

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

**THOMAS P.  
CAPPELLUZZO,**  
*Appellant*

v.

**CITY OF  
NEWBURYPORT,**  
*Respondent*

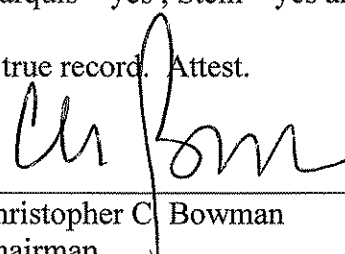
Case No.: D-08-3

### DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 1, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 17, 2009. The Appellant's comments were received by the Commission on September 18, 2009. The Respondent's comments were received on September 21, 2009. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman - yes; Henderson - no, Marquis - yes, Stein - yes and Taylor - no, Commissioners) on October 1, 2009.

A true record. Attest.

  
\_\_\_\_\_  
Christopher C. Bowman  
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Gary G. Nolan, Esq. (for Appellant)  
Darren Klein, Esq. (for Appointing Authority)  
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF ADMINISTRATIVE LAW APPEALS  
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August 17, 2009

Christopher C. Bowman, Chairman  
Civil Service Commission  
One Ashburton Place, Room 503  
Boston, MA 02108

**Re: Thomas Cappelluzzo v. City of Newburyport**  
**DALA Docket No. CS-08-196**

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

  
Richard C. Heidlage  
Acting Chief Administrative Magistrate

RCH/das

Enclosure

cc: Gary G. Nolan, Esq.  
Darren Klein, Esq.

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COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

**COMMONWEALTH OF MASSACHUSETTS**

Suffolk, ss.

**Division of Administrative Law Appeals**

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**Thomas P. Cappelluzzo,**  
Appellant

Docket No. CS-08-196  
(D-08-03)

v.

**City of Newburyport,**  
Appointing Authority

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**Appearance for Appellant:**

Gary G. Nolan, Esq.  
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133 Merrimack Street  
Lowell, Massachusetts 01852

**Appearance for Appointing Authority:**

Darren R. Klein, Esq.  
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101 Arch Street  
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**Administrative Magistrate:**

Bonney Cashin, Esq.

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**SUMMARY OF RECOMMENDED DECISION**

Newburyport satisfied its burden of proving just cause for its decision to suspend Sgt. Cappelluzzo for three days. He violated numerous police department rules during two incidents with citizens. Sgt. Cappelluzzo failed to show that the City's discipline was improperly motivated by political considerations or bias.

**RECOMMENDED DECISION**

*INTRODUCTION*

Thomas P. Cappelluzzo appeals the decision issued on December 20, 2007 by the City of Newburyport to suspend him for three days from his position as a police sergeant. The City took

this action following two incidents that occurred at Sgt. Cappelluzzo's home in Newbury while he was on duty. Sgt. Cappelluzzo timely appealed under the provisions of G.L. c. 31, § 43.

I held a hearing at the Division of Administrative Law Appeals on March 26, 2008 and on April 29, 2008. I declared the hearing to be private because neither party requested in writing that the hearing be public. Sgt. Cappelluzzo testified on his own behalf. Mr. Henry Becker, Dr. Sadru B. Hemani<sup>1</sup>, and City Marshal Thomas H. Howard<sup>2</sup> of the Newburyport Police Department testified for the City. The parties stipulated to the admissibility of 13 exhibits; and I entered them into evidence.<sup>3</sup> There are 5 cassette tapes of the hearing.

The parties filed closing papers on July 11, 2008, after which the record closed.

#### *FINDINGS OF FACT*

Based on the evidence in the record and on an assessment of the credibility of the witnesses who appeared before me, I make the following findings of fact:

##### A. Becker Incident

1. On June 20, 2007, while on duty and traveling in a City cruiser on the Plum Island Turnpike through Newbury, Massachusetts en route to a part of Newburyport on Plum Island, Sgt. Cappelluzzo saw an unfamiliar vehicle parked in the front yard of his home in Newbury. (Cappelluzzo Test.).

2. Sgt. Cappelluzzo stopped to investigate and make sure his property was safe. (Cappelluzzo Test.).

3. Sgt. Cappelluzzo parked his cruiser behind the vehicle, which was near a "No Parking" sign. (Becker Test.; Cappelluzzo Test.).

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<sup>1</sup> Dr. Hemani is also referred to as Sadruddin Hemani in the record.

<sup>2</sup> The chief of police is referred to as the City Marshal in Newburyport.

<sup>3</sup> Exhibits 3 and 4 are each comprised of several documents. In this decision I refer to these documents as Exhibits 3A-3F and Exhibits 4A-4F.

4. The owner of the vehicle, Benjamin L. Becker, had parked there shortly before and gone into the Plum Island Grille, which is next door to Sgt. Cappelluzzo's home, to have dinner with his father, Henry Becker. (Exh. 3A; Becker Test.).

5. Sgt. Cappelluzzo called the Newbury Police Department to report the vehicle trespass and to request that the Department send out a tow truck; Newbury patrol officer Gregg Frappier was dispatched to the Cappelluzzo residence and arrived about the same time as the tow truck. (Exh. 3A; Exh. 3C).

6. Mr. Becker initially asked a restaurant employee to move the vehicle for his son; however, Sgt. Cappelluzzo would not move his cruiser and told the employee that a tow truck was on the way. (Exh. 3A; (Becker Test.; Cappelluzzo Test.).

7. After learning that the vehicle was to be towed, Mr. Becker came outside to speak with Sgt. Cappelluzzo, who was in his cruiser. (Becker Test.).

8. Sgt. Cappelluzzo did not yell at Mr. Becker, however, he was upset. (Becker Test.; Cappelluzzo Test.).

9. Mr. Becker acknowledged that he and his son had alcohol to drink with dinner. (Becker Test.).

10. Sgt. Cappelluzzo did not allow Mr. Becker to move his son's vehicle because Mr. Becker had been drinking and the area was busy with pedestrians and other vehicles. (Cappelluzzo Test.).

11. At one point, Sgt. Cappelluzzo told Mr. Becker that he could not move the vehicle because he (Cappelluzzo) was going to make an example of him. (Exh. 3F; Becker Test.).

12. Mr. Becker was with Sgt. Cappelluzzo for only a few minutes; he walked away from the cruiser to use his cell phone and to wait for the tow truck. (Becker Test.; Cappelluzzo Test.).

13. Mr. Becker called the Newbury Police Department to request that an officer be sent to the scene. (Exh. 3A).

14. Mr. Becker informed the dispatch officer that he was a friend of Marshal Howard and that he would sue the Newbury and Newburyport Police Departments if his son's vehicle was touched. (Exh. 3A).

15. Mr. Becker also called the Newburyport Police Department to complain and learned that Sgt. Cappelluzzo was the shift supervisor. (Exh. 3F; Becker Test.).

16. Mr. Becker appeared extremely angry, particularly after the tow truck arrived. (Exh. 3A; Exh. 3F; Cappelluzzo Test.).

17. When the tow truck arrived, Mr. Becker swore at the operator and threatened to never do business with the company again if his son's vehicle was moved. (Exh. 3F; Becker Test.; Cappelluzzo Test.).

18. In response, the tow truck operator initially refused to tow the vehicle and called his supervisor. (Exh. 3F).

19. Sgt. Cappelluzzo, who was by his cruiser and about 50 feet from Mr. Becker at the time, yelled to the tow operator: "What did Becker say to you?" (Exh. 3F; Becker Test.).

20. Sgt. Cappelluzzo moved his cruiser and the vehicle was towed. (Cappelluzzo Test.).

21. Sgt. Cappelluzzo left the scene after the vehicle was towed. (Exh. 3C).

22. Mr. Becker thought he should have been allowed to move his son's vehicle and that the \$65.00 tow fee he had to pay was unreasonable. (Becker Test.).

23. The Becker incident took place over approximately 30 minutes. (Howard Test.).

B. Hemani Incident

24. On August 1, 2007, while on duty and traveling in a City cruiser through Newbury, Massachusetts on the Plum Island Turnpike, Sgt. Cappelluzzo saw an unfamiliar vehicle parked in the driveway of his home. (Cappelluzzo Test.).

25. Sgt. Cappelluzzo stopped to investigate and make sure his property was safe. (Cappelluzzo Test.).

26. Sgt. Cappelluzzo parked his cruiser behind the vehicle. (Exh. 4C; Hemani Test.).

27. A "No Parking" sign is posted on the front porch of Sgt. Cappelluzzo's home. (Exh. 4C; Exh. 10).

28. Dr. Sadruddin Hemani and his companion, Clare Dunphy, had gone to the Plum Island Grille at about 8:30 p.m. that evening; however, no parking spaces were available in the restaurant lot, so they parked the car in the Cappelluzzo's driveway and went into the restaurant. (Exh. 4C; Exh. 4E, Hemani Test.).

29. Sgt. Cappelluzzo called the Newbury Police Department and asked that a tow truck be dispatched to his address. (Exh. 4A).

30. When Dr. Hemani and Ms. Dunphy left the restaurant, they saw a police cruiser parked behind Ms. Dunphy's car. (Exh. 4C; Exh. 4D; Hemani Test.).

31. They approached Sgt. Cappelluzzo, who stepped out of the cruiser; and Dr. Hemani apologized for parking in his driveway. (Hemani Test.).

32. Dr. Hemani knew that he should not have parked in the driveway. (Hemani Test.).

33. Sgt. Cappelluzzo explained that he had requested a tow truck and that they should wait for it. (Hemani Test.).

34. Sgt. Cappelluzzo and Dr. Hemani argued; both men were agitated and both spoke with raised voices. (Exh. 4B; Exh. 4C; Cappelluzzo Test.).

35. At one point, Sgt. Cappelluzzo told Ms. Dunphy and Dr. Hemani to move off of his property. (Hemani Test.).

36. At another point, Sgt. Cappelluzzo raised his arm to prevent Dr. Hemani from getting into the car and driving away; when he did so, his gun was exposed. (Cappelluzzo Test.).

37. Dr. Hemani contacted the Newburyport Police Department to complain about Sgt. Cappelluzzo and was told he would need to speak with the shift supervisor, who was Sgt. Cappelluzzo. (Exh. 4D; Exh. 4E).

38. Dr. Hemani was upset because he believed that his apologies were not accepted and because he was not allowed to leave with the vehicle. (Exh. 4D; Hemani Test.).

39. While speaking with Dr. Hemani and Ms. Dunphy, Sgt. Cappelluzzo smelled alcohol, but he was not sure whether one of them or both had been drinking. (Cappelluzzo Test.).

40. When Sgt. Cappelluzzo asked Dr. Hemani if he had been drinking, Dr. Hemani took offense. (Exh. 4C; Hemani Test.).

41. Ms. Dunphy told the first Newbury officer at the scene, Keegan Stokes, that Dr. Hemani did not drink because he is Muslim, and that she had 1 or 2 glasses of wine, but would not be driving. (Exh. 4C).



42. Dr. Hemani stopped drinking for health reasons about 6 or 7 years ago. (Hemani Test.).

43. After Officer Stokes and a second Newbury policeman, Sgt. Jay Routhier, arrived Dr. Hemani and Sgt. Cappelluzzo raised their voices at each other again; and, in order to separate them, one of the officers asked Sgt. Cappelluzzo to move 20 feet away. (Exh. 4C).

44. Dr. Hemani complained that Officer Stokes was "rude, arrogant, and condescending" to him and that his behavior was "deplorable." (Exh. 4B; Exh. 4E).

45. Dr. Hemani paid the tow truck operator for coming to the scene, Sgt. Cappelluzzo moved his cruiser, and Dr. Hemani and Ms. Dunphy left. (Exh. 4D; Hemani Test.).

46. The Hemani incident took place over approximately 45 minutes. (Exh. 4A; Howard Test.).

#### C. Additional Facts

47. During each incident, Sgt. Cappelluzzo acted appropriately when he called the Newbury Police Department to report an unknown vehicle parked on his property. (Howard Test.).

48. During each incident, Sgt. Cappelluzzo acted appropriately when he went to his property to be sure it was safe. (Howard Test.).

49. During each incident, Sgt. Cappelluzzo should have excused himself from the scene once the Newbury officers arrived, unless he was asked to assist them, which he was not. (Howard Test.)

50. When traveling through Newbury, Newburyport officers typically do not call in to report that they are leaving Newburyport or are reentering the portion of Newburyport on Plum Island. (Cappelluzzo Test.).

51. Sgt. Cappelluzzo did not call in either incident to the Newburyport Police Department. (Howard Test.; Cappelluzzo Test.).

52. Sgt. Cappelluzzo did not report to the Newburyport Police Department that he was outside its jurisdiction while he was in Newbury. (Howard Test.; Cappelluzzo Test.).

53. Sgt. Cappelluzzo acknowledged that, in retrospect, it would have been better if he had left his home when the Newbury police arrived during each incident. (Cappelluzzo Test.).

54. Sgt. Cappelluzzo acknowledged that, at times, a police officer must raise his voice in order to assure that someone complies with his directive, and that his encounter with Dr. Hemani was not one of those occasions. (Cappelluzzo Test.).

55. Sgt. Cappelluzzo's continued presence at his home after the Newbury police arrived escalated each incident. (Howard Test.).

56. Sgt. Cappelluzzo was upset about the conditions at the Plum Island Grille, including the fact that patrons parked in his yard. (Exh. 3C; Cappelluzzo Test.).

57. Sgt. Cappelluzzo was issued a written reprimand on December 6, 2004 concerning violation of department rules about courtesy and insubordination. (Exh. 7A).

58. Sgt. Cappelluzzo was counseled on January 29, 2007 concerning the use and abuse of sick time. (Exh. 7B).

59. Sgt. Cappelluzzo received a notice of hearing concerning the Becker and Hemani incidents dated November 26, 2007. (Exh. 2).

60. On December 17, 2007, a hearing was held by Mayor John Moak, the appointing authority for City police officers; on December 20, 2008 the Mayor issued a decision suspending Sgt. Cappelluzzo from his position for three days without pay. (Exh. 1; Exh. 2).

61. A three-day suspension for behavior such as Sgt. Cappelluzzo's is not disproportionate to other suspensions issued to City police officers. (Howard Test.).

62. Sgt. Cappelluzzo received the mayor's decision on December 21, 2007; and he filed an appeal with the Civil Service Commission on December 27, 2007. (Appeal Record).

#### *APPLICABLE LAW*

##### A. Standard at c. 31, § 43

The standards that apply in disciplinary hearings under c.31, § 43 are well settled. The Civil Service Commission must determine whether the appointing authority has proven by a preponderance of the evidence that just cause exists for the disciplinary action taken. *See* G.L. c. 31, § 43; *School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, 622 (1997). "Just cause" means that the disciplined employee must be guilty of "substantial misconduct that adversely affected the public interest by impairing the efficiency of public service." *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514, 451 N.E.2d 408, 412 (1983).

The commission does not determine "whether it would have acted as the appointing authority had acted, but whether, on the facts found by [it], there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." *Town of Falmouth v. Civil Serv. Comm'n*, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735, 738 (2004) *quoting* *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, 445 (1983). Stated differently, the commission may not "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923, 926 (1997).

Moreover, “[p]olice officers must comport themselves in accordance with the laws that they are sworn to enforce *and* behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” *Police Comm’r of Boston v. Civil Serv. Comm’n*, 22 Mass. App. Ct. 364, 371, 494 N.E.2d 27, 32 (1986) (emphasis in original). “Police rules of conduct and their enforcement are policy matters that, absent ‘overtones of political control or objectives unrelated to merit standards or neutrally applied public policy’ are beyond the commission’s reach.” *Boston Police Dept. v. Collins*, 48 Mass. App. Ct. 408, 413, 721 N.E.2d 928, 932 (2000), *quoting Cambridge*, 43 Mass. App. Ct. at 304, 682 N.E.2d at 926.

#### B. City Police Department Rules and Regulations

Sgt. Cappelluzzo was disciplined for violating the following provisions of the City Police Department’s rules and regulations:

- a. Rule 4.02: Conduct Unbecoming an Officer - “Officers shall not commit any specific act or acts of immoral, improper, unlawful, disorderly or intemperate conduct, whether on or off duty, which reflect(s) discredit or reflects unfavorably upon the officer, upon other officers or upon the police department. Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the department and its members.”
- b. Rule 4.15: Abuse of Position – “Officers shall not use the prestige or influence of their official position, or use the time, facilities, equipment or supplies of the department for the private gain or advantage of themselves or another.”
- c. Rule 5.1: Neglect of Duty – “Officers shall not be absent from work without permission or abstain wholly or in part from the full performance of their duties in the normal manner without permission. Officers shall not: be absent from their assigned duty without leave; leave their post, sector, community, or assignment without being properly detailed or relieved, or without making required notifications.”
- d. Rule 10.2: Devotion to Duty – “Officers, while on duty, shall devote their full time and attention to the service of the department and to the citizens of the community.”
- e. Rule 10.3: Reporting for Duty – “While on duty [officers] shall not absent themselves from duty without leave.”
- f. Rule 10.7: Leaving the Community – “Officers shall not leave the limits of the community and enter another city or town unless it is necessary in the performance of duty. An officer shall inform the Commanding Officer or the

Communications Center prior to leaving and again upon returning. If an emergency prevents following this procedure, the officer must contact the Commanding Officer as soon as possible. In all such cases, a subsequent report will be submitted, in writing, for the attention of the City Marshal, to include the circumstances, the reasons for leaving the community and the period of absence."

- g. Rule 12.7: Department Vehicles – "Department vehicles shall not be used for personal business or pleasure."
- h. Rule 15.01: Adherence to Rules, Regulations, Policies – "Supervisory personnel will be responsible for subordinates' adherence to Department rules, regulations, policy, orders, directives and procedures."
- i. Rule 15.02: Efficiency of Department Operations – Supervisors are responsible and accountable for the maintenance of discipline and will provide leadership, supervision and example to ensure the efficiency of the Department."

### *CONCLUSION AND RECOMMENDATION*

I conclude that the City has satisfied its burden of proving just cause for its decision to suspend Sgt. Cappelluzzo for three days. The City has shown that he violated numerous police department rules during the incidents involving Mr. Becker and Dr. Hemani. On balance, his actions did not reflect the high standards expected of a police officer. Moreover, Sgt. Cappelluzzo failed to show that the City's discipline was improperly motivated by political considerations or bias. It may be that Mr. Becker's perceived influence in the community and the fact he and Dr. Hemani complained about Sgt. Cappelluzzo had some bearing on the City's decision to take disciplinary action. Viewed in light of all the other evidence however, this does not support a conclusion that the decision was tainted by political overtones or improper bias.

Sgt. Cappelluzzo also argued that the City failed to follow its own policies and procedures concerning disciplinary matters. Specifically, he asserts that the Hemani incident would not have occurred if he had known that the City had serious concerns about his behavior during the Becker incident. While timely follow-through on the City's part may have produced that result, nothing in the record before me suggests that the City strayed beyond the bounds of

“just cause” and into improper political considerations or bias. The policies are guidelines, not hard and fast rules that the City must adhere to.

The City acknowledges that Sgt. Cappelluzzo was justified in reporting to the Newbury police that unknown vehicles were on his property. He also was justified in stopping at his home to ensure that no other violation or crime was occurring. In Marshal Howard’s opinion, it was reasonable for Sgt. Cappelluzzo to detain Mr. Becker, Dr. Hemani, and Ms. Dunphy when he suspected that they might be intoxicated. He was justified thus in remaining at his home until a Newbury police officer arrived.

In numerous other respects, however, Sgt. Cappelluzzo failed to follow the City Police Department rules of conduct and procedure. He should have reported his whereabouts, however, to the Newburyport Police Department while he remained in Newbury to await the tow truck and an officer from the Newbury Police Department. While I accept that Newburyport officers routinely did not report in when traveling through Newbury to Plum Island, Sgt. Cappelluzzo’s actions went beyond that. Sgt. Cappelluzzo recognized that he should have called in once he decided to remain in Newbury to await the tow truck.

Furthermore, during each incident, there was no need for him to remain at the scene once the Newbury police arrived. Sgt. Cappelluzzo conceded as much. By this point in time, at the very least, he was absent from duty without leave; and he was not engaged in City police business. Consequently, I conclude that he violated Rules 5.1, 10.2, 10.3, and 10.7.

Sgt. Cappelluzzo’s use of his police cruiser to block the vehicles parked on his property was also unnecessary. No one was in the vehicles. Once Mr. Becker and Dr. Hemani came over to their vehicles, the presence of his cruiser served only to escalate the situation. Although he testified that he would not let them leave because he smelled alcohol, he had blocked the

vehicles in with his cruiser before he knew who was driving them and before he had reason to suspect that anyone had been drinking. It is fair to infer that Sgt. Cappelluzzo was upset to see the trespassing vehicles and decided to take action himself. He had complained on several occasions about the “downside” of living next to a restaurant, including vehicles parking on his property. He used his cruiser thus to pursue a personal plan, not to pursue Newburyport police business. I conclude therefore that he violated Rules 4.15 and 12.7.

Sgt. Cappelluzzo did not behave professionally during the Becker incident or the Hemani incident. Mr. Becker’s demeanor suggested that he is a man accustomed to getting his own way. His behavior was not that of a person intimidated by authority; rather, he moved about freely and used threatening language. Consequently, I do not credit his testimony that he remained a “gentleman” throughout the incident.

Mr. Becker was angry that his son’s car was to be towed. He thought that he should be able to leave, even though the vehicle was illegally parked. He attempted to use his purported influence by threatening the police department and the tow company. In sum, his conduct was less than exemplary.<sup>4</sup> Nonetheless, a police officer is expected to rise above such behavior and remain dispassionate in a manner that does not call his fitness for duty into question. *Police Comm’r of Boston v. Civil Serv. Comm’n*, 22 Mass. App. Ct. at 371, 494 N.E.2d at 32. Instead, Sgt. Cappelluzzo decided he was going to make an example of Mr. Becker. He remained at the scene after the Newbury police arrived. In so doing, he exhibited a personal rather than professional interest in the matter.

Similarly, Dr. Hemani was angry that his apologies were not accepted. He thought he should be able to leave, even though the vehicle was illegally parked. He was angry with Sgt.

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<sup>4</sup> The City argued that the Mayor took into account mitigating factors, including the behavior of Mr. Becker and Dr. Hemani, when he made the decision to suspend Sgt. Cappelluzzo. There is no support in the record for this argument.

Cappelluzzo and Officer Stokes when they asked if he had been drinking. He did not behave as if he was intimidated by Sgt. Cappelluzzo. Indeed, Dr. Hemani raised his voice to Sgt. Cappelluzzo and tried to get into his car to drive away.

Based on Dr. Hemani's demeanor during the hearing when he was simply recounting the events of that night, I believe Sgt. Cappelluzzo's description of Dr. Hemani's behavior during the incident. During Dr. Hemani's testimony he became more and more agitated, gesturing broadly and pointing at Sgt. Cappelluzzo. Dr. Hemani's testimony also was at odds with portions of his statements to Lt. Richard Siemasko and Marshal Howard. (Exh. 4E and Exh. 4F). Sgt. Cappelluzzo's description of Dr. Hemani is supported by Officer Stokes' report. Moreover, Sgt. Cappelluzzo was generally more candid in testifying about facts that were not in his favor.

Nonetheless, Sgt. Cappelluzzo argued with Dr. Hemani and raised his voice. He did not remain dispassionate in the face of Dr. Hemani's anger and frustration. It appears he did nothing to calm Dr. Hemani. Sgt. Cappelluzzo told Dr. Hemani and Ms. Dunphy to step off his property to await the tow truck. A Newbury police officer felt he had to separate the men. Again, Sgt. Cappelluzzo remained at the scene after the Newbury police arrived. These facts illustrate that Sgt. Cappelluzzo's personal and professional roles were blurred. This is just the sort of circumstance that can create public distrust in law enforcement. Accordingly, I conclude that Sgt. Cappelluzzo violated Rules 4.02 and 4.15.

Finally, Sgt. Cappelluzzo was serving as shift commander at the time of each incident. As a supervisor, he is responsible for providing leadership and setting an example for subordinates in the department. He failed to lead by example during each incident. Officers at the station were no doubt aware that Mr. Becker and Dr. Hemani called to complain about Sgt.



Cappelluzzo. His failure to follow department rules, as discussed above, does not set a good example. Consequently, I find that Sgt. Cappelluzzo violated Rule 15.02.

It is not apparent to me, however, that he violated Rule 15.01. The rule provides that supervisors are responsible for subordinates' compliance with the rules. The City did not provide any evidence that a subordinate failed to follow any rule for which Sgt. Cappelluzzo would be responsible during either of these incidents. If this rule is interpreted to mean that Sgt. Cappelluzzo should set a good example, which is how the City apparently reads it, then it becomes nothing more than a restatement of Rule 15.02. Accordingly, I find that Sgt. Cappelluzzo did not violate Rule 15.01.

In drawing my conclusions about the two incidents, I give no weight to the report filed by Lt. Siemasko. (Exh. 3E). He did not testify. Other evidence in the record, particularly witness testimony, contradicts his report in several respects.

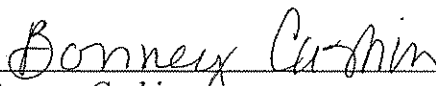
In addition, the Mayor's decision to suspend Sgt. Cappelluzzo found that he violated "Rule 5.0." There is no Rule 5.0, however. There is an introductory preface to each section of the regulations, which in this section is identified as 5.0. While the entire manual was not provided to me, it appears that 5.0 is a general statement about the topic "neglect of duty." It repeats much of the language found in rules on that topic and gives examples of behavior that would be considered neglect of duty. Consequently, I conclude that there is no separate violation of Rule 5.0.

To summarize, I conclude that Sgt. Cappelluzzo violated Rules 4.02, 4.15, 5.1, 10.2, 10.3, 10.7, 12.7, and 15.02. Based on these violations, I conclude that the City has shown good cause for its decision to suspend Sgt. Cappelluzzo for three days. I conclude that he did not

violate section 15.01. I further conclude that no Rule 5.0 exists; hence he could not have violated it.

While I differ with the City on the number of violations and about the degree to which Sgt. Cappelluzzo deviated from the high standard of behavior expected of a police officer, I nonetheless see no reason to reduce the sanction. I may not substitute my judgment for a valid exercise of discretion by the City based on policy considerations. *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. at 304, 682 N.E. 2d at 926. *See also Boston Police Dept. v. Collins*, 48 Mass. App. Ct. at 412, 721 N.E. 2d at 931 (reviewing agency cannot properly adjust suspensions of five days or fewer without encroaching on the appointing authority's discretion). Police rules of conduct and their enforcement are such policy matters. *Id.* at 413, 721 N.E. 2d at 932. I recommend that the Civil Service Commission uphold the action of the appointing authority.

DIVISION OF ADMINISTRATIVE LAW APPEALS

  
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Bonney Cashin  
Administrative Magistrate

DATED: **AUG 17 2009**