that gave rise to this appeal and, subsequently, took the job of Interim Fire Chief in the Town of Marion, the position he held when he testified in this appeal. (*Testimony of Joyce*)

6. Wareham operates pursuant to a home rule municipal charter, adopted in 1977, which vests legislative power in an open town meeting and executive authority in a five member elected Board of Selectmen. The Charter provides, among other things:

“[N]o individual member of the board of selectmen, nor a majority of it, shall, at any time, attempt to be involved in the day to day administration of the affairs of the town, but, shall, at all times, act only through the establishment of policy directives and guidelines to be implemented by officers and employees appointed or employed by it. To aid in the performance of its duties, the board of selectmen shall appoint a town administrator . . . *The town administrator shall be the chief administrative officer of the town He shall appoint and remove, subject to civil service law, where applicable, all department heads, all officers and subordinate employees* . . . He shall in conjunction with the personnel board, be entrusted with the administration of a town personnel system, including, but not limited to, personnel policies and practices, rules and regulations, the personnel by-law, and all collective bargaining agreements entered into on behalf of the town.”

(Exh. 25 (*emphasis added*))

7. Wareham’s current form of charter was expressly intended to alter the working relationship between the Board of Selectmen and the Town Administrator, and to give the Town Administrator “strong” independent administrative authority over the management of the Town’s affairs, including personnel. The Town Administrator became the appointing authority over all civil service positions, including all WPD officers and employees. The charter mandates that the Town Administrator position be filled by a “professionally qualified full-time town administrator” hired under contract for a three-year term, subject to removal pursuant to procedures for notice and hearing prescribed in the charter. These charter provisions were a direct response to criticism of the prior system, under which “the selectmen could appoint without regard to qualifications and could interfere in the day to day operations of the [Town Administrator’s] office.” (Exh. 25; *Testimony of McAuliffe*)

8. During the period involved in this appeal, the Wareham Board of Selectmen was comprised of James Potter, Bruce Sauvageau, John Cronan, M. Jane Donahue and Brenda Eckstrom. (*Exh. 27*)

9. John McAuliffe became Wareham's Town Administrator in August 2007. He brought over 10 years of experience as a professional town executive, most previously in the Town of Somerset. As more fully explained below, Mr. McAuliffe was abruptly removed by the Board of Selectmen in June 2008 and replaced by his recently-hired assistant, John Sanguinet, who then served as Interim Town Administrator (an at-will position) from that date through the hearing of this appeal. When he testified, Mr. McAuliffe was serving as the Town Administrator in the Town of Webster. (*Exh. 27; Testimony of McAuliffe & Sanguinet*)

Cellular Phones

10. (Then) Det. Sgt. Bliss introduced the idea of using cellular phones to the WPD in the late 1990s, when he began working as a detective. In order to convince Chief Joyce of the merits of the new technology, he purchased a phone at his personal expense and used it for police business. As a result, Chief Joyce was persuaded to purchase cell phones for the department. Det. Sgt. Bliss was commended for his idea. Bliss never sought reimbursement for any of the expenses he incurred personally for that cellular phone. (*Exh. 8; Testimony of Appellant & Joyce*)

11. According to Wareham Data Processing Systems Manager, Matthew Underhill, when Wareham first began to issue cell phones to employees, different departments used different carriers and had different usage plans. Eventually, Wareham switched to a single carrier, Nextel, for all departments. During this period, each phone user was

assigned a number of minutes' usage per month. Only if the user exceeded his or her dedicated monthly allowed minutes would Wareham incur any additional cost. The evidence established that Lt. Bliss never exceeded his allotted minutes during the time these prior plans were in effect. (*Testimony of Underhill*)

12. When Wareham began to issue cellular phones to its employees, no policies, procedures, rules or regulations were in place that governed the use of their assigned phones. At no time prior to the hearing of this appeal did Wareham, or any department or official of the town, promulgate any such policies or procedures or otherwise provide any guidelines, formal or informal, regarding the personal use of Town-owned cellular phones. Mr. Sanguinet testified that the Town Manager or the Board of Selectmen would have authority to do so and that he was working on one, but due to "time constraints", he had not yet completed it in the eighteen months he has served as Interim Town Administrator. (*Testimony of Bliss, Joyce, McAuliffe, Underhill & Sanguinet*)

13. Bliss testified that he had always made use of his Town-issued cellular phone to make and receive both WPD and non-WPD calls. It did not occur to him that reasonable personal use was prohibited (presumably, so long as it did not interfere with performance of official duty or cost the town any money). (*Testimony of Appellant, Joyce & McAuliffe*)

14. In fact, with the approval of Chief Joyce, Det. Sgt. Bliss testified that he had been making payments of \$10.00 per month to Wareham to cover any cost for "personal business" use of his cell phone. A page from a Wareham's accounting ledger was introduced that confirms this testimony. At some point, however, as a cost-saving measure, Wareham switched its cellular plans to a "shared" minute plan (in which the

total number of minutes (originally 27,000, later reduced to 18,000) were available for any Town employee and overage charges accrued only if the monthly usage exceeded the total town-wide allotment, which never happened. At that point, Matthew Underhill advised Bliss that he could stop the payments for his own use of the Town-owned cell phone. (*Exhs. 9, 10, 12, 14, 23; Testimony of Appellant, Joyce, Underhill*)

15. There was no evidence that any Wareham employee has been disciplined for making personal or business calls from a Town-owned phone. The only other instance of a Wareham employee's inappropriate use of a Town-issued cell-phone involved a Sewer Department employee who was making long-distance calls on the phone off-duty. The phone was temporarily disconnected and returned to the employee after his Department supervisor determined it was appropriate to do so. (*Testimony of Underhill*)

Outside Employment – Alarm Business

16. According to Chief Joyce, between one-quarter and one-half of the WPD officers work in some form of outside employment. His practice was to permit such employment, with the exception of certain types of employment (such as working for a towing company that WPD used on a regular basis for police business), and with the understanding that an officer's outside employment was secondary to full-time duty as a police officer who needed to be available to the WPD at all times if called. The WPD required officers to submit contact information, updated annually, which included a section for describing any outside employment. (*Exhs. 32 thru 35; Testimony of Joyce*)

17. In the mid-1990s, Bliss and an electrician friend started a wireless alarm company called New England Security Systems. After someone at WPD questioned whether his involvement in such a business might be a concern due to his position as a police officer,

Bliss contacted the “attorney of the day” at the State Ethics Commission.² Bliss said he was advised he could sell alarm systems, but could not represent himself as a police officer and could not reap financial benefit from sales transactions with the Town without filing a disclosure and consent form. Bliss asked: “What if he was recognized or queried to be a police officer?” and said he was advised to tell the truth. (*Testimony of Appellant*)

18. During this time, Bliss made use of his knowledge and experience with alarm systems for the benefit of the WPD. In 1996, he was instrumental in putting together an alarm system, triggered to a pager at the police station, which enabled the WPD to apprehend several persons who repeatedly had been vandalizing a seasonal home known as “Camp Chipmunk”, for which he was given a written letter of commendation by Chief Joyce. (*Exh. 31; Testimony of Appellant & Joyce*)

19. By 1999, New England Security System had approximately 40 accounts, mostly family or friends in or near Wareham. Mainly for personal reasons, Bliss and his partner could not continue to devote the time needed to run the business and decided to close it down. Bliss sold the business accounts to Intercity Alarms, a larger alarm system company with a customer base of about 35,000 customers in the Cape Cod area. (*Exhs. 21; Testimony of Appellant & Marchessault*)

20. Intercity Alarms offered Bliss a position as a part-time commission salesperson. He was paid a commission when he made a sale, usually emanating from leads provided to him by Intercity Alarms or referrals of friends or family, as he had little time to devote to prospecting for customers. When he began his employment in 1999, Intercity Alarms provided him with business cards which described him as a sales representative, and

² The State Ethics Commission provides a service by which any public employee may speak to a staff member for informal advice about state ethics law issues. See www.mass.gov/ethics (Request Advice).

listed the company phone number along with Bliss's home and cell phone number, the latter being his WPD cell phone (although not identified as such). He received no other benefits, save for mileage expenses (and a Christmas turkey). He updated the WPD as required of this new employment relationship. (*Exhs. 21, 33 thru 35, 38 & 45; Testimony of Appellants; Marchessault*)

21. In 2000, another competitor of Intercity Alarms in Wareham, owned by an individual, whom Det. Sgt. Bliss once had arrested, filed a complaint with the WPD about Bliss's affiliation with Intercity Alarms, asserting that Bliss had physically intimidated a local business owner into purchasing an alarm system from Intercity Alarms. A WPD internal affairs investigation found the accusations to be wholly fabricated, but it prompted Det. Sgt. Bliss to again contact the State Ethics Commission and seek a written advisory opinion to put in his file to confirm what he was and was not ethically permitted to do. Pursuant to this request, on June 21, 2000, the State Ethics Commission issued a five-page advisory letter to him. (*Exhs. 18 thru 20; Testimony of Appellant*)

22. The State Ethics Commission letter summarized the advice as follows:

"You have been employed as a police officer in the Town of Wareham (Town) for the past 15 years, and are currently a detective sergeant. For the past six years, you have also sold security, fire and video systems. The first five year you ran your own small company, which you sold to another security company (security company) located in the Town of Yarmouth, that now employs you as a salesman. The security company assigns you to house calls, and you wear a suit and tie, not your uniform, when you work for the security company. Alarms are connected to the security company, and when an alarm goes off, the security company calls the police department. As a detective, you would never respond when an alarm goes off.

"You ask whether any potential conflicts exist under G.L.c.268A between your employment as a police officer and your employment with the security company. Based on these facts, I can provide you with the following advice. As a police officer, you are a municipal employee subject to the conflict of interest law. G.L.c.268A, §1g. Sections 17, 19 and 23 are relevant to your inquiry.

“In summary form, you may sell security equipment in Town, but you are subject to the following restrictions: you may not represent the security company, or be paid by the security company, in relation to any particular matter in which the Town is a party or has a direct and substantial interest; you may not be involved as a police officer in a matter in which the security company has a financial interest; and, if your customer is an individual, business establishment, or vendor that you supervise or is under your regulatory jurisdiction as a police officer, the arrangement must be entirely voluntary and initiated by them (not you) *and* you must file a public disclosure with your appointing authority explaining that this is the case.”

The advisory letter goes on to explain the specific legal rules that apply to each of these particular provisions of state ethics laws. (*Exh. 20*)

Intercity Alarms’s Contacts with Wareham

23. Unbeknownst to Bliss, Wareham had been doing business as a customer of Intercity Alarms since the late 1970s or early 1980s. Bliss was not involved, directly or indirectly in any of these transactions, which would have started well before his employment with the WPD. (*Testimony of Appellant & Gifford*)

24. In or about March 2000, Wareham embarked on a town-wide upgrade of its alarm system in the municipal maintenance building to bring it up to code. The Wareham DPW purchased several pieces of security equipment from Intercity Alarms, aggregating \$4,050.90, and evidenced by three Agreements. The Intercity Sales Representative listed on all the documentation was Ken Elliot. Mark Gifford executed the Agreements on behalf of Wareham, although he testified that the procurement officer for the town at that time was the Town Administrator. Bliss did not solicit the purchase for Intercity Alarms. He had no substantial involvement in the transaction for either party, and received no commission or other compensation from the sale. There was some evidence that, for reasons not explained Bliss signed one or two of the Agreements on behalf of Intercity Alarms, as a witness to Gifford’s signature. (*Exh. 39; Testimony of Appellant & Gifford*)

25. At or about the same timeframe, Det. Sgt. Bliss investigated an alleged theft at the municipal maintenance building. Mark Gifford testified that he thought some surveillance cameras had been purchased from Intercity Alarms in connection with that matter, but could not recall that Bliss ever suggested any such purchase from Intercity Alarms. Bliss testified that he had a clear and certain recollection of the investigation and was sure that the cameras used in the operation were borrowed from the New England State Police Information Network (NESPIN), of which WPD was a member, which provides specialized equipment on loan to member law enforcement agencies who need it for a limited period of time. I credit that testimony. I also note that none of the 2000 written Agreements between Wareham and Intercity Alarm or any other contemporaneous transaction included camera equipment. (*Exh. 39; Testimony of Bliss & Gifford*)

Intercity Alarms's Contacts with the WPD

26. Evidence of four additional transactions between WPD, specifically, and Intercity Alarms were produced: (a) in November 2006, WPD purchased a back door lock for \$453.10; (b) in December 2007, WPD purchased alarm products totaling \$915.34; (c) in January 2008, WPD purchased additional alarm products \$1,858.00; and (d) in July 2008, WPD was invoiced for an annual monitoring fee at no charge. Computer-generated invoices for three of these transactions were addressed by Intercity Alarms to: "Wareham Police Department, 2525 Cranberry Highway, Det. Sgt. Bliss, Wareham MA". (*Exh. 40*)

27. According to Chief Joyce, however, Bliss did not purchase any equipment for the WPD as that was not within his authority. Procurement was the responsibility of the Police Chief, who made all decisions regarding such purchases. Chief Joyce knew of no time that Bliss ever solicited or advised him to purchase any equipment or services from

Intercity Alarms. Chief Joyce did rely on Bliss for his general knowledge and experience in the alarm business, as he did before Bliss affiliated with Intercity Alarms, to learn what products were available and how well they worked. Chief Joyce clearly recalled one occasion on which Lt. Bliss recommended a substantial purchase of \$25,000 worth of security cameras from Galaxy, a competitor of Intercity Alarms. Intercity Alarms General Manager Steven Marchessault recalled occasions on which Bliss declined sales leads sent to him that he said might be raise a potential conflict issue. *(Testimony of Joyce & Marchessault)*

28. As to the November 2006 purchase of a back door lock, Chief Joyce had stated at a staff meeting that the rear door at the police station could not be locked and that he was looking for a solution. Lt. Bliss responded by noting that it would be possible to have a coded door entry system. At Chief Joyce's request, Lt. Bliss called Intercity Alarms and provided Chief Joyce with the name of a person there to speak to. Lt. Bliss had no other involvement in that transaction for either the WPD or Intercity Alarms, and received no commission or other compensation on the sale. There was some evidence that the WPD received this product at cost. *(Exh. 40; Testimony of Appellant, Joyce & Marchessault)*

29. The December 2007 purchase involved equipment to properly secure a large quantity of marihuana (several hundred pounds valued at more than \$1 million) seized by the WPD and then being stored in a trailer behind the police station. Again, at Chief Joyce's request, Lt Bliss obtained the name of a contact person at Intercity Alarms which he passed along to Chief Joyce who concluded the purchase. This was Lt. Bliss's only connection to the transaction, for which no commission was paid by Intercity Alarms. *(Testimony of Appellant, Joyce & Marchessault)*

30. The January 2008 purchase involved acquisition of a “watch tour” system for checking the security of prisoners. Another WPD officer, Lt. Wallace, had been assigned to research this project. Lt. Bliss happened to know that Toby Hospital, where Bliss’s wife worked as a nurse, had recently installed the type of system they needed, and he and Lt. Wallace went to Toby Hospital together to view the system. Lt. Wallace concurred that the Toby Hospital system was what they needed, he did a price comparison, and the necessary equipment eventually was purchased from Intercity Alarms at cost and no financial benefit to Intercity Alarm or Bliss. According to Intercity Alarms General Manager Steve Marchessault, this is not uncommon, as his company does not view police or fire departments as profit-making opportunities and it will frequently donate or provide equipment and services to them at deeply discounted prices as a matter of good will.

(Testimony of Appellant & Marchessault)

31. The final transaction in July 2008 involved monitoring services for a newly-opened WPD “crime watch” building. Lt. Bliss obtained a donation of the building alarm system and its free installation from an alarm company other than Intercity Alarms. He convinced Intercity Alarms to donate the monitoring for the system, hence the \$0.00 invoice (normally a \$294 annual fee). This transaction was the only one that Bliss was actually and substantially involved. *(Exh. 40; Testimony of Appellant & Marchessault)*

Alarm System Sale to Lisa Bindas

32. In 2005, Lt. Bliss sold an Intercity Alarm system to Linda Bindas to be installed in her home on Maple Spring Road in Wareham, then under construction. Ms. Bindas and Lt. Bliss presented starkly different versions of the details of this transaction. The

truth of the matter requires careful note of the disputed evidence and credibility of these two witnesses. (*Exhs. 43, 45, 46 & 48; Testimony of Appellant & Bindas*)

33. In October, 2005, Ms. Bindas moved into her new home with her partner Jaci Barnett (who was present when Bliss met Bindas on at least one occasion, but did not testify). Thereafter, Ms. Bindas became active in local affairs. She attended Board of Selectmen meetings to press issues of concern to her and her neighborhood. She has visited with several members of the Board of Selectmen – she said she could not recall which ones. She was interviewed by the Special Town Counsel hired by Wareham to investigate the charges against Lt. Bliss, but she did not testify at the appointing authority level hearing, being identified there only as “Confidential Witness A”. She appeared before the Commission with her personal attorney, a preeminent able counsel, and presented as a well-dressed, intelligent woman. (*Exh.4-ID; 48; Testimony of Bindas & Sanguinet*)

34. Ms. Bindas testified that she contacted Lt. Bliss about an alarm system after a neighbor (who was the Wareham Harbormaster) told her about Bliss and gave her Bliss’s Intercity Alarm business card. Ms. Bindas said she called Intercity Alarm or may have called Bliss directly, she wasn’t sure. Thereafter, Bliss visited her home and quoted a price for an alarm system. She recalled that he returned another three or four times, but he may have made as many as six visits in total. She did not recall when the first visit occurred, or whether it was before or after she had moved in. (*Testimony of Appellant & Bindas*)

35. Ms. Bindas testified that Lt. Bliss said he was a police officer and that he wore his “uniform” on one of the occasions he had visited her home. On cross-examination, she

elaborated that the uniform consisted of “navy blue pants and a shirt”. She did not state that Lt. Bliss wore a hat, carried a firearm, or saw a badge or other insignia. She had no recollection about the vehicle he drove, what he wore on any of the other visits, or whether or not anyone else accompanied Lt. Bliss on any of the visits. She did not recall, at all, that, when Lt. Bliss came to her home to check on the installation work, she sold him a “tiki bar” for which he gave her a \$250.00 check. (*Testimony of Bindas*)

36. On cross-examination, Ms. Bindas initially could not recall any of the specific dates or details of her conversation with Lt. Bliss about being a police officer and did not recall him ever saying she would get “better service” if she bought an alarm from him or words to that effect. She was asked about a statement prepared by Special Town Counsel reciting the substance of her interview with him – which included assertions that Lt. Bliss said “I’m a cop, other police officers know it’s my alarm” and that he “made it seem” she would get better service from the Police Department if she purchased an alarm from him. She said she did make those statements, but did not recall on which visit they were made. When confronted with the assertion that she told Special Town Counsel that “Lt. Bliss showed up on at least two occasions dressed in his police uniform”, she said she did not recall making that statement. (*Testimony of Bindas*)

37. Lt. Bliss gave a clear and coherent account of his business with Ms. Bindas from start to finish, which he substantially corroborated with unimpeachable documentary evidence. On August 30, 2005, Intercity Alarms faxed him a Lead Sheet from an inquiry received from Lisa Bindas. August 30, 2005 was a scheduled day off for Lt. Bliss. He met Ms. Bindas at the home site that day, accompanied by his teenage son. He remembers speaking to a subcontractor, and came to learn that two other competitors

were also bidding the job, so he asked Intercity Alarms for a price that would beat the competition. After an exchange of e-mails, he got authority to offer a reduced price of \$1,000. A written Agreement was executed on October 14, 2005 and faxed to Intercity Alarms on October 16, 2005. On October 20, 2005, Ms. Bindas called Intercity Alarms early in the morning to complain about the installers, and Bliss returned to her home to handle the complaint. He took another \$100 off the price, and purchased a “tiki bar” from her, for which he gave her a \$250.00 check (in evidence). Lt. Bliss also produced documents confirming that he took off October 20, 2005 as a holiday and did not work for WPD that day. (*Exhs. 45 & 46; Testimony of Appellant*)

38. Lt. Bliss vociferously denied that he ever wore his police uniform when transacting business for Intercity Alarms and specifically denied that he did so on any of his visits to see Ms. Bindas. He testified that, when he was appointed to the position of Detective Sergeant, he stopped wearing a uniform on duty, and has rarely done so since. Chief Joyce corroborated this testimony and I find it credible. He did recall being in uniform when attending Board of Selectmen’s meetings at which Ms. Bindas was also present. He also said it would be “impossible” that the police officer dispatched to respond to an alarm call would know what alarm company had called in. (*Exh. 45; Testimony of Appellant & Joyce*)

39. The preponderance of the evidence weighs heavily in favor of the conclusion that Lt. Bliss made two visits to Ms. Bindas’s home, as he testified, and that he did not appear in his police uniform on either occasion. His convincing testimony regarding the Bindas transaction outweighs the unpersuasively vague and inconsistent testimony from Ms. Bindas whom I infer, given the passage of time, has conflated her recollections and

timeframes of the dates, occurrences and individuals involved in her interactions with the Harbormaster, Lt. Bliss and others over the alarm system. (*Exh. 45; Testimony of Appellant, Bindas & Joyce*)

Outside Employment - The Real Estate Advertisement

40. At some time prior to 2007, Lt. Bliss began taking classes to become a licensed real estate agent. He had known the instructor, Pat Debois, a woman in her mid-80s, since he was a student and she was a teacher in the school system and they had kept up a long-standing social friendship. After he obtained his license, Ms. DeBois asked him to work for her and he agreed. Lt. Bliss updated his contact information for the year 2007 to disclose this new employment relationship. (*Exh. 33; Testimony of Appellant*)

41. Lt. Bliss had rarely engaged in the real estate business, having only two listings since getting his license, when his wife's parents decided to sell a parcel of land they owned in Wareham. In 2008, Lt. Bliss agreed to serve as the listing broker as a favor, and was planning to forego his commission. As it turned out, the parcel generated no interest, there were no showings and Lt. Bliss could not recall even getting a single call about the property. (*Exh. 12; Testimony of Appellant*)

42. The property was listed through the Pat Dubois real estate agency, which created and placed an advertisement for the property in the local newspaper on September 19, 2007. The advertisement contained a contact line "Call Donald Bliss at (508) 958-7703", along with a passport-style photo of him. The phone number was Lt. Bliss's WPD assigned cellular phone, which he had provided to Pat DuBois earlier as a general contact number. He testified that he neither knew of, nor saw, the advertisement before it appeared in the newspaper. (*Exh. 36; Testimony of Appellant & Joyce*)

43. Selectman Brenda Eckstrom saw the real estate advertisement and complained about it to the new Town Administrator, John McAuliffe. On November 20, 2007, McAuliffe summonsed Chief Joyce to his office to discuss the issue. (*Exhs. 12 & 16; Testimony of Joyce & McAuliffe*)

44. McAuliffe and Chief Joyce agreed that use of a WPD officer's cellular phone number in a private commercial advertisement raised a serious cause for concern. Chief Joyce recalled McAuliffe said that it could constitute larceny (possibly even a felony) if Town monies had been lost, and might be grounds for termination. McAuliffe agreed that Chief Joyce should undertake a thorough investigation to determine the facts before deciding on the appropriate response. (*Exhs. 12 & 16; Testimony of Joyce & McAuliffe*)

45. After doing some preliminary research on his own, Chief Joyce summonsed Lt. Bliss to his home on December 3, 2007. He testified that he chose that location to ensure privacy. They met for about an hour. (*Exh. 12; Testimony of Appellant & Joyce*)

46. Chief Joyce showed Lt. Bliss the real estate advertisement, explained that there was a perception that it represented the use of Town-owned property for personal gain, and that his job might be in jeopardy. Lt. Bliss was taken completely off-guard. His immediate reaction was to state that he had been bothered by the situation himself and had been planning to get a personal phone. They discussed the fact that there were no overage charges associated with the use of the cell phone and that he did not receive real estate calls while working on duty. He said he had no intent to do anything wrong, but acknowledged that allowing his WPD cell phone to be used in the advertisement did create the impression of wrongdoing for which he apologized. He requested permission to transfer the WPD cell phone number to a personal phone and issue him a new WPD

cell phone number, which Chief Joyce approved. Bliss made the transfer and got a new WPD cell phone that same day. (*Exh. 12; Testimony of Appellant & Joyce*)

47. Chief Joyce reviewed his records and confirmed that no extra costs to the Town had been incurred due to Lt. Bliss's personal business use of his WPD cell phone. Chief Joyce met with Lt. Bliss again on December 6, 2007 and informed him of this fact. Lt. Bliss was still visibly upset. He again acknowledged the appearance of impropriety but denied any intent to steal anything. He explained how he used to write personal checks each month to cover his personal use, which he stopped after Matt Underhill said it was no longer necessary under the "shared minutes program". Chief Joyce confirmed this fact to be correct with Mr. Underhill. (*Exh 12; Testimony of Appellant & Joyce*)

48. At the December 6, 2007 meeting, Lt. Bliss also pointed out that his WPD cell phone number was blocked (i.e., one calling or receiving a call on that line would not know the source) and that only a handful of non-WPD employees would recognize the number in the newspaper as a WPD line. (*Exh. 12; Testimony of Appellant & Joyce*)

49. On December 10, 2007, Lt. Bliss submitted a "To From" memo to Chief Joyce, in which he acknowledged his "bad judgment" and stated "I can guarantee it will never happen again". He listed five points that supported his belief that he had not used his phone improperly: (1) He was required to carry the phone at all times and was never given any restrictions on its use; (2) Wareham has no policies or procedures governing use of cell phones; (3) He used to make a payment to Wareham to cover his personal use until Mr. Underhill said it was no longer necessary; (4) He was smarter than to have allowed his WPD cell phone number to appear in a newspaper advertisement if he

actually thought he was doing something wrong; (5) Very few people who saw the ad would know it was a WPD phone. (*Exhs. 11 & 12; Testimony of Appellant & Joyce*)

50. On December 12, 2007, Chief Joyce reported his findings in a memorandum to Town Administrator McAuliffe, which he followed up on January 12, 2008 to confirm that a further thorough review of the phone records showed minimal usage of Lt. Bliss's cell phone that was possibly associated with the real estate business. In particular, for the one year period from November 2006 through December 2007, there were twenty-nine (29) calls (15 outgoing and 14 incoming) involving the real estate office. Only 5 calls from or received by Lt. Bliss's cell phone were during hours that he "would have normally been working" but, due to his flex schedule, Chief Joyce said: "I have no way of discerning for sure whether he was actually working, was between hours or on a lunch break at the time of these calls." The 29 calls aggregated 61 minutes of time, of which 12 minutes were attributed to the five calls possibly during duty hours. Meanwhile, Mr. Underhill confirmed to Mr. McAuliffe that the town had 27,000 shared minutes, which it never had exceeded, so that "In Donald Bliss's case . . . it costs us nothing more if the phone was used for a few personal calls." (*Exhs. 12 & 13; Testimony of Joyce & McAuliffe*)

51. After receiving all of the foregoing information, Town Administrator McAuliffe reached the conclusion that his initial impression of possible serious wrongdoing was not supported by the facts. He was also gaining first-hand knowledge about Lt. Bliss's "spectacular" professional accomplishments, among other things, from his observations during NAT community meetings. McAuliffe testified that he was contemplating a two-day suspension as the appropriate penalty. He said this conclusion took into account the

lack of any clear Wareham or WPD policy or guidance in the use of cell phones, the lack of any cost to the town, Lt. Bliss's stellar employment record, and that, under principles of progressive discipline, Lt. Bliss, who had never been previously disciplined and had acknowledged his mistake, was not the sort of problem employee who required an improvement plan. (*Exh. 16; Testimony of McAuliffe*)

52. At some point, probably in early February, Chief Joyce and Mr. McAuliffe reached the conclusion to hold the suspension in abeyance and, instead, to suggest "punishment duty", i.e., requiring Lt. Bliss to work extra shifts without pay.³ McAuliffe found this solution "made a lot of sense", as it would be better for Wareham to have someone with Lt. Bliss's dedication working extra hours at no overtime cost rather than sitting at home doing nothing for the Town. Lt. Bliss accepted this disposition and it was agreed he would perform 16 hours of volunteer duty during the summer months, during special events that were expensive costs to the town in detail and overtime pay. Lt. Bliss served this duty over several days in June, July and August 2008. In addition, on Chief Joyce's order, he forfeited reimbursement for two other previously served four-hour overtime shifts. (*Exhs. 16, 17 & 49; Testimony of Appellant, Joyce & McAuliffe*)

Termination of Town Manager McAuliffe

53. On June 21, 2008, on a surprise motion of Selectman Eckstrom, the Wareham Board of Selectmen adopted a resolution (4-1, with Selectman Potter in strong disagreement) which ordered Town Administrator McAuliffe to be placed on paid administrative leave. The resolution was not on the Board's agenda, and was the final business raised around midnight, after a very lengthy meeting. Among the particulars

³ Punishment duty of public safety personnel is authorized under G.L.c. §§62 & 62A, but may be imposed only with the agreement of the employee.

stated in the resolution were two grievances that pertain specifically to McAuliffe's handling of Selectman Eckstrom's complaint about Lt. Bliss's use of his cell phone:

"WHEREAS, Mr. McAuliffe failed to act after he has been informed of an was presented with evidence of an employee who had been using a town-paid cellular telephone to operate a business that was in no way a function of his employment with the town; and

"WHEREAS, when confronted with his inaction, Mr. McAuliffe suggested he was going to seek an action at a later date, but has not within the six months, not did he require restitution by the employee;"

(Exhs. 27; Testimony of McAuliffe & Sanguinet)

54. At the same meeting, prior to the presentation of this resolution, the Board voted (also 4-1) to hire a Special Town Counsel to advise the Board (i.e., not the Town Administrator as appointing authority) "relative to personnel matters". The billing records of counsel in evidence demonstrate that this engagement encompassed an investigation of Lt. Bliss as well as investigation of the Town Accountant, Donald Bliss (no relation), who was also later fired along with Lt. Bliss. *(Exhs. 27 & 44)*

55. The Board of Selectmen immediately installed John Sanguinet as Interim Town Administrator, pending Mr. McAuliffe's ultimate discharge (abrogating the three-year employment contract entered into the previous year). Within a matter of days, Mr. Sanguinet re-opened the cell phone investigation involving Lt. Bliss. *(Exhs. 6, 15, 44 & 47; Testimony of Joyce, McAuliffe & Sanguinet)*

56. Six months later, on January 22, 2009, Mr. Sanguinet brought a letter to Chief Joyce for delivery to Lt. Bliss that placed Bliss on paid administrative leave pending a hearing on charges specified in the letter, to be held January 30, 2009, and ordered Lt. Bliss to stay away from the Police Station and to have no contact with "any identified or non-identified witness" in the matter. Although the letter was drawn over Mr. Sanguinet's

signature, Chief Joyce recalls (and I credit his testimony) that Mr. Sanguinet stated, as he delivered the letter to Chief Joyce, that the matter was “out of my [i.e. Sanguinet’s] hands.” (*Exh. 41; Testimony of Sanguinet*)

57. The January 22, 2009 letter specified the following five charges:

- Knowingly and intentionally utilized a Town Cellphone for your personal business enterprise in violation of General Laws Chapter 268A
- Knowingly and intentionally failed to reimburse the Town for the cost of use of the cell phone in proportion to use for your private business enterprise
- Knowingly and intentionally engaged in conduct prohibited by General Laws Chapter 268A by the following acts:
 - Knowingly and intentionally participating in a matter as a public official (police supervisory officer), in which a business enterprise (Intercity Alarm), had a financial interest
 - Utilizing your official position as a police officer to gain an unfair, competitive and economic advantage in the sale of residential alarm systems in the Town of Wareham
- Knowingly and intentionally providing information during your investigative interview that was directly contradictory to statements and information obtained in the investigation despite being told that you were required as a condition of your employment to provide complete, accurate and truthful information
- Knowingly and intentionally interfered with and attempted to obstruct an employer investigation.

(*Exh. 41*)

58. On January 23, 2009, by a vote of 32-7, the Wareham Police Union issues a “Vote of No Confidence” in the Wareham Board of Selectmen. (*Exh. 29*)

59. On February 18, 2009, following the hearing, Acting Town Administrator Sanguinet delivered a letter to Lt. Bliss terminating him from his position as a WPD Lieutenant, effective immediately. In addition to reciting verbatim the original five charges, the termination letter stated the following additional reasons for the decision:

“[P]articipating in matters as a public employee in which your second employer, Intercity Alarm Company, financially benefited, utilized a government issued and funded cellular phone for several years for two of your private business enterprises, a real estate company and Intercity Alarm Company, and did not provide truthful information in an investigation interview on each of the matters. In addition, it was

apparent from your testimony that you have held yourself out as a police officer to benefit your private business, the sale of home security systems.”

“[Y]ou have actively participated in conversations and purchasing decisions by various Town officials that have resulted in the purchase of Intercity Alarm products or services by the Town.”

“[F]or a period of approximately eight years you utilized a Town issued and funded cellular phone for two private business enterprises you were involved with . . . Advertisements for both . . . proved you knowingly used the Town cell phone for this purpose. . . . [W]hen you were interviewed in December 2007 on two separate occasions by the Chief of Police concerning inappropriate use [sic] of the cell phone for the real estate business, you knowingly concealed information concerning your use of the phone for the Intercity Alarm Co. . . .”

“[Y]ou have knowingly held yourself out to be a police officer in the pursuit of your private business enterprise” and by “appearing . . . in uniform in a matter associated with Intercity Alarm” you violated the “specific dictates of the State Ethics Commission opinion you received in 2007 [sic].

(*Exh. 42*)

60. On February 24, 2009, Chief Joyce issued a Press Release announcing the termination of Lt. Bliss and stated: “The Department is fully confident that a pending review of these complaints by the Civil Service Commission, on the actual facts rather than political retribution, will result in the Lieutenant being vindicated and reinstated to his position. I would urge the hundreds of citizens who have been aided by Lt. Bliss to continue to support him and respect the individual whose integrity and professionalism they know.” (*Exh. 25; Testimony of Joyce*)

The Commission Hearing

61. Chief Joyce and John McAuliffe both gave persuasive testimony in support of their shared conclusion that Interim Town Administrator Sanguinet’s discharge of Lt. Bliss was wrong-headed, and was not based on sound, independent judgment, but was one (of several examples) of continued intermeddling in personnel matters and daily operations orchestrated by the Board of Selectmen in excess of their authority, motivated

by personal and political factors. John McAuliffe testified that the Board of Selectmen at the time was the “most aggressive bunch” that he had seen in his years as a professional municipal executive. Chief Joyce testified that he “never saw anything like” the degree of interference in his daily operations as he received from the Board as constituted in 2007 and 2008. He was convincing when he testified that, by the middle of 2008, the relationship had deteriorated to the point where he decided to retire, after 20 years as Chief of Police. He was personally close to tears as he described how strongly he believed Lt. Bliss was mistreated by the Board of Selectmen. (*Testimony of Joyce & McAuliffe*)

62. Chief Joyce testified that, at one point, Mr. Sanguinet told him that his job as Interim Town Administrator, was to “carry out the wishes” of the Board of Selectmen. At another point, during a discussion of budget issues, even Mr. Sanguinet admitted that he was reluctant to reallocate Lt. Bliss’s WPD salary because he agreed that it was likely Bliss would eventually win back his job. (*Testimony of Chief Joyce*)

63. I find the testimony of Chief Joyce and Mr. McAuliffe, two career professionals, entirely credible in their recollection of the facts and assessment of the inferences that may be drawn from them. In contrast, Mr. Sanguinet’s admissions and demeanor (tentativeness, failure to make critical eye contact and inability to articulate the specific facts he used to support the decision to terminate Lt. Bliss), confirmed a picture far more consistent with one who took his cue from others, and not a true decision-maker who acted on his own careful and independent judgment. (*Testimony of Sanguinet*)

64. Chief Joyce also testified that he had been informed that the source of his “tumultuous” relationship with the Board of Selectmen, may have had its origins, at least

in part, from the bypass of a candidate for Lieutenant (in favor of Lt. Bliss), who was a long-time personal friend of one of the members of the Board (i.e., Selectman Donahue). While I credit his testimony that is what he was told, I am not satisfied there is substantial evidence of a nexus between this bypass (dating back to 2002), and the events of 2008. On this record, to draw any inference to that effect would be largely speculation. (*Testimony of Joyce*)

65. To the same effect is the Appellant's proffer of evidence that in May 2009, after two years of lobbying, Ms. Bindas finally obtained the relief she had sought from the Board of Selectmen – a cease and desist order for an alleged nuisance in her neighborhood. While these facts are true, I am not persuaded that the inference the Appellant wishes to be drawn is warranted – i.e., some sort of quid pro quo for her testimony against Lt. Bliss. I have discounted Ms. Bindas's testimony as unpersuasively vague, inconsistent and contrary to the weight of the evidence in many respects, as set forth in the findings of fact above. I do not, however, discredit her testimony as the product of undue influence. (*Exhs. 43 & 48; Testimony of Bindas & Sanguinet*)

66. Wareham contested the Appellant's assertion that he served any punishment duty for his admitted poor judgment in advertising his WPD cell phone number in connection with his business activities by pointing out that there was no documentary evidence that memorialized such an agreement. Chief Joyce and Mr. McAuliffe acknowledged this assertion was true. They gave separate reasons that purported to explain why such documentation did not exist. (*Testimony of Appellant, Joyce & McAuliffe*)

67. Chief Joyce testified that in his twenty years as Chief, he cannot ever recall formally reporting the imposition of punishment duty. He did agree that it was his

practice to memorialize such agreements, but that there have been exceptions where agreements had been reached with employees that would not be found to be memorialized anywhere. (*Testimony of Joyce*)

68. Mr. McAuliffe also testified that it was his intention to place a letter into Lt. Bliss's personnel file. He took personal responsibility for failure to do so. He attributes his neglect to the fact that, in February 2008, Wareham was entering peak budget season and he had not attended to it before he was abruptly terminated. (*Testimony of McAuliffe*)

69. There was also evidence, or more accurately, a dearth of evidence, to suggest that Wareham at any time prior to Lt. Bliss's termination, made any inquiry about the punishment duty issue, although there was evidence that Mr. Sanguinet had come to know about it. In a similar vein, Wareham's pre-termination investigation appears to have omitted any attempt to inquire of Mr. McAuliffe at all, either about that issue or the cell phone issue. There is no evidence that any inquiry was ever made into records or any other source, concerning Lt. Bliss's use of his cell phone in connection with the Intercity Alarm business or the personal use by any other Wareham employee with a Town-issued cell phone (other than the one DPW employee who was discovered making off-duty long-distance calls). Mr. Sanguinet's investigation of the matter once he became Interim Town Administrator was "minimal". When asked why he had not been more proactive in researching or making inquiry, he replied: "I couldn't tell you." Wareham counsel stipulated that, save for Chief Joyce's December 12, 2008 memorandum to Mr. McAuliffe, Wareham had no other evidence of the extent of Lt. Bliss's use of his cell phone in connection with either the real estate or alarm businesses. (*Exh. 12; Testimony of Appellant, Joyce, McAuliffe, Sanguinet; Representation of Counsel*)

CONCLUSION

Applicable Legal Standards

A tenured civil service employee may be discharged only for “just cause” after due notice and hearing, followed by a written decision “which shall state fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such a decision, may appeal to the Commission pursuant to G.L.c.31,§43. Under Section 43, the appointing authority carries burden to prove to the Commission by a “preponderance of the evidence” that “there was just cause” for the action taken. G.L.c.31, §43. 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); McIsaac v. Civil Serv. Comm’n, 38 Mass.App.Ct. 473, 477 (1995); Watertown v. Arria, 16 Mass.App.Ct. 331,334, rev.den., 390 Mass. 1102 (1983).

In performing its appellate function, “the commission does not view a snapshot of what was before the appointing authority . . . [T]he commission hears evidence and finds facts anew. Examining an earlier but substantially similar version of the same statute, the [SJC], said: ‘We interpret this as providing for a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer.’ For the commission, the question is ‘not whether it would have acted as the appointing authority had acted, but 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.’ ” [Citations omitted]

Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003) (affirming Commission's decision to reject appointing authority's evidence of appellant's failed polygraph test and prior domestic abuse orders and crediting appellant's exculpatory testimony) (*emphasis added*). See generally Villare v. Town of North Reading, 8 MCSR 44, reconsid'd, 8 MCSR 53 (1995) (discussing de novo fact finding by "disinterested" Commissioner in context of procedural due process); Bielawski v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (same)

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).

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.

It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing) 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)

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with “considerable discretion”, albeit “not without bounds”, to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. 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)

Summary of Conclusion

Applying these principles to the facts of this appeal, Wareham falls short of establishing just cause for discharging or further disciplining Lt. Bliss, as there is insufficient evidence of substantial misconduct on his part contained in the record. The draconian sanction imposed here upon a career 24-year veteran WPD police officer with an otherwise unblemished and, indeed, markedly distinguished career of service to Wareham, who has acknowledge his one poor lapse of judgment and fully remediated his behavior, is an unmistakable example of the effect of improper personal motives and undue political influence which have no place in a merit-based civil service system.

State Ethics Law Violations As Just Cause for Civil Service Discipline

Wareham does not have, and never has had, any written, formal or informal procedures governing the use of Town-issued cell phones. Indeed, there is no evidence in this record that Wareham has promulgated any policy regarding the personal or business use of Town property. Accordingly, Wareham alleges only that Lt. Bliss “knowingly and intentionally utilized a Town Cellphone for your personal business enterprise in violation of General Laws Chapter 268A.”

The Commission has indicated that, in general, absent evidence that an employee’s conduct violated a specific municipal rule or regulation, the bare allegation that the conduct violates Chapter 268A will not support civil service discipline, without a State Ethics Commission input to that effect. See McDowell v. City of Springfield, 23 MCSR

243 (2010), reconsidered, CSC Case No. D-05-148, 24 MCSR --- (2011); Solomon v. City of Methuen, 23 MCSR 441 (2010); Erickson v. Town of Oxford, 22 MCSR 14 (2009), citing Sciuto v. City of Lawrence, 389 Mass. 939, 945 (1983) (“We think the [civil service] commission has no role to play either in deciding whether the appointment . . . might violate the conflict of interest law or in concluding that, for this reason, his name should not appear on a civil service list.”); cf. Shea v. City of Boston, CSC Case No. D-08-309, 24 MCSR --- (2011) (violation of Boston’s strict written policy explicitly prohibiting excessive personal use and any business use of municipal property warranted a five-day suspension). See generally, G.L.c.268B, §3(i), as amended by c.12, §6 of the Acts of 1986 (“The [state ethics] commission shall . . . (i) act as the primary civil enforcement agency for violations of all sections of [c. 268A] and of this chapter.”)

Here, however, acting pursuant to G.L.c.286B, §3(g), the State Ethics Commission issued a written, binding advisory opinion to Bliss that identifies the controlling provisions of state ethics laws applicable to his outside employment activities and describes in detail the scope of what he is permitted to do and what he is prohibited from doing by those laws. (*See Exhs 18 thru 20*) Accordingly, the Commission will use this opinion as the template for assessing whether disciplinary action against Lt. Bliss was warranted because he “knowingly” failed to conform his conduct to the obligations and advice of which he had been provided specific prior notice.

Business Use of Cell Phone

Wareham does not specify which particular provision of Chapter 268A Lt. Bliss violated in using his WPD cell phone, and cell phone number, to further his outside business activities. At the time he requested the advisory opinion in 2002, Det. Sgt. Bliss

apparently did not disclose those facts and the State Ethics Commission advisory opinion does not expressly address them. Under these circumstances, for the reasons explained above, the Commission would be warranted to find that Wareham has failed to meet its burden to establish just cause for taking disciplinary action against Lt. Bliss based on allegations of improper cell phone use. Alternatively, there are even more compelling reasons to reach the same conclusion.

First, the record has clearly established that Lt. Bliss immediately and fully acknowledged that he was wrong to have permitted his cell phone number to appear in a commercial advertisement, and, after a thorough investigation and thoughtful consideration, Wareham Town Administrator McAuliffe, the duly authorized Appointing Authority, has already imposed the discipline he concluded to be appropriate for that conduct, i.e. two days of punishment duty. Lt. Bliss remediated his mistake immediately, and there is undisputed evidence that no further use of any WPD cell phone number assigned to Lt. Bliss appeared in any business context thereafter.

Second, although the focus of the initial investigation surrounded Lt. Bliss's outside real estate activities, the gravamen of the error was essentially the same in the context of the alarm businesses. Indeed, the scant evidence in the record of any comparable misuse of the cell phone number in the alarm business shows it long pre-dated the use in the real estate business. The remedial action taken by Lt. Bliss cured the issue as to both and, after such remediation had been accomplished and the punishment duty was served, Lt. Bliss did nothing remotely suggesting a risk of repeating the mistake. No reasonable view of basic merit principles and, in particular, fair and equitable progressive discipline, is compatible with the idea of imposing any further discipline on Lt. Bliss for similar

conduct which pre-dated that for which he was already disciplined, and for which remediation had long been wholly effective.

Third, the evidence also warrants the conclusion that only a handful of people, if that, would have recognized the cell phone number in the real estate ad or on the alarm company business card or literature as a WPD phone number. There is no evidence to indicate that Lt. Bliss did anything overt to link that number to his status as a police officer. The inference may be properly drawn that only those who already knew Lt. Bliss was a police officer were among those who would recognize the number as a WPD phone line. On this record, therefore, there is no reasonable basis to infer that, providing a WPD cell phone number to his business contacts, Lt. Bliss intentionally or knowingly attempted to use his public position for private gain, or that it ever had that effect.

Fourth, the undisputed evidence established that any incidental use of the WPD cell phone incurred no additional cost to Wareham. To the contrary, before he was advised that he no longer needed to do so, Lt. Bliss voluntarily paid Wareham a monthly amount to cover any such possible incremental costs for his "personal business cell phone use. Indeed, the fact that Wareham received such payment from Lt. Bliss for years without anyone questioning him about it, stands as clear and compelling evidence that there was no reason for him to believe that Wareham considered such use problematic.

Fifth, the evidence established, at most, 60 minutes of calls made to or from the real estate office (of which 12 minutes were "possibly" during working hours). Since Mr. Bliss also maintained a personal friendship with the owner of the real estate business, no evidence necessarily infers that any calls were even business-related. Thus, any contention that Mr. Bliss's business benefited financially or otherwise from the

arrangement, or that Wareham is due restitution of any amount, is without merit. Mr. McAuliffe appropriately concluded that degree of use was not “material”.

The Alarm Sale to Lisa Bindas

Wareham’s charges that Lt. Bliss solicited Ms. Bindas in his “uniform” and suggested that she would be better served to purchase her alarm from a police officer, certainly would justify discipline, up to and including termination, if they were proved.⁴ The State Ethics Commission advisory opinion reflects that Lt. Bliss expressly acknowledged the impropriety of wearing a police uniform while dealing with customers in his alarm business. Similarly, by any reasonable interpretation of the State Ethics Commission advisory opinion, representations that a customer would be better served by purchasing an alarm system from a police officer, would amount to substantial involvement as a municipal employee in a transaction “in which Intercity Alarms had a financial interest”. These charges, however, are easily dispatched. The credible testimony from Lt. Bliss and Chief Joyce, together with substantial corroborating documentary evidence, proves that Lt. Bliss did not wear his uniform or otherwise hold himself out as a police officer (unless he was asked, and then told the truth). Ms. Bindas’s spotty recollection of the key events five years earlier and her inconsistent, ambiguous and uncorroborated testimony did not persuade me to believe otherwise. Wareham has not met its burden to establish any “knowing” or “intentional” ethical impropriety in connection with the Bindas transaction.

⁴ The Appellant argues that Wareham failed to provide adequate notice of these charges at the appointing authority level hearing and decision, as required by G.L.c.31, §41, and therefore, is precluded from pressing those charges before the Commission. The Appellant made substantially the same argument earlier by motion for summary disposition, which motion was denied. After hearing all of the evidence, I do not find reason to change the conclusion that the Appellant was given sufficient notice of the charges against him to be able to properly defend himself at the appointing authority level and, more importantly, before the Commission.

Intercity Alarm's Transactions with Wareham and the WPD

Wareham charges that Lt. Bliss violated G.L.c.268A through participation in various transactions involving the acquisition by Wareham and the WPD of alarm equipment and/or monitoring services from his outside employer, Intercity Alarm. Wareham did not specify at the appointing authority level or before the Commission which provisions of the state ethics law were violated. The Commission should not have to parse, ab initio, the meaning of this multi-faceted and technical statute, for which the Commission neither has special expertise nor is empowered by the General Court to enforce. Rather, as indicated above, the Commission must consider Lt. Bliss's alleged violation of state ethics law as informed by the State Ethics Commission advisory opinion provided to him, which defines the scope of the obligations under Chapter 268A as they apply to him.

The State Ethics Commission advisory opinion cites three sections of state ethics law applicable to Bliss's outside employment by Intercity Alarm: (1) Section 17 – Divided Loyalties/Outside Work; (2) Section 19 – Prohibited Involvement in Matters Affecting Financial Interest; and (3) Section 23 – Standards of Conduct/Public Disclosures:

- Section 17 “is designed to prohibit divided loyalties” and “applies “when a public employee, who is expected to demonstrate undivided loyalty to the public interest, represents the interests of an ‘outsider’ in a matter in which the public is a party or has a direct and substantial interest. To illustrate, you may not receive compensation from [Intercity Alarm] to sell video systems to the Library, because a Town agency would be a party to that matter.” In particular, Section 17 (a) prohibits Bliss “from receiving compensation, directly or indirectly, from [Intercity Alarm] in relation to a particular matter in which [Wareham] is a party or has a “direct and substantial interest.” Section 17(c) prohibits Bliss “from knowingly acting” as Intercity Alarm’s “agent” [which the State Ethics Commission opinion defines as “acting on behalf of” someone else, “as a spokesperson, negotiating, signing documents and submitting applications” and “whether or not compensated”] “in connection with any particular matter in which [Wareham] is a party or has a direct and substantial interest.” The opinion cites the definition of “particular matter” in G.L.c.268A, §1(k), to include “any judicial or other proceeding, application,

submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination [or] finding”.

- Section 19 prohibits Bliss from “participating” as a Wareham employee in a particular matter in which “to his knowledge” he or a business organization in which he is serving as employee “has a financial interest”. Thus, you [Bliss] may not act as a police officer on a matter in which you or [Intercity Alarm] . . . has a financial interest. For example, if equipment is stolen from [Intercity Alarm], a financial interest exists in the return of the equipment or in restitution; therefore, you may not be involved in investigating that case, unless you receive an exemption . . . through written disclosure, of the nature and circumstances of the particular matter and. . .the financial interest *and* you receive in advance a written determination . . .by your appointing authority that the interest is not so substantial as to be deemed likely to affect the integrity of your services to the Town. According to the definition cited in the opinion from G.L.c.268A, §1(j), to “participate” means to act “personally and substantially as a . . .municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.”
- Section 23(b)(2) provides that Bliss “may not use his official position to gain for himself or other unwarranted privileges or exemptions which are of substantial value [which the State Ethics Commission defines as \$50 or more] and which are not properly available to similarly situated individuals. This section of the law specifically prohibits [Bliss] from using his official position to solicit, exploit or exert undue influence over others. The purpose of this restriction is to eliminate any implicit or explicit coercion, such that individuals feel compelled to provide or accept services where they would not otherwise do so, and to eliminate any possibility that the supervisory employee may take unfair advantage of [a subordinate in] the situation.”. . .In order for you to comply with the conditions outlined above when you sell security equipment to individuals that you supervise or to business establishments or vendors within your regulatory jurisdiction as a police officer (such as VFW hall or taverns, for example, the business relationship must be entirely voluntary . . . and you must file a . . . written disclosure with your appointing authority. . . .[Y]ou are also subject to §23(b)(3), which prohibits [you] from engaging in any conduct which gives a reasonable basis for the impression that any person can improperly influence or unduly enjoy [your] favor in the performance of [your] official duties . . . For example, if a former customer of yours is arrested . . .even if you believe you can be objective, a reasonable person would perceive that you would show him favoritism. . . .[and] you should file a written disclosure of the relevant facts with your appointing authority, prior to taking any official action, in order to dispel such an impression.” Finally, the advisory opinion cites Section 23(c) concerning avoiding business relationships that require disclosure of confidential information acquired as a police officer.

(Exh. 20)

The evidence established that Wareham was a customer of Intercity Alarms for decades before Lt. Bliss affiliated with the business. Bliss personally did not “gain for himself” any privileges of “substantial value” in any of the transactions in which Wareham or the WPD acquired security equipment or services from Intercity Alarms. Except for his procurement of a donation of free monitoring services by Intercity Alarms for the “crime watch” building, to complement the donation of a piece of security equipment from another security vendor, Lt. Bliss acted neither as “agent” for Intercity Alarms nor as a WPD employee or “substantially” participated in any other transaction between the two entities. His role consisted of providing general advice gained through his years of experience with security equipment, and passing along an Intercity Alarm point of contact to other WPD officers who handled the matter (i.e., Chief Joyce and Lt. Wallace). Nothing within the extensive analysis of Lt. Bliss’s obligations described in the State Ethics Commission advisory opinion fits these incidental and uncompensated activities within the scope of “knowingly participating” as a WPD employee “personally and substantially” in any prohibited transactions without having obtained his appointing authority’s approval after disclosure, as specified by that opinion. Wareham has not met its burden of proof that any discipline is warranted against Lt. Bliss based on its unsubstantiated charge of any conflict of interest that violated G.L.c.268A.⁵

⁵ As noted earlier, the State Ethics Commission, not this Commission, is the “primary” enforcement agency for violations of state ethics laws. While this Commission may properly conclude that Wareham did not meet its burden of proof to establish that Bliss “substantially” participated in any conflict of interest situation that justifies discipline based on the evidence in this case, ultimately, only the State Ethics Commission has the authority to definitively draw the line between “substantial” and non-substantial “participation” in a matter. It may behoove each of the parties to take a fresh look at further clarification of some of the questions, while not proved on this record, that might be of recurring concern, such as the possibility that Intercity Alarms personnel or other people may be telling prospective customers that Bliss is a Wareham police officer (albeit not on his initiative or with his knowledge), as well as what level of incidental use as a go-between for both Intercity Alarms and Wareham might amount to “substantial” participation that requires Section 19 prior disclosure and appointing authority level approval.

Untruthfulness and Otherwise Impeding the WPD Investigation

Wareham's remaining findings against Lt. Bliss assert that (1) he was "knowingly" untruthful in his statements made during the course of the investigation of his alleged misconduct that were "directly contradictory to statements and information obtained" during that investigation and (2) he "knowingly and intentionally interfered with and attempted to obstruct" the WPD investigation.

As to the first finding, the principal evidence that Wareham proffered of untruthfulness centered on the dispute between Lt. Bliss and Ms. Bindas concerning his appearance "in uniform" and statements she said were made that purported to leverage his position as a police officer for the benefit of his private business interests. On this matter, essentially a question of credibility, I have found Lt. Bliss's truthful testimony and corroborating evidence far outweighed the evidence from Ms. Bindas to the contrary. Thus, Wareham's conclusion that Lt. Bliss was untruthful has not been proved.

As to the second of these findings, there was no proper evidence (or even argument by Wareham at the Commission hearing), that remotely tends to support any such conclusion. The evidence proved that, when apprised of the complaint about the real estate ad, Lt. Bliss freely acknowledged his culpability and corrected the problem the very same day. It borders on incredulous for Wareham to claim that Lt. Bliss "knowingly and intentionally" interfered and obstructed the internal investigation because he was not forthcoming about his other and prior private use of the WPD cell phone. Wareham accepted payment for such use for years, never promulgated any rules or guidelines for such use, and took no steps to ask Lt. Bliss about that prior use or to otherwise probe the matter during the 2007-2008 investigation, or at any other time before or since. The

matter during the 2007-2008 investigation, or at any other time before or since. The Commission has expressed distain for, and continues to find it telling of an appointing authority's motives, when there appears to such unfair "piling on" of patently marginal charges that lack any reasonable investigatory foundation or evidentiary basis. See Solomon v. City of Methuen, 23 MCSR 441 (2010); Harrington v. Town of Winchendon, 20 MCSR 452 (2007).

Relief to Be Granted

In sum, Lt. Bliss exercised poor judgment in allowing his WPD cell phone number to used in a business context, for which he already served appropriate discipline of 16 hours of punishment duty, forfeited additional overtime and has prospectively rectified his mistake. Wareham has failed to prove "just cause" for any further discipline of Lt. Bliss. Accordingly, for the reasons stated above, the appeal of Donald Bliss must be ***allowed***, and he shall be returned to his position of WPD Lieutenant and restored to all compensation and other benefits to which he is entitled by law.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on. May 5, 2011

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Andrew Gambaccini, Esq. (for Appellant)

Steven A. Torres, Esq. (for Appointing Authority)