

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

MICHAEL CALCASOLA,
Appellant

v.

D1-17-258

TOWN OF EAST LONGMEADOW,
Respondent

Appearance for Appellant:

Thomas J. Rooke, Esq.
73 Chestnut Street
Springfield, MA 01103

Appearance for Respondent:

Kevin C. Maynard, Esq.
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Springfield, MA 01115

Commissioner:

Cynthia A. Ittleman

DECISION

The Appellant, Michael Calcasola (hereinafter "Mr. Calcasola" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on December 20, 2017, under both G.L. c. 31, ss. 42 and 43, appealing the decision of the Town of East Longmeadow (hereafter "Town" or "Respondent") to terminate the Appellant from his position as a tenured, permanent police officer. A prehearing conference was held in this case on January

24, 2018 at the State Office Building in Springfield.¹ A full hearing was held on the appeal on April 11, 2018, at the same location. At the Appellant's written request, the hearing was declared open to the public. The hearing was digitally recorded and copies of the digital recording were sent to the parties.² All witnesses, with the exception of the Appellant and, by agreement, the Appellant's technical expert witness, were sequestered. For the reasons stated herein, the appeal is allowed.

FINDINGS OF FACT:

Twenty-seven (27) Exhibits were entered into evidence at the hearing (Joint Exhibits J-A through J-L; Appellant Exhibits 1, 4 - 18).³ Based on the exhibits and the testimony of the following witnesses:

Called by the Appointing Authority:

- Denise Menard, East Longmeadow Town Manager
- Mr. B (former private security guard for company A)
- Police Sergeant Joseph Dalessio
- Police Officer Edward Rice
- Detective Sergeant Steven Manning
- Police Chief Jeffrey Dalessio

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

²If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

³Included in the record is a USB flash drive from Mr. Oulundsen, the Appellant's expert witness, containing recordings and photographs he reviewed and/or prepared in this case, as well as a document in support of Mr. Oulundsen's testimony entitled, "Comparing Frame Rates for Video Surveillance," by Nedap Security Management, self-described as "... a leader in the design and manufacture of electronic access control systems" (www.nedapsecurity.com)

Also included in the record is a transcript of the recorded hearing provided by the Respondent. Neither party offered documents of any pertinent ELPD rules or regulations. There is no allegation that the Appellant violated a specific ELPD rule.

Called by the Appellant:

- James Oulundsen
- Police Officer Michael Calcasola (Appellant)

and taking administrative notice of all matters filed in the case; pertinent statutes, case law, regulations, rules, and policies; and reasonable inferences from the credible evidence; a preponderance of the evidence establishes the following facts:

1. The Appellant began employment as a Police Officer with the East Longmeadow Police Department (“ELPD”) in or about July 2015, and was a tenured civil service employee at the time of his termination. At all pertinent times, the Appellant worked the 3pm to 11pm shift. (Stipulated Fact; Testimony of Appellant)
2. The Appellant earned a Bachelor’s Degree in Criminal Justice from Westfield State University. (Testimony of Appellant)
3. The Appellant had not received any prior discipline or negative employment actions during his employment as an East Longmeadow Police Officer, and his record demonstrates that he had been an active and dutiful police officer. (Testimony of Appellant; Appellant’s Exhibit A (Ex. A-)13)
4. The ELPD has a Police Chief, Jeffrey Dalessio, no Lieutenants or Captains, six (6) Sergeants, and a number of Patrol Officers. One of the Sergeants is Joseph Dalessio, Chief Dalessio’s son. (Testimony of Sgt. Dalessio) Chief Dalessio began working in the ELPD decades ago. At the time of the Commission hearing, Chief Dalessio had been Chief for two (2) years. (Testimony of Chief Dalessio)
5. There is some tension between the Appellant and Sgt. Dalessio. Specifically, Sgt. Dalessio has tried to irritate the Appellant and, when the Appellant does not respond, Sgt.

Dalessio reports it to his father, the Police Chief. (Testimony of Appellant) For example, problems have arisen between them when the Appellant was processing civilian fingerprints and in regard to the service of restraining orders. (Testimony of Appellant and Sgt. Dalessio) In addition, the Appellant alleges that, in front of other officers, Sgt. Dalessio has made multiple disparaging statements and comments in poor taste when the Appellant's wife was pregnant. (Testimony of Appellant)

6. On August 10, 2017, the Appellant was working on patrol in his capacity as an East Longmeadow Police Officer. (Testimony of Appellant)
7. At approximately 9:00 p.m. that evening, the Appellant was monitoring traffic on Shaker Road in East Longmeadow when an ambulance pulled over. The EMTs/paramedics asked the Appellant if he was responding to an incident involving someone who was choking at company A, which is a large facility with multiple parking areas. (Testimony of Appellant; Joint Exhibit (Ex. J)-A)
8. The Appellant had not been notified by the ELPD dispatcher of the incident but, in view of the emergency, the Appellant advised the EMTs/paramedics that he would follow them to company A. The Appellant informed the ELPD dispatcher about the choking victim. The Appellant activated his rear emergency lights and followed the ambulance to the company A premises. (Testimony of Appellant)
9. Upon arrival at the company A parking lot, the Appellant and the ambulance waited for the private on-site security guard, Mr. B, to lead them to the victim. (Testimony of Appellant) At the time of this incident, Mr. B was in the second week of a one-month security company training program at company A and attending college. Shortly

thereafter, he began working at a company in Connecticut. (Testimony of B)

10. Mr. B arrived in his vehicle at the parking lot where the Appellant and the ambulance were located but he did not immediately lead the ambulance and the Appellant to the choking victim. Instead, the Appellant observed Mr. B using his phone and he did not seem to be aware of the seriousness of the situation. The Appellant gestured to Mr. B and urged him to hurry up. Thereafter, Mr. B led the Appellant and the ambulance indoors to the victim. At or around that time, the Appellant received a call from the ELPD dispatcher indicating that the blockage in the victim's throat had been dislodged. (Testimony of Appellant; Ex. J-A)
11. Upon entering the building, another security guard driving a golf cart appeared and brought the ambulance personnel to the victim. The ambulance subsequently transported the victim to an area hospital. (Testimony of Appellant; Ex. J-A)
12. At or about this time, the Appellant notified his supervisor on duty, Sgt. Dalessio, of the incident by radio. Sgt. Dalessio told the Appellant to find out why the security personnel contacted the ambulance before informing ELPD since security was supposed to call ELPD (at 911) first in such situations. (Testimony of Appellant and Sgt. Dalessio)
When the Appellant contacted Sgt. Dalessio, he was on duty but at the home of his father, Chief Dalessio, where they were having dinner and watching television.⁴ Other members of the ELPD also occasionally visit Chief Dalessio at home. (Testimony of Chief and Sgt. Dalessio)
13. The Appellant approached Mr. B in the area of the security office and asked him why

⁴ It is unknown if Sgt. Dalessio was on a break at his father's house.

security called the ambulance without first calling 911 and said that his Sergeant was on the way. The Appellant found Mr. B to be “defensive”, “angry” and “confrontational”. (Testimony of Appellant; Ex. J-A)

14. The Appellant and Mr. B entered the company A building interior security office where there was limited space for two (2) people to pass one another near the door. The security office had windows to the adjacent foyer. A security camera was affixed near the ceiling of the foyer, diagonally across from the entry to the security office and a couple of windows that were each separated by columns. (Exs. A-16 and 17) In the office, the Appellant asked Mr. B his name. In his recorded interview, Mr. B stated that he said to the Appellant, “no, what’s YOUR name because you’re in MY territory and you’re telling me to hurry up outside ... I didn’t come to you disrespectfully .” (Ex. J-L)(emphasis in audio/visual recorded interview) The Appellant gave Mr. B his name. (Testimony of Appellant)

15. At one point during the verbal altercation between the Appellant and Mr. B, Mr. B moved around from behind the desk or counter in order to leave the office, in the process passing the Appellant, who stood on the other side of the desk or counter, facing Mr. B. As Mr. B turned the corner of the desk or counter, he was in close proximity to the Appellant, his left arm was bent and his pointer finger was extended, pointing at the Appellant’s mid-to-lower chest. By this time, Officer Rice was near the security office door and Mr. B appeared to be heading toward Officer Rice and calling out to him. (Exs. J-G and A-17)

16. Although the security camera video recording (which does not record audio) shows some of what was going on in the security office between the Appellant and Mr. B through the

office windows, the recording does not show whether or not Mr. B touched the Appellant with his extended pointer finger before the Appellant pushed Mr. B because, as the local hearing officer indicated, Mr. B's actions were obstructed by a window column.⁵ As Mr. B walked by the Appellant, there was limited room for Mr. B to pass the Appellant without coming into contact with him. (Exs. J-A, J-B, J-C, J-E, J-G, J-J, A-17)

17. Officer Rice was walking through the foyer next to the security office while the Appellant and Mr. B were arguing. He was heading toward the glass doors, looking straight ahead while passing the security office windows (on his right side) through which the Appellant and Mr. B can be seen arguing. He looked for an instant through one of the windows into the security office but that was prior to any contact between the Appellant and Mr. B. He did not look to his right side again until he passed the windows and had nearly passed the security office doorway. At or about that time, the Appellant had put his left hand on Mr. B's left shoulder and pushed him somewhat. (Exs. J-D, J-E, J-G, and J-J) However, Officer Rice later told investigator Sgt. Manning that "... from his [Officer Rice's] angle he did not see [Mr. B] assault [the Appellant]". (Ex. J-E) Mr. Rice did not see the security camera recording. (Testimony of Rice) I find that Officer Rice could not have seen whether or not Mr. B touched the Appellant before the Appellant put his hand on Mr. B's shoulder because Officer Rice did not previously look in that direction. Even if Officer Rice had looked in that direction sooner, it is unlikely he could have seen Mr. B's actions since Mr. B was behind the Appellant. (Ex. J-G)
18. Sgt. Dalessio arrived at company A and spoke to Mr. B. Mr. B "admitted there was a

⁵Sgt. Manning's investigation report and the hearing officer's report similarly found that the security camera view was blocked by a window column at this point. (Exs. J-E and J-J)

delay in leading Officer Calcasola and [the ambulance] into the building because he went to the wrong door, which he stated was his fault because he was new and didn't know his way around the facility yet." (Ex. J-C). Mr. B was not injured. Sgt. Dalessio asked Mr. B if he wanted to file a complaint against the Appellant and he said yes. Mr. B filled out the one (1) page complaint after viewing the security camera recording with Sgt. Dalessio. (Testimony of Mr. B) The complaint contains two different styles of handwriting with the first part of each of the two (2) paragraphs on the complaint in one (1) style and the end of the two (2) paragraphs written in another style.⁶ (Ex. J-B) The complaint states that the Appellant had told him to hurry up when they first met in one (1) of the parking areas, the Appellant was "rude" when he asked Mr. B why security called the ambulance before calling 911, he asked for the Appellant's name when they were in the security office, he walked past the Appellant in the security office to speak to Officer Rice but denied that he touched the Appellant, and the Appellant pushed him. (Exs. J-B and J-C; Testimony of Mr. B) Sgt. Dalessio suggested that Mr. B white-out a portion of the complaint (and provided the white-out to Mr. B), insert that the Appellant was "rude and sarcastic", and insert "my arm was up but I didn't make any contact". (Testimony of Mr. B) Asked why there are two (2) different types of handwriting on the complaint, Mr. B indicated that it was because Sgt. Dalessio helped him fill out the complaint form. (Testimony of Mr. B) Sgt. Dalessio denied helping Mr. B fill out the complaint form stating that he did not "recall" the use of white-out on the complaint and he did not "recall" that he suggested that Mr. B use any particular words in the complaint.

⁶ There was insufficient evidence in the record to conclude who else's handwriting is in the complaint in addition to that of Mr. B. The existence of two (2) handwriting styles in the complaint undermines its reliability.

(Testimony of Sgt. Dalessio) There is no evidence in the record that there was anyone else with Mr. B and Sgt. Dalessio when Mr. B drafted the complaint. (Administrative Notice) Given the specificity of Mr. B's description of how Sgt. Dalessio helped him fill out the complaint and Sgt. Dalessio's lack of recollection, I credit Mr. B's testimony that Sgt. Dalessio assisted him in filling out the complaint in the manner described by Mr. B.⁷

19. While he was at company A, Sgt. Dalessio also spoke with the Appellant. The Appellant reported to Sgt. Dalessio that Mr. B pushed him and that he pushed Mr. B back. Sgt. Dalessio asked the Appellant if Mr. B had assaulted him, why the Appellant hadn't arrested Mr. B. In his August 14, 2017 report on the incident, Sgt. Dalessio wrote that the Appellant had no answer to this question. However, at the Commission hearing, Sgt. Dalessio agreed that such arrests are discretionary. (Ex. J-C; Testimony of Sgt. Dalessio)
20. When the Appellant returned to the police station near the end of his shift, Sgt. Dalessio ordered the Appellant to write his report regarding the incident, per Chief Dalessio's order. The Appellant told Sgt. Dalessio that he wanted to prepare it the next day because he wanted time to think about it and to talk to his union representative. Sgt. Dalessio denied the Appellant's request. (Testimony of Appellant) At the Commission hearing, Sgt. Dalessio stated that he could not "recall" telling the Appellant to write the report that night as required by the Chief. (Testimony of Sgt. Dalessio)
21. Notwithstanding his concerns, the Appellant submitted his report on the night of the incident at company A. He wrote, in pertinent part,

⁷I make no finding whether the statements in the lower part of the complaint in a different handwriting style is that of Sgt. Dalessio as there is insufficient evidence in the record in that regard.

... I arrived at [company A] with [the ambulance] on the [street name redacted] side of the building.

At this point ... we still did not know where the victim was in the building nor did the security guard because we were driving around the parking lot. [The ambulance] said the security guard in the van would lead the way. [The ambulance] pulled up and the security guard stayed in his vehicle and appeared to be on his phone looking at it. I drove beside him and told him 'come on man we are waiting on you someone is choking, lets go'. At this point he still appeared to be unaware of the seriousness of this call. He ended up leading myself, and [the ambulance] back to the main entrance.

As soon as we got there I got the doors dor (sic) [the ambulance] and followed them inside ... where another security guard was waiting in a golf cart. ... prior to this dispatch said what ever the victim had lodged in her throat was cleared. Sergeant Dalessio said he was in route ... I was going to wait for him at the front security entrance. Sergeant Dalessio wanted to know why the security guards didn't call 911 first. I said I would find out.

I then went to the security guard office area ... to speak with the guard. I said my sergeant is on his way, and asked him if he could show my sergeant where we would be. He said the Sergeant is from your department right or from somewhere else? I said what department would you think he would be from? He said that I gave him an attitude when he was on his phone in the side lot. He said I was rude and that I was sarcastic to him. I informed him that someone was choking at that time and the one person that was supposed to lead myself and [the ambulance] to the victim was using his phone parked in his vehicle. ... I asked him why he did not call 911 and then he became upset and said 'Nah whats (sic) your name, you know what im taking your name. Im (sic) not going to sit here and take this from you after you talked to me rude and being sarcastic.' I then asked him for his name. ... I stood in a small hallway while I was speaking with him. He began to yell at me. He was walking towards me and then touched me in the chest area. At this point I created distance by using my hands to separate myself from him. At this point I asked for Sergeant Dalessio to meet me at the front counter where this was taking place. Officer Rice was also present ...
(Ex. J-A)(emphasis)(sic)

22. On August 17, 2017, Sgt. Steven Manning was informed by Chief Dalessio that Mr. B filed a verbal complaint (i.e., to Sgt. Dalessio on August 10, 2017, the date of the incident) alleging that the Appellant assaulted him while on duty on August 10, 2017. Chief Dalessio ordered Sgt. Manning to conduct an investigation into the incident. Sgt.

Manning informed Chief Dalessio of a possible conflict of interest because he was the Union President and, after a brief discussion, they agreed that Sgt. Manning could fairly and objectively conduct an investigation into a fellow-union member. (Testimony of Manning; Ex. J-E)

23. Sgt. Manning reviewed the security camera recording and the reports of the Appellant, Sgt. Dalessio and Officer Rice. He conducted a recorded interview of Mr. B on August 31, 2017.⁸ On August 24 and 27, 2017, Sgt. Manning interviewed the two (2) ambulance personnel. On October 20, 2017, Sgt. Manning interviewed Officer Rice and on October 24 he interviewed the Appellant (who was accompanied by a union attorney and union representative). Sgt. Manning submitted his investigative report on October 25, 2017. (Testimony of Manning; Ex. J-E) The report summarizes each report and interview but makes no recommendations. (Ex. J-E)
24. For his investigation, Sgt. Manning reviewed the August 30, 2017 report of Officer Rice. Office Rice's report states, in part, that he observed when Mr. B was exiting the security office where he had been arguing with the Appellant and that, "... [Mr. B] wanted to speak to me and he moved behind Officer Calcasola and at the time Officer Calcasola pushed [Mr. B] backwards away from him and he yelled at [Mr. B] not to ever touch or place your hands on a police officer and at this time [Mr. B] then pushed Officer Calcasola back." (Ex. J-D)(emphasis added); *see also* Exs. J-A, J-D, J-J, and A-17) Officer Rice's report did not say whether or not Mr. B touched the Appellant prior to the Appellant touching him. Further, Officer Rice's report states that Mr. B told him the

⁸Sgt. Manning also recorded interviews of the two (2) ambulance personnel but their interviews provided little information. Copies of the two (2) recordings are in the record.

reason he did not use the 911 system was that “[Mr. B] was new on the job and he called the ambulance by the telephone number that was listed in the book.” (Ex. J-D)

However, in Mr. B’s audio-video recorded interview, Mr. B stated that it was his security guard colleague who called the ambulance first instead of 911, not him. (Ex. J-L)

Officer Rice’s written report also states that when he saw the Appellant and Mr. B arguing, he “stepped between” them. However, the security camera recording and Sgt. Manning’s investigation report indicate that Officer Rice did not step between them; rather, he was talking to them from the foyer nearby. (Exs. J-D, J-E and J-G)

25. In addition to filing a complaint about the Appellant, Mr. B agreed to an audio-video recorded interview with Sgt. Manning and another officer.⁹ In his interview, Mr. B asserted that he “ignored” the Appellant because he was “rude”, “sarcastic” and had “pushed” him. (Exs. J-B, J-C and J-L) Further, Mr. B denied touching the Appellant before the Appellant touched him and said that the Appellant’s action was unprovoked. (Exs. J-B and J-L) However, the security camera recording clearly shows both Mr. B and the Appellant actively arguing, as the Respondent’s hearing officer found. (Exs. J-J and J-L) In addition, in his recorded interview, Mr. B added, in part, “I did get in his face a little bit [Mr. B illustrated by raising his left arm and pointing his pointer finger back and forth]” (Ex. J-L) Mr. B also stated twice in his recorded interview that as he walked around the desk toward the Appellant, his hands were up near his shoulder, demonstrating the action by putting both hands near his right shoulder, allegedly to avoid touching the Appellant. However, the security camera recording does not show Mr. B

⁹Mr. B did not file a report about the August 10, 2017 incident at company A. (Testimony of Mr. B)

putting both of his hands near his right shoulder. (Exs. J-G and J-L).¹⁰ If Mr. B raised his hands when he walked around the Appellant, it was not visible in the security camera recording. When asked again to describe how the Appellant touched him, Mr. B told the interviewers, “I said listen, you don’t touch me”, adding that he did put his finger in the Appellant’s face when he said that. (Ex. J-L) Further, at the Commission hearing, Mr. B testified that the Appellant shoved him with two (2) hands on his upper chest, even though Mr. B’s complaint states that the Appellant pushed him and the security camera recording shows the Appellant pushing Mr. B by putting his hand on Mr. B’s left shoulder, not putting both hands on Mr. B’s chest. (Testimony of Mr. B)

26. In his report, Sgt. Dalessio wrote, in part,

“... Officer Calcasola stated that he was having an issue with Mr. [B] and a physical altercation had occurred in which Officer Calcasola stated to me that Mr. [B] pushed him after being argumentative, therefore he pushed him back. He stated that the security guard had been on his phone when he was supposed to be showing Officer Calcasola and [the ambulance] personnel the entrance into the building and felt he was being disrespectful. Mr. [B] admitted there was a delay because he went to the wrong door ...
... As [Mr. B] went around [the Appellant], he alleged that Officer Calcasola then reached out and struck him with his hand, claiming that [Mr. B] struck him. [Mr. B] decided (sic) ever making contract with Officer Calcasola” (Ex. J-C)(emphasis added)

However, Officer Rice’s written report states that the Appellant “pushed” Mr. B first, not that he “struck” him. (Exs. J-C and J-D) At the Commission hearing, Sgt. Dalessio conceded that the contact between the Appellant and Mr. B was “between a brushing and a pushing”. (Testimony of Sgt. Dalessio) Finally, Sgt. Manning’s investigation report did not find that the Appellant “struck” Mr. B. (Ex. J-E)

¹⁰ Instead, the recording shows that as he passed the Appellant, at least his left arm was lower, near his mid-section on his left side, where visible. (Exs. J-G and J-L).

27. A month after Sgt. Manning completed his report, specifically on November 29, 2017, Chief Dalessio called the Appellant and ordered him to report to the office of the Town Manager, Denise Menard, on December 1, 2017, at 11:30 a.m.¹¹ Chief Dalessio did not inform the Appellant of the purpose of the meeting, nor did he provide any written notice or documents to the Appellant regarding the purpose of the meeting. When the Appellant asked what the meeting was about, Chief Dalessio responded, “the [company A] incident.” Chief Dalessio did not advise the Appellant that the meeting would involve the Appellant’s truthfulness regarding the incident. (Testimony of Appellant; Testimony of Chief Dalessio)
28. On December 1, 2017, the Appellant reported to the Town Manager’s office, where he was met by Chief Dalessio and Denise Menard. Ms. Menard handed the Appellant a letter (Testimony of Appellant) which stated, in part,

For the reasons set forth below, acting as the “Appointing Authority” referenced in Mass. Gen. Laws c. 31, § 41 and consistent with the recommendation of Chief of Police Jeffrey Dalessio, **I intend to discharge you from your employment** ...

You were involved on duty in an incident on August 10, 2017, at or about 9:00 p.m. in which there was physical contact between you and a private security guard, [redacted], at [company A] ... Following the incident, **you informed [Sgt. Dalessio] that the physical contact occurred when [Mr. B] pushed you after being argumentative, and that you pushed back.** You also gave that version of events in a text message or messages to a member of the [ambulance] crew you had accompanied to [company A].

You repeated a similar version of events in an incident report prepared by you on August 10-11, 2017, in which you stated:

‘He was walking towards me and then touched me in

¹¹ This was the first time Ms. Menard had been a town manager for a Massachusetts civil service community. Previously, she was a town manager in Connecticut. (Testimony of Menard)

the chest area. At this point, I created distance by using my hands to separate myself from him.⁷

Your statements are inconsistent with the observations and recollection of Mr. Brown and of Officer Ed Rice, who was present during the altercation. They are also inconsistent with the video of the incident captured by [company A]'s video security system, which you are able to review if you wish. The Chief of Police and I have determined that your statements were untruthful and you were dishonest in making them. ...

If necessary, a hearing concerning the reasons for discharge will be conducted on Tuesday, December 5, 2017, at 2:00 P.M. in the Office of Town Manager. As Appointing Authority, I will preside. You are invited to attend and bring whatever legal/union representation you wish...

(Ex. J-I)(attaching G.L. c. 31, ss. 41-15)(emphasis added)¹²

I take administrative notice that this letter states that the reason for discipline of the Appellant is only for his alleged untruthfulness after the incident on August 10, 2017, not for his conduct during the incident.

(Administrative Notice)

29. At the meeting on December 1, 2017, the Appellant objected to the first paragraph of the December 1st letter and stated that he was uncomfortable with the process at this point. Although the Appellant had been working since the date of the incident, Ms. Menard immediately suspended the Appellant for three (3) days without providing any prior written notice. (Testimony of Menard and Chief Dalessio) Ms. Menard did not want the Appellant acting as a police officer after she handed him the December 1, 2017 letter.

(Testimony of Menard)

30. On December 5, 2017, the Appellant and his counsel hand delivered a letter to Town counsel asking the Town Manager to recuse herself. (Testimony of Appellant)

¹²There was no text message in the record as it could not be found. (Ex. J-E)

31. The disciplinary hearing was continued to December 13, 2017 and Attorney Robert Sacco was designated as the hearing officer by the Town Manager. (Ex. J-J) At the hearing, the witnesses were Chief Dalessio, Sgt. Manning and the Appellant. The Appellant testified and was represented by counsel and his union representative. (Ex. J-J) In his testimony at the local hearing and at the Commission hearing, the Appellant added that Mr. B touched him three (3) times. (Id.; Testimony of Appellant)¹³ The evidence included the various officers' reports (including that of Sgt. Dalessio), Mr. B's written complaint, the security camera recording, slower versions of the recording and photos from the recording. The Respondent did not call Mr. B to testify at that hearing and Mr. B's recorded interview was not included in the record there. (Ex. J-J; Administrative Notice)

32. In his December 18, 2017 report, Attorney Sacco wrote, in part,

“ ... Officer Calcasola made three statements to superiors: He put in his report ‘[Mr. B] was walking towards me and then touched me in the chest area. At this point I created distance by using my hands to separate myself from him’; He (sic) told Sergeant Dalessio that [Mr. B] had pushed him so he pushed [Mr. B] back; and he reenacted the incident for Detective Sergeant Manning by showing that [Mr. B] was coming towards him when [Mr. B] brushing (sic) up against him and put a finger to his chest. Officer Calcasola did not deny making any of these three statements. ...

I find in reviewing the several versions of the tapes that Officer Calcasola' (sic) statement that [Mr. B] pushed him or poked him was not accurate. ...

The second claimed point of contact was as [Mr. B] passed Officer Calcasola in the narrow area near the exit to the room. ... There is no indication of a push or poke or arm movement by [Mr. B] consistent with a poke or shove. ... At most the two men may have slightly grazed one another because of the narrow space.

...

I conclude that Officer Calcasola's statements regarding the incident on August 10, 2017 were untruthful and he was dishonest in making them and therefore

¹³ Specifically, at the Commission hearing, the Appellant stated, “[Mr. B's] left hand was up like that, I remember. I remember him brushing up against me. And I remember his right hand – I felt the poking, three – three times ...” Transcript April 11, 2017, Vol. II, p. 346.

affirm the Appointing Authority's termination of Officer Calcasola's employment" (Ex. J-J)

33. By letter dated December 19, 2017, Ms. Menard sent the Appellant a copy of Attorney Sacco's report and terminated the Appellant's employment. (Ex. J-K)

34. In deciding to terminate the Appellant, Chief Dalessio consulted the Massachusetts Chiefs of Police Association attorney who recommended terminating the Appellant's employment and sent Chief Dalessio a document entitled, "Chiefs' Legal Interest Column, A Legal Bulletin for Massachusetts Chiefs of Police, dated April 4, 2016.

(Testimony of Chief Dalessio; Ex. J-H) This article states, in part,

Some Chiefs may find it easier to think of untruthfulness like a continuum or spectrum. On one end of the continuum is intentional, malicious, deceptive conduct that will take one of three forms:

Deceptive action in a formal setting, such as testifying in court or during an internal affairs investigation

Failure to bring forward information involving criminal action by other officers, also known as observing the so-called 'code of silence'

Creation of false evidence that tends to implicate another in a criminal act

Naturally, any officer engaging in such untruthfulness should be terminated or permanently removed from any possible activity where the officer could be called upon to be a witness to any action.

At the other end of the continuum, however, are white lies, humorous lies and lies justified by investigative necessity. Officers engaging in such behavior are not usually subject to discipline and are excusable, if not acceptable.

In some instances, however, an officer's conduct may not be clearly on one end of the continuum or the other ...

(Ex. J-H)

However, Chief Dalessio did not indicate what part of this article he relied on.

(Administrative Notice) Chief Dalessio also called a District Attorney for information

about concerns they may have in this regard but Chief Dalessio did not indicate whom he spoke with, nor did he provide any details of any such conversation. (Testimony of Chief Dalessio; Administrative Notice)

Appellant's Expert

35. The Appellant's expert, James Oulundsen, reviewed and analyzed the security camera recording. Mr. Oulundsen is a principle at Investigative Services (IRIS) in Connecticut, which has a digital forensic lab. He has been a registered private investigator in Connecticut "specializing in criminal defense and civil matters who has conducted computer and cell phone forensic acquisitions and investigations since 2004 ..." (Ex. A-18) He has received a number of pertinent certifications over the years, taught best investigative practices to Connecticut attorney associations, and he has most often been involved in criminal and civil cases in favor of the defense. His certifications are in computer forensics, advanced computer forensics, mobile forensics, and physical (of retrieved data, for example). Mr. Oulundsen is not certified in video forensics. Mr. Oulundsen was recognized at the hearing as an expert digital investigator. In this case, Mr. Oulundsen tried to enhance the security camera recording in order to see greater detail in it. The standard speed of such a recording is thirty (30) frames per second. The speed of the security camera recording in this case is fifteen (15) frames per second, which provides less clarity in the recording than a recording with thirty (30) frames per second. In order to enhance the details of the security camera recording, Mr. Oulundsen copied the recording and made copies of the copies in order to create versions of the recording slowing the replay down to 10, 25 and 50 percent of the original speed. He did

so applying the scientific working group investigative standards used in criminal cases in Connecticut. In addition, Mr. Oulundsen printed copies of frames in the security camera recording to show the limited information that was visible from even the slowed recordings. (Testimony of Oulundsen; Exs. A-16, 17 and 18; Ex. J-G) The reduced speed versions of the security camera recording show that Mr. B's left arm was bent and his pointer finger was extended, pointing at the Appellant's mid-to-lower chest immediately prior to when he walked past the Appellant. (Id.) However, due to the columns between the security office windows, which partly blocked the security camera recording, and the passage of Mr. B behind the Appellant, the slowed recordings could not show whether or not Mr. B touched the Appellant when he passed the Appellant. (Id.)

Applicable Law

A tenured civil service employee may be disciplined for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L. c. 31, s. 41. Under G.L. c. 31, s. 42, a civil service employee alleging that the appointing authority did not follow the requirements of section 41 in a disciplinary matter can file an appeal at the Commission within ten (10) days. Section 42 further states, "[i]f the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights." Id.

An employee aggrieved by an appointing authority's disciplinary decision may appeal to

the Commission. G.L. c. 31, s. 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. Id.; *see e.g.*, Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, *rev.den.*, 726 N.E.2d 417 (2000).

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). 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 Common, 43 Mass.App.Ct. 300, 304, *rev.den.*, 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477 (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 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 well-established that law enforcement personnel are held to a higher standard and are expected to be truthful. The corollary, however, to the serious consequences that flow from a finding that a police officer or applicant has violated the duty of truthfulness requires that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged. *See, e.g., DeTerra v. New Bedford Police Dep't*, 29 MCSR 502 (2016) (forgetting a 20-year-old license suspension); Boyd v. City of New Bedford, 29 MCSR 471 (2016) (honest mistakes in answering ambiguous questions on NBPD Personal History Questionnaire); Morley v. Boston Police Dep't, 29 MCSR 456 (2016) (candidate unlawfully bypassed on misunderstanding appellant's responses about his “combat” experience); Michaud v. Saugus Police Dep't, 28 MCSR 534 (2015) (immaterial omissions of information applicant could not obtain and/or was covered elsewhere in application); and Lucas v. Boston Police Dep't, 25 MCSR 420 (2012) (mistake about appellant's characterization of past medical history). An officer's demonstrated record of untruthfulness may compromise the officer's ability to serve as a credible witness in the prosecution of a criminal case. Gallo v. City of Lynn, 23 MCSR 348 (2010). *See generally, United States v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2400 (1976), citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). *See also Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985).

However, the standard established in the Brady case may not necessarily apply in each case.¹⁴

Analysis

The Respondent has not established by a preponderance of the evidence that it had just cause to discipline the Appellant for being untruthful. In addition to asserting that there was no just cause to discipline the Appellant, the Appellant asserts that the Respondent failed to follow the procedural requirements of G.L. c. 31, s. 41 in so doing. As noted above, section 42 provides that if an appointing authority has failed to follow the procedural requirements of section 41 and the rights of the civil service employee have been prejudiced thereby, the Commission is to order the appointing authority to restore such employee to his employment immediately “without loss of compensation or other rights.” Id. The Appellant avers that the Respondent’s procedure was flawed because the Town Manager’s letter notifying him of a hearing, “if necessary”, indicated that the Town Manager had already decided to terminate him (“I intend to discharge you from your employment”). While sections 41 and 42 do not require that a local hearing be conducted by an impartial person, the Town Manager assigned private counsel who conducted the hearing and wrote a report on which the Town Manager relied to terminate the Appellant. Although the Appellant alleged that the private counsel was connected to the city and, therefore, was biased against him, there is insufficient evidence in the record to support such allegations. Therefore, the Respondent has not failed to follow the procedural requirements of section 41 and the Appellant’s civil service rights have not been prejudiced. That said, I note that the Town

¹⁴ Massachusetts jurisprudence takes a somewhat different path when ordering exculpatory evidence disclosed in criminal prosecutions. In particular, evidence “beyond information held by agents of the prosecution team”, including, in particular, internal affairs investigatory material, does not generally come within the sweep of the “Brady” test, but is subject to other, stricter rules. See, e.g., MASS.R.CRIM.P. 14(a)(1)(A); Commonwealth v. Laguer, 448 Mass. 585 (2007); Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Daye, 411 Mass. 719 (1992); Commonwealth v. Gallerelli, 399 Mass. 17 (1987); Commonwealth v. Wilson, 381 Mass. 90 (1980).

Manager's letter notifying the Appellant of disciplinary action was inaccurate in stating that a hearing would be held "if necessary" since civil service law requires a hearing when a civil service employee is terminated. Further, it was inappropriate for the letter to state that the Respondent intended to discharge the Appellant when the purpose of such a letter is to notify the employee that a hearing would be held to determine whether he should be disciplined. I also note that the Respondent suspended the Appellant for three (3) days without written notice. The Town Manager said this was done because they did not want the Appellant acting as an officer pending the local hearing. It is hard to understand what concern the Respondent suddenly had about the Appellant working on the force in December since the incident with Mr. B occurred in August and the investigation was completed in November. Nonetheless, the Appellant was afforded a hearing and his civil service rights were not prejudiced.

The Respondent argues that the Appellant was untruthful when he told Sgt. Dalessio that Mr. B touched him before the Appellant touched him and when the Appellant reported the same thereafter.¹⁵ I find that the Appellant was truthful for a number of reasons. Although the security camera recording (which does not include audio) at the critical time was blocked by a window column, as the local hearing officer report acknowledges, the Appellant testified that, at or about the time that Mr. B touched the Appellant, he yelled words to the effect "don't touch a police officer!". Officer Rice, a percipient witness, confirmed in his testimony and written report that the Appellant yelled that statement at or about the time that Mr. B touched him, while acknowledging that he did not see the Appellant and Mr. B prior to the time that the Appellant

¹⁵ The Town Manager's letter notifying the Appellant that a hearing would be held because he was untruthful on two (2) occasions: when the Appellant told Sgt. Dalessio about the incident and when the Appellant wrote in his report about the incident. The local hearing officer's report adds a third allegation of untruthfulness, alleging that the Appellant was also untruthful when Sgt. Manning interviewed him during Sgt. Manning's investigation about the incident.

put his left hand on Mr. B's shoulder because of the "angle" of his view as he walked past the security office in which the Appellant and Mr. B were arguing. Although the Commission is exempt from G.L. c. 30A regarding adjudicatory agencies, I take guidance from the statute where appropriate. Specifically, G.L. c. 30A, s. 11(2) states that agencies are not required to follow the rules of evidence, with the exception being the rules of privilege, but it also states, in part, that "[e]vidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." I find that the Appellant's yelled statement not to touch a police officer at or about the time that Mr. B touched him to be the kind of evidence on which to rely here. In addition, I find that the Appellant's yelled statement is reliable for reasons that the rules of evidence in court determine, in appropriate circumstances, to admit an excited utterance that would otherwise be inadmissible hearsay. See Massachusetts Guide to Evidence ["Guide"], § 803 (2), <https://www.mass.gov/guide-to-evidence>. The Notes following section 803 of the Guide offer parameters for determining whether there is sufficient reliability, stating, in part,

"In determining whether a statement qualifies under this exception, the trial judge should consider whether the statement was made 'under the stress of an exciting event and before the declarant has had time to contrive or fabricate the remark' (citations omitted). Commonwealth v. Baldwin, 476 Mass. 1041, 1042 (2017). The judge should consider such factors as whether the statement was made in the same location as the precipitating event, the temporal proximity to the event, and the age, spontaneity, and degree of excitement of the declarant. Id. 'The statement itself may be taken as proof of the exciting event.' Commonwealth v. Nunes, 430 Mass. 1, 4 (1999). ... 'There can be no definite and fixed limit of time [between the incident and the statement]. Each case must depend upon its own circumstances.' Commonwealth v. McLaughlin, 364 Mass. 211, 223, quoting Rocco v. Boston-Leader, 340 Mass. 195, 196-197 (1960)." Guide, at Note, p. 217.

Although the question of admissibility is not at issue here, I find that the Appellant's yelled statement has the reliability of an excited utterance because it was made at or about the time that

the Appellant and Mr. B were having a loud, vigorous argument, the Appellant did not expect Mr. B to approach him so closely and so quickly, and, at or about the time that Mr. B touched the Appellant, and the Appellant yelled words to the effect “don’t touch a police officer!” The Appellant further reacted to Mr. B touching him by pushing Mr. B with one (1) hand to create distance from Mr. B, as the Appellant was trained to do. The Appellant did not have time to “contrive” or “fabricate” his reaction during the few seconds of this event. As a result, I find that the Appellant was truthful when he said that Mr. B touched him first.

Further, I find that the Appellant was not untruthful because he told Sgt. Dalessio minutes after the incident that Mr. B touched him first, the Appellant wrote in his report on the same day that Mr. B touched him first, the Appellant told Sgt. Manning when Sgt. Manning interviewed him two and a half months after the incident that Mr. B touched him first, the Appellant testified at the local hearing and at the Commission hearing that Mr. B touched him first.

In addition, the local hearing officer did not have the testimony of Mr. B or his recorded interview in the record in support of the Respondent’s allegation that the Appellant was untruthful. Mr. B testified at the Commission that Sgt. Dalessio helped him fill out the complaint form, noting specific words that Sgt. Dalessio told him to include. The complaint contains two (2) different handwriting styles, of which the local hearing officer took no notice. Although Sgt. Dalessio denied when he testified at the Commission hearing that he assisted Mr. B in filling out the complaint, there is no evidence in the record indicating that there was anyone else with Mr. B when he prepared the complaint, rendering the complaint questionable. Further, at his recorded interview, Mr. B made a number of statements that are inconsistent with his testimony here. For example, he repeatedly stated that he “ignored” the Appellant during their

argument and that the Appellant's conduct was "unprovoked" but the security camera recording shows Mr. B and the Appellant both actively engaged in arguing. In fact, as Mr. B's recorded interview shows, Mr. B took great offense when the Appellant asked him his name during the incident and Mr. B said words to the effect "you're in MY territory and what's YOUR name" (emphasis in recording). Thus, it was inaccurate of Mr. B to assert in the complaint form that the Appellant's actions were "unprovoked". On the recorded interview, Mr. B also asserts (and demonstrates) that he repeatedly extended his arm, with his finger jutting or jabbing at the Appellant as they argued. During his interview, Mr. B even felt it necessary to assert that although it looked on the security camera recording like he was touching the Appellant that he was not. At the local hearing and the Commission hearing, the Appellant stated that Mr. B touched or poked him three times. At the Commission hearing, the Appellant specified that Mr. B had touched or poke him with his right hand, which is consistent with Mr. B's recorded interview. Mr. B also stated (and demonstrated) twice in his recorded interview that he put both of his hands near his right shoulder as he passed the Appellant in the security office in order to avoid even unintentionally touching the Appellant. The security camera recording does not show Mr. B's hands were near his right shoulder at that time. At the Commission hearing, Mr. B testified that the Appellant shoved him with two (2) hands on his upper chest during the incident even though Mr. B's complaint states that the Appellant pushed him and the security camera recording shows the Appellant pushing Mr. B by putting his hand on Mr. B's left shoulder. Finally, Mr. B told Officer Rice that he (Mr. B) was the one who called the ambulance first instead of dialing 911 because he found the number at his desk but Mr. B told the interviewers that it was his security guard colleague who called the ambulance first, not him. In view of the

many inconsistencies in Mr. B's statements, I find that his assertions that the Appellant touched him first are unreliable and that the Appellant was not untruthful.

Finally, there are additional factors belying the Respondent's allegation that the Appellant was untruthful. First, the Respondent has not cited any ELPD rules that the Appellant's conduct purportedly violated. Second, there was an on-going tension between the Appellant and Sgt. Dalessio, whose father is the Police Chief. Third, the Appellant has no record of discipline. Fourth, Chief Dalessio was not aware of anyone else at the ELPD who had been terminated for untruthfulness.

Conclusion

Accordingly, for the above stated reasons, the discipline appeal of Mr. Calcasola, Docket No. D1-17-258, is hereby allowed.

Civil Service Commission

/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 25, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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. 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:
Thomas J. Rooke, Esq. (for Appellant)
Kevin C. Maynard, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

MICHAEL CALCASOLA,

Appellant

v.

D1-17-258

TOWN OF EAST LONGMEADOW,

Respondent

CONCURRING OPINION OF COMMISSIONER BOWMAN

The Appellant claims that the security guard poked him four (4) times, including three (3) times while the security guard walked by him; and one (1) time after the security guard walked by him. I don't believe that happened, in part because the Appellant's oral and written statements during the investigation don't mention that; and, in part, because, in my view, the video evidence does not support the Appellant's claim. To me, it appears that the Appellant has fudged the truth regarding a material issue in an attempt to justify his admitted pushing of the security guard and to avoid discipline for his actions.

Ultimately, however, those findings rest with the hearing officer who has the responsibility, among other things, to assess the credibility of the witnesses. That is particularly important when, as here, divergent testimony has been offered by multiple witnesses and the video evidence is hampered by an obstructed view.

Deferring to the thoughtful, well-reasoned findings of Commissioner Ittleman, which are explained in detail in her analysis, I join the majority in voting to allow the Appellant's appeal.

/s/ Christopher C. Bowman