

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JOHN BURKE, JR.,
Appellant

v.

D-17-043

TOWN OF WEYMOUTH,
Respondent

Appearance for Appellant:

Timothy M. Burke, Esq.
Law Offices of Timothy M. Burke
160 Gould Street, Suite 100
Needham, MA 02494

Appearance for Respondent:

Joseph Callanan, Town Solicitor.
Weymouth Town Hall
75 Middle Street
Weymouth, MA 02189

Commissioner:

Paul M. Stein

DECISION

The Appellant, John Burke, Jr., a Police Lieutenant with the Weymouth Police Department (WPD), appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43,¹ from a decision of the Respondent, the Town of Weymouth (Weymouth), acting through its Chief of Police, to suspend him for five (5) days. The Commission held a pre-hearing conference at the UMass School of Law in Dartmouth on March 24, 2017 and a full evidentiary hearing at that location on May 15, 16 and August 11, 2017. The full hearing was declared private, with witnesses sequestered. The hearing was digitally recorded and subsequently transcribed by the parties.² Thirty-five exhibits were received in evidence at the hearing (Exhs.1 through 35). Both parties submitted proposed decisions on September 29, 2017.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² CDs of the hearing recordings were provided to the parties which Weymouth converted into written transcripts and used as the official record. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to supply the court with such a written transcript to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Town of Weymouth

- WPD Chief of Police Richard Grimes
- WPD Sergeant BF
- WPD Sergeant GH
- WPD Sergeant MS
- WPD Detective DG
- WPD Officer JA
- WPD Officer EH
- WPD Dispatcher EM

Called by the Appellant:

- WPD Lieutenant John Burke, Jr., Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, John Burke, Jr., is a sworn member of the WPD with 29 years of service in law enforcement. He has been a member of the WPD for twenty years. He has held his current rank of Lieutenant for the past eight (8) years. His prior employment included positions with the Abington Police Department, the Plymouth County Sheriff's Department and the Boston Municipal Police Department. (*Tr.II:497-498 [Appellant]*)

2. Lt. Burke holds a good reputation within the WPD as a responsible, experienced supervisor and trusted mentor who never "shirked his responsibilities" or knowingly put safety of officers under his command at risk; in fact, he could be called "overly protective" when it came to officer safety and courtesy to dispatchers. Until the incident that gave rise to this appeal, Lt. Burke had never been disciplined in his law enforcement career. (*Tr.I:37-38,56,62[MS]; Tr.I:109, 119[EM]; Tr.I:164-165[GH]; Tr.I:217[JA]; Tr.II:505 [Appellant]; Tr.III.21[DG]*)

3. Lt. Burke is assigned to the evening shift (4PM to Midnight) and serves as the Watch Commander. He works out of an office at the WPD Police Station adjacent to, but separate from,

the WPD dispatcher center. The Watch Commander is the highest ranking superior officer on duty. (*Tr.I:9-10[MS]; Tr.II:497-499[Appellant]*)

4. As Watch Commander, Lt. Burke was responsible for booking prisoners brought to the station. He personally has booked over 1650 prisoners during his career. (*Tr.II:498[Appellant]*)

5. On October 17, 2016, at 9:04:47 pm, a 911 call came into the WPD dispatcher on duty [Telecommunicator EM] from a Weymouth citizen who reported that his son “who has psych issues”, was “real drunk and also has a warrant on his arrest”. The caller said his son was “just acting stupid” but “not out of control”. EM obtained the son’s name and date of birth and said she would send someone over. The 911 call ended at 9:05:29 pm. (*Exh.21; Tr. I:79-81[EM]*)

6. EM entered the call in the WPD computer log as a “DK [intoxicated] PERSON”. At 9:06:54 pm, she dispatched two cruiser patrol officers to the scene, i.e., Patrolman JA and Canine Officer EH, stating “there was a father who had a son that had a psych issue and was [intoxicated]”. EM did not mention the father’s report of a warrant on his son. (*Exhs. 19 & 21; Tr.I:82[EM];Tr.I:191-192[JA];Tr.II:295-296[EH]*)

7. The dispatcher then “ran” the subject, which I infer means that she reviewed the WPD’s “Master Card” data base and queried the subject through the Criminal Justice Information System (CJIS) or Board of Probation (BOP) system to which she would have had access. This confirmed an outstanding “straight warrant” on him, stemming from a July 3, 2016 incident that caused a summons to issue against him for failure to appear on a criminal complaint of assault and battery on ambulance personnel.³ (*Exhs. 1, 15 & 17; Tr.I:12-13[MS]; Tr.I:82-86[EM]*)

³ A “straight warrant” is issued when a defendant has not responded to a summons on a criminal complaint. The WPD’s practice has allowed some discretion on whether to arrest the subject of a “straight” warrant, as it differs from other warrants that issue after a defendant had been previously arrested and released on bail or on probation and then fails to appear for a scheduled future court date or violates probation, matters which a court is likely to treat as more serious offenses than ignoring a “straight” warrant. See Exhs. 2, 12, 26,p.3. See generally, Comm. v. Trembley, 92 Mass.App.Ct. 295, 306n.12 (2017); <https://attorneychan.wordpress.com/tag/warrant/>

8. The WPD's "Master Card" on the male subject is annotated with the word "**Caution**", in bold red type near the top of the page and, in the "Notes" section, states "CAUTION . . . Known combative toward police and first responders. Tends to flee" The purpose of this "CAUTION" is to "alert telecommunicators [i.e., dispatchers] and officers of the existence of a concern as it pertains to the individual." (*Exhs. 1 & 15*)

9. Sgt. MS, the Station Officer on duty, who worked in the dispatch area, heard the dispatch announcement. He recognized the address and subject involved as the person he encountered in the incident on July 3, 2016, when he was one of responding officers. As indicated in the incident report he filed, the subject was found by Sgt. MS staggering on the sidewalk, given Narcan®, handcuffed "to prevent injury to the male party as well as Off[icer] Chesna and I" and transported to the hospital by ambulance. En route, the subject became combative, managed to free his legs and kicked one of the ambulance technicians, which resulted in Sgt. SM's request for the criminal complaint that issued against the subject. (*Exh. 17; Tr.I:9-11,20-22[SM]*)

10. A week later, on July 11, 2016, Sgt. MS again encountered the male subject when he responded to a "Disturbance" call from the subject's parents, who reported an "intoxicated male who was unwelcome in the home." According to the incident report he filed, upon arrival at the scene, Sgt. MS found the male staggering on the street, extremely intoxicated. After a struggle, during which the subject swore and spit at Sgt. MS, he was subdued, placed in protective custody and transported to the hospital for alcohol and mental health issues. No further charges emanated from this incident. (*Exh. 18; Tr.I:22-24[SM]*)

11. After speaking with Telecommunicator EM, Sgt. MS proceeded to the Watch Commander's office, just outside the dispatch area. He found Lt. Burke and Detective DG talking about an on-going investigation of an alleged rape/kidnapping that had occurred earlier in

the day as to which Det. DG wanted to be sure the oncoming watch commander was briefed thoroughly on the status of the victim, who had been hospitalized, and may need follow-up during the night. (*Exhs. 2, 6, 9 & 19; Tr.I:13[SM]; Tr.II:499-500 [Appellant]; Tr.III:5-6[DG]*)

12. Sgt. MS interrupted the conversation between Lt. Burke and Det. DG to report that cruisers had been dispatched to the residence of a male whom Sgt. MS knew to have “severe mental illness”, was reportedly schizophrenic with suicidal ideations, and was “combative with officers” in the two previous encounters Sgt. MS had with the subject. He also mentioned that the subject had a warrant. He then returned to his duty station in the dispatch area. (*Exhs. 2, 3 & 9; Tr.I:13-15[MS]; Tr.II:500-50, 564-565[Appellant];Tr.III:7[DG]*)

13. Lt. Burke wrapped up his conversation with Det. DG, left his office and walked over to the dispatch area. He spoke to Telecommunicator EM and told her that she should not put the information about the warrant out over the air [radio] but, rather, to instruct all officers involved to call the station “right away”. He preferred, for “safety” reasons and “because of the social media aspect”, that she inform the responding officers and the patrol supervisor on duty [Sgt. BF] about the warrant via a secure phone or electronic message line rather than “in the usual manner” via radio which the public could intercept.⁴ (*Exhs 2, 3, 6, 9, 13 & 26; Tr.I:15-17, 57[MS]; Tr.I:86,114-117,120-122[EM]; Tr.II:501-502,555,569-579[Appellant]*)

14. Patrolman JA was first to arrive on scene and “calls off” at 9:09:50 pm. He requested that dispatch call an ambulance to the area to stand by. Given the “nature of the call” and for “safety issues”, Patrolman JA, with less than three years’ service on the WPD, waited for the more

⁴As recently as October 4, 2016, all WPD officers were advised to take care when using the radio to transmit sensitive information, as “many news agencies are now recording all of our radio transmissions and using them in news stories” and “anything you say on the radio could end up in the news”. There was also widespread concern among WPD officers about tipping off suspects and recent incidents, locally and nationally, of violence against officers who had been ambushed when responding to a call. (*Exhs. 13 & 26; Tr.I:57-58[MS];Tr.I:165-166[GH];Tr.I:218-219[JA];Tr.II:555,569-579[Appellant]*)

Soon after the October 17, 2016 incident, the WPD decided to incorporate a “scrambler” device in its radio system to provide secure communications that could be decoded only by authorized WPD personnel. (*Exh. 26,p.3*)

experienced EH to arrive, who “called off” on-scene at 9:11:53 pm. Per protocol, EH’s canine partner, Arco, whom EH “would never bring” into the house, stayed in the cruiser. (*Exhs.7, 8 & 21;Tr.I:88-90[EH];Tr.I:193-197,228[JA];Tr.II:296-299[EH]*)

15. At 9:11:58 pm, Telecommunicator EM acknowledged EH’s arrival on scene and radios EH the message: “When you get things settled down, give me a [call on a WPD land line]”. JA also heard this message. (*Exh. 21; Tr.I:197 [JA];Tr.I:255[EH];Tr.II:299[EH];Tr.II:354[BF]*)

16. Officers EH and JA then proceeded to the residence, where they found the male subject and followed him to a bathroom where he filled a plastic cup with water. As the male left the bathroom, he threw water at JA and pushed his way past the officers. At 9:13:52 pm, JA radios that the subject fled the house and, at 9:14:44 pm, reports that the male is hiding in a nearby wooded area. (*Exhs.1, 7, 8, 15 & 21; Tr.I:198-199[JA]; Tr.I:258-260[EH];Tr.II:357[BF]*)

17. At 9:15:30 pm, Sergeant BF, the patrol shift supervisor, who was monitoring the situation from the reconstruction scene of an earlier serious motor vehicle crash, called JA on the radio and asked if the male subject was “wanted for anything or was it just a welfare check?” to which JA responded “psych issues.” (*Exhs. 5, 16, 19 & 21; Tr.I:202-204[JA];Tr.II:353-355[BF]*)

18. At 9:16:39 pm, after hearing this radio exchange, Telecommunicator EM told Sgt. BF to “check his [cruiser] terminal.” JA heard this message. (*Exhs.5&21;Tr.I:205[JA];Tr.II:356[BF]*)⁵

19. EM then exchanged electronic “chat” messages with Sgt. BF via his cruiser computer:

EM to BF-9:16:49: “Party does have 1 straight warrant but id [sic] he is extremely DK [Lt] wants him to go to hospital”

BF to EM–9:17:52 “whats it for”

EM TO BF-9:18:06 “a&b on ambulance personnel”

EM to BF–9:21:23 “haven’t told them yet, told them to call when they got him settled down”

(*Exhs. 5, 10 & 21; Tr.II:357,420-423[BF]*)

⁵ WPD officers have cruiser and mobile radio capabilities that enable them to monitor and engage in communications with dispatch and with each other. Officers also have a laptop computer in their cruisers which enables secure messages to be transmitted and received. Officers can access WPD’s “Master Card” or criminal history date from their cruisers, but not without knowing certain details such as name and date of birth. (*Tr.I:199, 243-245, 248-250[JA]; Tr.II:316[EH]; Tr.II:354-360[BF]*).

20. After receiving the chat messages from Telecommunicator EM, Sgt. BF exited his cruiser and returned to assist the motor vehicle accident reconstruction team. By that time, he knew that the suspect had fled into the woods and knew that the subject had a warrant on him for assaulting an EMT. He “did not recall” if he actually saw the final message indicating that EM had not told JA or EA about the warrant and did nothing to convey the information to them, as he “had no reason to think they wouldn’t already know about it”. (*Tr.II:357-359,383,425[BF]*)

21. Meanwhile, JA and EH, using muzzled Arco, cornered the male subject in the woods. Once EH determined that the subject had become “compliant” and “Officer [JA] was in a safe position”, EH “pulled Arco back and let [JA] start to handcuff” the male. At that point, the male rolled over and kicked JA in the face, breaking his eyeglasses and causing minor facial injuries. Eventually, with Arco’s support and assistance of the paramedics on scene, the male was subdued, handcuffed and placed in an ambulance. (*Exhs. 1, 5, 7, 8, 14, 15, 16 & 21; Tr.I:206-208[JA]; Tr.I:260-272[EH];Tr.II:295,307-312,330-334[EH]*)

22. At 9:24:01 pm, radio transmissions resume. JA reports he had been assaulted. Sgt. BF leaves the accident reconstruction team and arrives on scene and is briefed by EH. By 9:33:14 pm, JA is on his way to the hospital for treatment of his injuries. (*Exhs. 1, 5, 7, 8, 14, 15, 16 & 21; Tr.I:208-209[JA]; Tr.I:269-272[EH]; Tr.II:360[BF]*)

23. At 9:37:36 pm, Sgt. BF called dispatch on a recorded line and was transferred to Lt. Burke. After reporting on JA’s injuries, they considered whether to arrest the male or send him to the hospital and “complaint” him (i.e., file a criminal complaint and obtain a summons for his appearance in court). (*Exh. 31; Tr.II:380-385[EH];Tr.II:537-540[Appellant]*)

24. The recorded conversation included the following colloquy:

SGT. BF: “So do you want me to just . . . put him under arrest?”
LT. BURKE: “Yeah, I mean I . . .

SGT. BF: “The kid’s . . . really got psych issues, do you know what I mean, so he’s going to have to go to the hospital. . . .”
LT. BURKE: “Well, if he’s going to the hospital, then I don’t know. If he has to go to the hospital then . . .”
SGT. BF: “Yeah, he definitely has to go to the hospital. He’s completely out of control psychologically.”
LT. BURKE: “Then let’s just ‘complaint’ him. I’m not going to get through booking anyway . . . I want to arrest him. I’ve got a straight warrant here. But if you’re telling me he’s schizophrenic and he’s in this condition right now, you know, then I’m not going to be able to book him anyway. Do you know what I mean?”
SGT. BF: “Right.”

After this colloquy and BF’s assessment that the male was “completely incoherent”, he was sent to the hospital by ambulance, with EH. (*Exh.31;Tr.II:380-385[EH];Tr.II:537-540[Appellant]*)⁶

25. At 9:38:43 pm, EH called dispatch to follow up EM’s prior message to contact the station “when things settled down.” He then learned “that guy has a warrant and [Sgt. BF] is aware of it”. EH replied that “we probably would have handled it lot differently and nobody would have got hurt” if they had known about the warrant. Getting no response, he “kind of chuckled”, then said: “Have a good day” and ended the call. (*Exh. 21; Tr.II:314-315 [EH]*)

26. Upon learning of Officer EH’s displeasure for not knowing about the warrant sooner, Lt. Burke told Officer EH that he [Lt. Burke] had decided to keep knowledge of the warrant off the public radio channel. He asked EH to apologize to Telecommunicator EM, which he did. (*Exhs. 5, 7, 8 & 26; Tr.I:236[JA]; Tr.I:280-282[EH];Tr.II:554-565[Appellant]*)

27. Lt. Burke’s primary focus that evening had been the investigation the two high priority, serious rape/kidnapping and motor vehicle crash reconstruction matters. He did not learn the specifics of the radio and chat transmissions and the delay in informing EH and JA about the warrant until after the incident cleared. (*Exhs. 2, 3, 6 ,9 & 26; Tr.II:368[BF];Tr.II:480[Grimes]; Tr.II:499-504,549,562-565[Appellant]*)

⁶ At the Commission hearing, Sgt. BF agreed that summoning the male rather than arrest him was a “legitimate response to the facts” that Sgt. BF provided him, but it was a “option” he didn’t agree with. He said the written transcript of the call was erroneously transcribed and the actual recording would confirm that he disagreed with Lt. Burke on this decision. After reviewing the transcript and recording (*Exhs.21 & 31*), I find the transcript is accurate.

28. EM could have chosen a number of other available ways to get the message out – chat, text or call to cell phone – but Lt. Burke was not one to tell her how to do her job and he was “not going to judge the dispatcher.” He agreed it was not “right” to withhold or deliberately delay sending the information but, still, he took full responsibility for the consequences of his actions. (*Exhs. 2, 5, 7, 8 & 26; Tr.I:236[JA]; Tr.I:280-282[EH]; Tr.II:554-565[Appellant]*)

29. Sgt. BF called Lt. Burke again from the hospital. After further discussion, he obtained Lt. Burke’s approval to place the male subject under arrest for assault and battery on a police officer. The male was evaluated and treated at the hospital and then transported to the WPD station about midnight for booking. (*Exhs.2, 5 & 15; Tr.I:367[BF]; Tr.II:518-522,533[Appellant]*)

30. The next day, October 18, 2018, WPD Chief Grimes assigned Captain DP to conduct an investigation of the prior night’s incident. Capt. DP reviewed the incident reports, computer “chat log” and radio transmissions, as well as obtained “To/From” reports from the officers involved. (*Exhs.1 through 10, 14 through 16, 19, 21 & 31*)

31. Capt. DP provided a detailed written report to Chief Grimes dated November 3, 2016. Capt. DP’s report concluded that Lt. Burke failed to ensure that the officers on scene obtained the warrant information in a timely manner; that, in general, he discouraged officers to arrest suspects and bring them to the station for booking; and that, in particular, he failed to order the arrest of the subject in the October 17, 2016 incident. Capt. DP recommended that Lt. Burke receive a three-day suspension. Capt. DP also criticized Lt. Burke for demanding that Officer EH apologize to Telecommunicator EM, finding (accurately) that Officer EH did not ever raise his voice and stated that he did not find he exchange “unnecessarily harsh”. (*Exhs.1 & 21*)

32. By letter dated December 12, 2016, Chief Grimes imposed a five (5) day suspension, finding that: (1) Lt. Burke gave a “deliberate order” to deviate from “expected and required

practice of immediately keeping personnel who have been dispatched on calls fully informed of all facts affecting their safety and efficiency of their response to calls” and, specifically, by not allowing radio transmission, “to deliberately delay . . . and or to withhold . . . police information concerning wanted persons”; (2) he had taken a “persistent stance” against arresting a person with an outstanding warrant for assault and battery on an EMT, despite “prior knowledge that the male in question had been assaultive to public safety personnel as recently as three months prior”; and (3) “you abused your authority by compelling Officer [EH] to apologize to a Telecommunicator for a situation you created . . . to withhold information.” (*Exh. 22*)⁷

33. Chief Grimes found that Lt. Burke’s actions violated the newly promulgated WPD Code of Conduct (Rules and Regulations), specifically: (1) Section 2, Required Conduct, subsection (e) Department Communications by “failing to transmit all official communications promptly, accurately and completely to other officers in the department as required” and (2) Section 4, Prohibited Conduct, subsection (n) Neglect of Duty (nonfeasance) by “failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention or service.” Chief Grimes believed that concern for “officers’ safety” and “social media” was too speculative to justify Lt. Burke’s decision not to transmit the information about the warrant over the police radio channel. (*Exh. 22;Tr.II:460[Grimes]*)

34. The WPD Code of Conduct (Rules and Regulations), WPD Policy and Procedure 26-3 (issued and effective 8/5/2016) referenced by Chief Grimes provide, in relevant part:

GENERAL CONSIDERATIONS

The Rules and Regulations . . . are included in the Policies and Procedures manual as the Code of Conduct. Whereas policies and procedures allow for leeway in choice from possible alternative actions and generally define the limits of discretion, rules and regulations specifically define the actions that are allowed and those actions that are prohibited. . . .

⁷ By a second letter dated December 12, 2016, Chief Grimes issued a written reprimand to Lt. Burke for creating “the atmosphere of a negative influence on the officers under your command toward arrests.” (*Exh.30*)

DEFINITIONS

Policies and Procedures: Policies and procedures provide officers with direction and guidelines for the delivery of police services based on department vision, mission and values as well as all constitutional, state, and local ordinance. Policies and Procedure allow for officer discretion within the law, good judgment and common sense and they define the limits of discretion.

Rules and Regulations: Rules and Regulations are specific and binding statements regarding employee conduct that allow for little or no discretion. In most cases, conduct outside of the rules and regulations shall be subject to disciplinary action.

PROCEDURES

1) Professional Conduct & Responsibility [26.1.1]⁸

2) Required Conduct [26.1.1]

In addition to the specific duties of each individual rank and assignment as set forth in this manual, the following provisions are applicable to all officers and employees of the department insofar as they are pertinent to their particular functions and responsibilities.

e) Department Communications – All officers shall transmit all official communications promptly, accurately and completely to other officers of the department as required, and shall immediately inform their Officer-In-Charge of any matter of police importance coming to their attention during their tour of duty, or otherwise. They shall call to the attention of their relieving officers any information regarding unresolved problems or problems that may arise during the next tour of duty.

⁸ The bracketed citations refer to CALEA Accreditation Standards (5th Ed.) used for accreditation by the Massachusetts Police Accreditation Commission (MPAC), which the WPD was in the process of seeking at the time of the incident in question. (*Tr.II:485-495[Grimes]*) I infer that the August 2016 Code of Conduct was one of several such policies adopted in furtherance of that accreditation process; two other policies in evidence referenced 5th edition accreditation standards [41-6 on Mental Illness (effective 2/3/2017) and 71-1 on Holding Facility and Detainee Processing (effective 11/11/2016)] (*Exhs.20, 29, 33 & 35*). I indicated at the hearing (*Tr.II:494-495*) that I would take administrative notice of the substantive provisions of the Accreditation Standards then in effect and referenced in the WPD's 2011 versions of its Policies and Procedures (*Exhs. 32 & 34*), in the 2016 revisions to its Policies and Procedures (*Exhs. 20, 29 & 33*) and what appears to be an index of the standards marked *Exh. 35*. However, I have been unable to find a public source for the standards; only indices [titles] appear available on-line from the accreditation organizations [<http://masspoliceaccred.net> and <http://www.calea.org>]. In addition, it appears that the CALEA accreditation standards are now in their 6th Edition (versus the 5th Edition referenced in the 2016 WPD's Rules and Regulations) and there seem to be differences between the Massachusetts Commission standards and the CALEA standards: MPAC Accreditation has 159 Standards (not including Standard 41.2.7 on Mental Illness) for "Certification" and 257 Standards for "Accreditation". CALEA has 188 Standards (including 41.2.7 for "Tier 1" Certification and 482 Standards for "Tier 2" Certification). I do take notice that Weymouth received MPAC "Certification" in October 2017 and "Accreditation" in June 2018 [<http://masspoliceaccred.net/program-members/w/>]. I advised the parties that, therefore, I would take notice of WPD's certification and accreditation under MPAC, but I do not intend to further research these programs, and will draw no inferences about how the WPD's 2011 and 2016 Policies and Procedures compare and/or conform to the MPAC or CALEA Standards as then or now in effect, which I do not believe would be appropriate without reopening the evidence for further hearing. (See E-mail to counsel dated 8/14/2018) Having heard no objection from either party, I have proceeded accordingly.

v) Care and Transportation of Prisoners – All arrested persons shall be transported safely and directly to the appropriate place of custody. Officers shall make every effort to ensure that prisoners do not injure themselves or others and that they do not attempt to escape or dispose of evidence.

3) Prohibited Conduct

The following acts, actions or activities by department personnel are prohibited or restricted: [26.1.1]

n) Neglect of Duty – Being absent from assigned duty without leave; leaving post or assignment without being properly relieved; or failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention or service.

(Exh. 20)

35. At the time of the October 17, 2017 incident, the WPD also had an extensive manual of written policies in place, these excerpts from four of which are germane and set forth below:

Policy Number 11-02 ARREST (1/22/2012 rev.)

- “It is the policy of the department . . . [t]hat when appropriate circumstances exist, officers may exercise discretion and not make an arrest. In such limited cases, citations, summonses, informal resolutions, warnings and referrals to other agencies may be alternatives to arrest.”
- “Although police officers must always be guided by the intent and purpose of the law, there are limited circumstances in the discretion of the officer involved when the public interest would be better served by not making an arrest, even though there is legal justification for such action.”
- “Circumstances where little or no discretion to use alternatives to arrest is appropriate include the following: 1) Domestic Violence . . . 2) Operating Under the Influence of Alcohol.”

Policy Number 11-06 DETAINEE PROCESSING (1/22/2012 rev.)

- “Medical treatment shall be arranged for any detainee in need of medical treatment.”
- “No employee shall be allowed to go beyond his/her training in administering to the emergency or special medical needs of any person held in the custody of this department”

Policy Number 11-45 LOCKUP AND HOLDING FACILITY (2/13/2012 rev.)

- “[I]t will be up to the discretion of the watch commander to determine if constant or more frequent than 30 minute monitoring [of a prisoner] is needed .”
- “In the case of a prisoner who may have medical or physical difficulties more frequent monitoring may be required.”
- “All officers shall follow the guidelines below to attending to the medical needs of a prisoner.”

- “Any person requesting in [sic] or deemed in need of medical attention shall be transported to South Shore Hospital.”⁹
- “When transfer of a detainee to a hospital is necessary the mode of transportation shall be by ambulance . . . [A] police officer shall accompany ambulance attendants.”

Policy Number 11-10 HANDLING THE MENTALLY ILL (1/22/2012 REV.)

- “If an officer believes [s]he is faced with a situation involving a mentally ill person, [s]he should not proceed in haste unless circumstances require otherwise.”
- “It is not necessarily true that mentally ill persons will be armed or resort to violence. However, this possibility should not be ruled out and because of the potential dangers, the officer should take all precautions to protect everyone involved.”
- “If an officer receives a complaint from a family member of an allegedly mentally ill person, the officer must assess the person’s state . . . in making a good faith determination as to whether or not there is reason to believe that failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, and as to whether the person is a threat to himself or others.”
- “A mentally ill person may be taken into custody if: i) [s]he has committed a crime for which there is a right of arrest. ii) The officer has a reasonable belief, under the circumstances, that [s]he poses a substantial danger of physical harm to himself/herself or other persons.”
- “Whenever a mentally ill or mentally deficient person is a suspect and is taken into custody for questioning, police officers must be particularly careful in advising the subject of his/her Miranda rights . . . It may not be obvious that the person does not understand his/her rights.”
- “Before interrogating a suspect who has a known or apparent mental condition or disability, police should make every effort to determine the nature and severity of that condition or disability; the extent to which it impairs the subject’s capacity to understand basic rights and legal concepts, such as those contained in the Miranda warnings.”

(*Exh. 34*)

36. Two additional WPD policies were introduced: (1) a “new” Policy and Procedure No. 71-1, entitled “Holding Facility and Detainee Processing”, issued 10/28/2016, effective 11/11/2016, and (2) a “revision” Policy and Procedure No. 41-6, entitled “Response to Persons with Mental Illness and Emotional Disturbances”, issued 1/20/2017, effective 2/3/2017. WPD counsel moved to strike these exhibits as they post-date the disciplinary incident. While that is true, they were in

⁹ At the time of the October 2016 incident, the WPD detention facility was not considered “suitable” for handling the needs of detainees who required immediate or sustained medical attention, including emotionally disturbed people. Hospitalization of such persons was generally believed to be a preferred option rather than incarceration in the first instance. (*Exh. 29, p.8; Tr.I:47[MS]; Tr.I:167[GH]; Tr.I:238-239[JA]; Tr.II:347-348[EH]; Tr.II:381-382[BF]; Tr.441-442,470-478[Grimes]*)

effect when the appointing authority held its disciplinary hearing and my review of the exhibits confirms, as Chief Grimes testified, that the new policies are consistent with “good police practices” and substantially track existing WPD policies. (*Tr.II:439-450,491-497[Grimes]*)¹⁰

37. WPD also has policies and procedures covering a “prisoner watch”, i.e., when a person taken into custody is sent to the hospital. In general, the officer taking the person into custody follows them to the hospital and remains there until relieved, which may be an officer coming on-shift or an officer called on duty for overtime. The watch commander has some discretion on how any specific situation is handled and, in practice, staffing a prisoner watch has been handled differently over time. (*Exhs.2,11,19 & 26; Tr.I:169-180[GH]; Tr.II:429-432[BF]*)

38. Lt. Burke had in mind the logistics and manpower issues that would come into play if the suspect had been arrested at the scene and put on “prisoner watch” at the hospital, rather than “complaint” him instead. With several officers working the accident reconstruction on overtime and others tied up with that incident and the other priority matter (the rape/kidnapping case), and with Officer JA out injured, Lt. Burke faced either ordering additional officers on overtime duty or completing the shift with a reduced roster. These logistic considerations were not the key factor in his decision, however, which was primarily motivated by the on-scene report from Sgt. BF about the suspect’s mental status. (*Exhs. 2, 26, 31; Tr.I:71[MS]; Tr.II:460-461[Grimes]*)

39. Lt. Burke duly appealed his discipline for an appointing authority hearing, which was held on February 10, 2017 before a hearing officer (Weymouth Director of Human Resources) designated by Chief Grimes. Lt. Burke appeared and testified. The Town appeared through counsel and submitted documentary evidence but called no witnesses. (*Exhs. 23 through 26*)

¹⁰ In these circumstances, the documents are relevant and entitled to some weight. The Motion to Strike is denied. The WPD Policies and Procedures themselves will remain in evidence and considered for what they may be worth, taking into account of their respective effective dates.

40. By Memorandum dated February 21, 2017, the hearing officer reported that he credited the WPD's documentary evidence that "Lt. Burke delayed and withheld the transfer of vital information therefore deviating from normal protocol" and this conduct "jeopardized those under Lt. Burke's command" and "unnecessarily endangered the responding officers and caused injury and hospitalization of [Officer JA]." The hearing officer stated: "I do not feel that Lt. Burke provided any additional, substantive or compelling information or persuasion concerning the incident." He recommended that the five (5) day suspension be sustained. (*Exhs. 25 & 27*)

41. Chief Grimes concurred with the hearing officer's memorandum and sustained the five (5) day suspension he had originally imposed, from which final decision Lt. Burke duly appealed to the Commission. (*Exhs. 27 & 28*)

APPLICABLE LAW

A tenured civil service employee may be disciplined only for "just cause" after due notice, hearing and a written decision that states "fully and specifically the reasons therefore." G.L.c.31,§41. An employee aggrieved by that decision may appeal to the Commission, pursuant to G.L.c.31,§43, for de novo review by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

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., 359 Mass. 211, 214 (1971); City of 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 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)¹¹

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 "merit principles" which govern 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 recognizes that law enforcement officers are vested with considerable power and discretion and must be held to a high standard of conduct, especially when it comes to the exercise of their authority. "Police officers are not drafted into public service; rather they

¹¹ The "just cause" standard applied in disciplinary cases is distinct from the more deferential standard in hiring decisions, which come to the Commission under a different section of the Civil Service Law (G.L.c.31,§2(b))."We think that the standards are materially different. Simply put, a municipality should be able to enjoy more freedom in deciding whether to appoint someone as a new police officer than in disciplining an existing tenured one." See "Memorandum and Order, City of Attleboro v. Massachusetts Civil Service Comm'n, C.A. BRCV2011-00734 (MacDonald, J), citing City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct.182,191 (2010).

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, 494 N.E.2d 27, 32 rev.den. 398 Mass. 1103, 497 N.E.2d 1096 (1986).

The Commission is entitled to “due weight for its experience, technical competence, and specialized knowledge, as well as to the discretionary authority conferred upon it. . . . This standard . . . is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.’ ” Brackett v. Civil Service Comm’n, 447 Mass. 233, 241-42 (2006) and cases cited. It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. See, e.g., Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) 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 takes 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).

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”) Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

SUMMARY OF CONCLUSION

Applying these principles of civil service law to the facts of this appeal, I conclude that the WPD has failed to establish just cause for the five (5) day suspension of Lt. Burke. The preponderance of evidence proved that none of Lt. Burke's actions amounted to the deliberate or intentional misconduct with which he was charged. In fact, his decisions were taken in substantial compliance with established WPD policies and procedures and within the limits of the discretion which those rules allowed. Nothing that Lt. Burke did that night can fairly be construed to have "impaired the efficiency of the public service" or to have "called into question" his fitness to serve as a police officer sufficient to support for imposing the remedial discipline of a suspension without pay. In particular, the preponderance of the evidence did not establish a clear nexus between Lt. Burke's action and the unfortunate injuries to Officer JA.

ANALYSIS

The Decision on the Warrant

Weymouth asserts that Lt. Burke's instruction to the dispatcher, after learning about a warrant outstanding on an emotionally disturbed person who was subject of a call for service, that she tell the officers en route to the call of the warrant "off the air", i.e., by means other than radio transmission, was a "neglect" of duty under the WPD's Code of Conduct. The justification for this conclusion rests on four prongs, none of which are substantiated.

First, Weymouth erroneously equates Lt. Burke's decision to keep information about the warrant "off the air" with a deliberate "withholding" of the information. In fact, the evidence from virtually all witnesses established that Lt. Burke wanted to see, and specifically so stated according to the dispatcher, that the information be communicated "right away". At the time, Lt. Burke was justified in his belief that the dispatcher had equally efficient alternative ways and

plenty of time to deliver the information to the responding officers and/or their patrol supervisor, once Lt. Burke spoke to her and before the officers “call off” at the scene.¹²

Second, Weymouth’s contention that Lt. Burke’s decision was “neglect of duty” under the Code of Conduct reads more into that broad generic principle than any reasonable interpretation can bear. As the Appellant points out, although radio transmissions are typically used as the means of communication to multiple officers in the field, no WPD policy mandates that information about a warrant, or, indeed, any other matter that “requires police attention or service”, be transmitted by any specific methods or that transmission by radio was the only “suitable and appropriate” method of efficient communication to officers in the field.

Third, I am not persuaded by Weymouth’s clam that delay in communicating the information about the warrant to the officers in the field “caused” the unfortunate injuries that later occurred to JA. In hindsight, more explicit instructions to and/or follow-up with the dispatcher possibly might have avoided the delay, but I do not find that, under all of the facts and circumstances, there is a sufficient nexus between the delay and the assault on JA that Lt. Burke fairly can be charged with having “caused” the assault.

Fourth, Weymouth discredits Lt. Burke’s concern for the risks of “ambush” and “social media” as speculative “possibilities and presumptions” that did not outweigh adherence to an “expected” and “usual” preference to use the radio for departmental field communications. I do not read Chief Grimes to have disbelieved that Lt. Burke, in fact, had such concerns (nor do I)

¹² Weymouth points to testimony by Det. DG that, during the colloquy between Sgt. MS and Lt. Burke, he overheard Lt. Burke say: “he didn’t want that f---g kid in the station” and to the dispatcher’s chat message to Sgt. BF that said Lt. Burke wanted the subject to be taken to the hospital. Weymouth asks me to infer from this evidence that Lt. Burke had no intention of arresting the subject, which Weymouth argues shows his ulterior a motive for keeping the officers in the dark about the warrant. DF’s short To/From that he wrote shortly after the incident said nothing about Lt. Burke’s alleged statement; other probative evidence, including that of percipient witnesses (MS and Telecommunicator EM) substantially discredits this inference. Even assuming that Lt. Burke was predisposed, initially, not to arrest a mentally disturbed person on a “straight warrant” (which was his discretionary call), that does not change my conclusion about his instructions to the dispatcher, which, as the preponderance of evidence showed, limited the means by which, but not if, the warrant information, should be communicated forthwith.

but that it was not objectively reasonable for any officer ever to override such preference on the basis of “possibilities and presumptions”. I agree that it could be fairly argued that a concern for an “ambush” is problematic, as the communication of the information about the warrant added little, if any risk, to that possibility than did the initial radio dispatch of two officers to the scene. The evidence did persuade me, however, that Lt. Burke’s actions were taken in his good faith belief that he was acting within his discretion to keep the information “off the air” because of an honest judgment that such an approach was more likely to protect his officers than put their safety at risk. Similarly, the “social media” concern cannot be dismissed as completely irrational or an abuse of discretion. Transmitting a message that a subject, with mental issues who had not yet been convicted of any crimes was about to be arrested on a warrant for assault and battery on ambulance personnel, could reasonably trigger media attention to something that would otherwise be disregarded as a routine “welfare” check. The legitimacy of these concerns is further reinforced by the department cautionary memo on the media disseminated just weeks earlier and the WPD’s subsequent conversion to a secure radio transmission system that eliminated these known, inherent risks to radio transmissions.

In sum, the discipline here did not charge Lt. Burke with a lapse of judgment, but solely for an alleged deliberate “neglect of duty”. Lt. Burke’s concerns, while open to question, do not support a finding of such deliberate misconduct or dereliction of duty.

The Decision on the Arrest

Weymouth also contends that Lt. Burke’s actions in handling of the subject’s custody also amount to “neglect of duty”, specifically, that “you opposed the arrest . . . for two felony charges where the victim is a Weymouth Police Officer . . . It was not until the on duty Patrol

Sergeant correctly disregarded your misguided rationale for not putting the male under arrest, that the male was ordered by the Sergeant to be arrested.” The facts proved otherwise.

First, the recorded colloquy between Lt. Burke and Sgt. BF showed that it was Lt. Burke, not Sgt. BF, who first mentioned arresting the subject. Only after Sgt. BF said the subject was “completely out of control” and “definitely has to go to the hospital” did Lt. Burke change his mind and decide it would be better to “complaint” the subject.

Second, Lt. Burke’s judgment that, in reliance upon the on-scene assessment by Sgt. BF, he could not complete the booking of the subject before he had been medically evaluated, actually conformed to, indeed, was required by, established WPD policy and procedure. Even Sgt. BF agreed that the decision to send the subject first to the hospital was a legitimate “option”. Lt. Burke acted in accordance with sound judgement and good police practices here. There simply is no basis to charge him with “neglect of duty” for action that he believed, in good faith, was required for the best interest of the department and the well-being of the subject himself.

The Decision on the Apology

The charge that Lt. Burke “abused his authority” by requiring that EF apologize to Telecommunicator EM for expressing displeasure about how he learned about the warrant can be addressed summarily. While the colloquy between the officer and the dispatcher was no shouting match, Lt. Burke had reason to be troubled that a sworn officer said anything to a dispatcher that implied she had let him down, especially, in a statement broadcast on a public radio channel. In a world in which the blame-game has become all too commonplace, I credit Lt. Burke for coming to the defense of the dispatcher, not shirking responsibility for his actions, and imposing a high standard of civility. I find that disciplining Lt. Burke for ordering an apology actually may send the wrong message for good order and discipline within the WPD.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, John Burke, Jr., in Appeal D-17-043 is **allowed**. The five (5) day suspension is vacated and the Appellant shall be restored to all compensation and benefits to which he is entitled.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By 3-2 vote of the Civil Service Commission (Bowman, Chairman [NO]; Camuso [AYE], Ittleman [NO], Stein [AYE] & Tivnan [AYE], Commissioners) on December 20, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by 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. 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:

Timothy M. Burke, Esq. (for Appellant)

Joseph Callanan, Town Solicitor (for Respondent)