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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1884CV03612

CHRISTOPHER J. CAREY

vs.

TOWN OF HOLDEN & another[1]

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Christopher J. Carey (Carey), a former lieutenant with the Town of Holden Police Department (Department or Holden PD), seeks judicial review pursuant to G. L. c. 31, § 44 and G. L. c. 30A, § 14 of a decision of the Massachusetts Civil Service Commission (Commission) upholding the Town of Holden's (Town) termination of Carey from his position with the Holden PD. Before the Court are cross-motions for judgment on the pleadings. After hearing and review, and for the reasons stated below, the Town's Motion for Judgment on the Pleadings is **ALLOWED**. Carey's Motion for Judgment on the Pleadings is **DENIED**.

BACKGROUND

I. Procedural Background

At some point in May 2016, the Department learned of allegations that Carey had engaged in criminal conduct twenty years' prior. On June 23, 2016, Holden PD's Police Chief, David A. Armstrong (Armstrong), placed Carey on "administrative restriction" based on an investigation being conducted by the Massachusetts State Police (MSP) concerning those allegations. On September 13, 2016, Carey was placed on

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[1] Massachusetts Civil Service Commission

administrative leave after additional concerns arose about Carey's conduct towards the Department's female employees. The Department conducted an investigation. After that investigation, the Town's designated hearing officer held hearings over three days in March and April 2017. On June 30, 2017, the Town terminated Carey from employment.

Carey appealed his termination to the Commission on July 5, 2017. The Commission held hearings on two days in November 2017, heard from seven witnesses, admitted forty-three exhibits into evidence, and received eleven supplemental exhibits after the hearing. After the parties submitted proposed decisions, the Commission, *sua sponte,* held an additional hearing in February 2018, recalling two witness and calling one new witness. On November 8, 2018, the Commission issued a thirty-two-page decision denying Carey's appeal (Decision). Four of the five commissioners issued a concurrence, discussed below. Carey filed this chapter 30A appeal on November 19, 2018.

II. Factual Background

The following facts are taken from the Decision and the administrative record which the Court has reviewed in its entirety, with some facts reserved for discussion below.

As of 2018, Carey, a forty-eight-year-old male, had worked for the Department for twenty-seven years and had risen through the ranks from dispatcher to lieutenant. From 2013 or 2014 until sometime in 2016 Carey was responsible for internal affairs for the Department. During the events in question, a brother and a sister (JB) both worked as police officers for the Department. Their father had also previously worked for the Holden PD. Carey had supervised the father and, sometime prior to the events at issue, questioned whether the father had properly accounted for certain drug buy money. Also, while in charge of internal affairs, Carey investigated JB who had been involved in two potential drunk driving incidents and supervised her work performing field sobriety tests which he found concerning. There was evidence in the record that JB was unhappy with Carey's supervision and his conclusions regarding her field sobriety tests. In

connection with one of JB's alleged drunk driving incidents, JB's brother "cleared" his sister. After Carey's investigation of the second possible drunk driving incident, Carey concluded that JB had not been impaired due to alcohol but questioned the dispatcher's failure to follow protocol by not entering the information of the citizen who reported a drunk driver.

In May 2016, JB told certain unnamed Department employees that Carey had been accused of criminal behavior in the past. JB never made a police report. Department supervisors eventually learned of the allegations and turned the matter over to the MSP for investigation. No criminal or disciplinary charges were ever filed against Carey as a result of the MSP's investigation, apparently because the alleged victim in the case refused to cooperate. While the MSP investigated, on June 23, 2016, Armstrong placed Carey on administrative restriction which, according to Armstrong, limited Carey to working on the "911 West Boylston transition."

After being placed on administrative restriction, Carey, who had been one of two officers permitted to access the Department's evidence room, entered the evidence room on multiple occasions. On July 11, 2016, Carey entered the room to retrieve a semi-automatic handgun at another officer's request and gave it to the officer to hold in a temporary locker. The gun was in the Department's custody for safekeeping and was subject to Department policies regarding location and custody documentation. Carey did not document the removal of the gun from the evidence room but asked the officer to do so. The officer did not have the necessary authorizations to document the removal of the gun from the evidence room. As a result, the gun remained in the temporary locker without appropriate documentation for a lengthy period of time.

On September 12, 2016, two state police detectives interviewed JB in connection with the criminal investigation. A Holden PD detective sergeant accompanied JB and was present for the interview. During the interview, JB told the MSP investigators that Carey had liked photographs of the Department's female employees on Facebook (in

which they wore bikinis) and recounted an incident involving JB and Carey that was sexually inappropriate.[2] After the interview, the detective sergeant told Armstrong of JB's disclosures to the MSP. Armstrong immediately opened an investigation into Carey's conduct toward the Department's female employees and decided to place Carey on administrative leave.

On September 13, 2016, Carey met with Armstrong, the detective sergeant who accompanied JB to the MSP interview, and two other sergeants. Armstrong told Carey that he was being placed on administrative leave and asked for, among other items, Carey's gun, badge, and Department-issued cellphone and laptop. Armstrong also asked for Carey's password to the laptop and cellphone. Carey declined to provide his password, stating that he wanted to consult his attorney. Due, in part, to Carey's refusal to provide the password, and the nature of the allegations that had been made about him, Armstrong wanted Carey's cellphone searched. The Holden PD eventually discerned Carey's password and was able to extract information from Carey's cellphone. The data revealed that Carey had regularly searched for and viewed pornography on his Department-owned and issued cellphone including while he was on duty.[3] Carey never denied having searched for and viewed pornography on his Department-issued cellphone both on and off duty. At some point, Armstrong asked the sergeants to search their own personal phones and to self-report whether they had visited any pornographic sites. They reported that they had not.

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[2] There does not appear to have been any investigation of the alleged sexual conduct Carey evinced toward JB and neither side offered any reason for that failure.

[3] The Department concluded that Carey accessed pornographic sites eighty-seven times in a one-month period. I have reviewed Carey's internal affairs interview and the printouts of the images depicted on the websites he visited that were exhibits before the Commission. After that review, it is very difficult to believe that Carey was ignorant of what images were depicted on those sites, which is what he professed at his interview.

After Carey was placed on administrative leave, an officer searching for information about Carey's license to carry a firearm located an identity theft complaint which identified Carey as the victim.[4] The officer looked at the report and noted that he was listed as the reporting officer, even though he had never spoken to Carey and had no information about the incident. During his internal affairs interview, Carey claimed that he had spoken to the officer.[5]

During the investigation, the Department interviewed a civilian employee, JA. JA informed the Department, and testified before the Commission, about inappropriate and offensive conduct Carey directed toward her. JA described numerous statements and behavior by Carey of a discriminatory and / or demeaning nature. For example, JA recounted that Carey often demeaned her by calling her a "secretary" and telling her she made no contribution to police work. JA reported that Carey made a sexual gesture about her backside when she was on her hands and knees fixing a printer. And, JA reported that Carey once asked her inappropriate questions about the physical endowment of African-American men and whether she had "firsthand" knowledge of that topic. Carey's conduct which occurred over a period of years interfered with JA's ability to do her job and caused her to miss work on a number of occasions.

III. <u>Commission Decision</u>

The Commission found, by a preponderance of the evidence, that Carey had engaged in five instances of substantial misconduct which adversely affects the public interest: (i) violating the Town's Sexual Harassment policy; (ii) accessing pornographic websites on his Department-issued cellphone; (iii) failure to comply with Armstrong's order to provide his passcode; (iv) filing a false police report; and (v) failing to comply

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[4] There is no dispute that Carey had been the victim of identity theft.

[5] At the hearing before the Commission, the officer contradicted Carey's testimony directly.

with police policies regarding the documentation of the weapon in Department custody when it was removed from the evidence room.

First, the Commission determined that Carey engaged in inappropriate, and sexually harassing conduct toward JA in violation of the Town's sexual harassment policy. The hearing officer fully credited JA's testimony including that she did not report Carey's conduct to the Department because she was concerned about jeopardizing her job. The Commission addressed Carey's defenses, in particular (i) that Carey had not been provided sufficient notice of the allegation; (ii) that other officers had similarly engaged in offensive conduct and were not subject to investigation; and (iii) that JA's allegations were stale as they involved conduct that occurred before the 300-day filing deadline for a charge at the Massachusetts Commission Against Discrimination (MCAD). The Commission rejected those arguments, finding that the Town was required to investigate the allegations; that notice was sufficient[6]; that no other officer had engaged in the same type of repeated and inappropriate behavior as Carey; and that the MCAD deadline had no bearing on whether the conduct at issue supported a charge of conduct unbecoming a police officer.

The Commission next found that Carey had accessed pornographic websites on his Department-issued cellphone in violation of Department policy which prohibits using Department phones to access send or download any "materials which contain overt sexual language or images." The Commission also found that Carey's failure to provide his passcode to Armstrong upon demand violated his obligation to comply with all lawful orders. In reaching that conclusion, the Commission determined that Carey had no privacy rights in his Department-issued phone and that Carey's desire to consult with a lawyer did not "render the order unlawful."

[6] The record establishes that Carey was given Notice of Internal Investigation on December 16, 2016 that included sexual harassment, misuse of town property (the cellphone), insubordination, and falsifying a police report.

The Commission found next that Carey filed an inaccurate police report regarding identity theft. The hearing officer credited the testimony of the alleged reporting officer who disclaimed any knowledge of the report, and did not credit Carey's testimony. As a result, the Commission concluded that Carey made a false official report and did not testify truthfully at his internal affairs interview, in direct contravention of Armstrong's order to do so. Finally, the Commission found that Carey failed to document the transfer of the gun from the evidence room to a locker in violation of the Department's storage procedures and of Carey's obligation to ensure that a proper log entry was made to signify the change of location.[7] Based on those findings, the Commission determined that the level of discipline imposed by the Town, namely, termination, was appropriate.

The Commission considered and addressed Carey's many defenses. First, Carey argued that the Department was biased against him and that the investigation was tainted because it stemmed from JB's uncorroborated criminal allegations made when JB had a substantial motive to retaliate against Carey. The Commission recognized that "[t]he peculiar course of events here, including how the initial criminal allegations came about, and the domino-like nature of the ensuing charges and investigations, warrants a healthy degree of skepticism and careful review." However, notwithstanding JB's potential bias and improper motivation, the Commission determined that Armstrong's decisions – to report the criminal matter to the MSP and to conduct an internal investigation after allegations were raised about Carey's conduct vis a vis female employees – were reasonable and justified. The Commission concluded that any "misstep[s]" did not alter the fact that "a civilian female employee provided Department

[7] Based on a lack of clarity of the specific limitations imposed on Carey during the period of administrative restriction, and the fact that Carey's keys and ability to access the evidence room had never been taken from him, the Commission concluded that Carey's entry into the evidence room during the period of administrative restriction alone did not constitute insubordination.

investigators with a litany of alleged incidents that, if true, would fall squarely under the definition of sexual harassment and conduct unbecoming a police officer."

The Commission also considered whether the decision to extract data from Carey's phone was unfair or impermissible and concluded that there was a specific reason to do so where allegations had been made that Carey inappropriately "liked" female employees' Facebook posts. The Commission considered whether two of the sergeants who investigated Carey and were promoted to Lieutenant after Carey was terminated influenced the investigation and concluded that they did not. In deciding whether a lesser sanction was warranted, the Commission concluded that "the number of offenses [and] the seriousness" of the charges justified termination even "absent any prior formal discipline." In reaching that conclusion, the Commission was "mindful that 'police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens.'" Citing DeTerra v. New Bedford Police Dep't, 29 MCSR 502, 508 (2016). Finally, the Commission properly considered Carey's failure to testify before the Town's hearing officer and the adverse inference it could draw from that failure.

Four of the five commissioners wrote a concurring opinion to "emphasize that the record established that the Town [came] before the Commission tainted by problematic origin of the charges and the behavior of certain officers involved has not been overlooked, none of which has any proper place in a public safety organization . . . ." Nonetheless, the concurring commissioners concluded that Carey's misuse of his Department phone, insubordination and attempts to obstruct the investigation, and his pattern of sexual harassment "stand as just cause for the discipline imposed." The concurring commissioners noted that, even very stale misconduct may not be excused because it leaves the police officer "vulnerable to compromise." They concluded: "Thus, a municipality is entitled to demand that its public safety officers maintain the highest standard of conduct at all times."

DISCUSSION

I. Standard of Review

When considering Carey's appeal of the Town's decision to terminate his employment, the Commission "was required to conduct a de novo hearing for the purpose of finding facts anew." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006). After finding the facts, the Commission must then consider whether the penalty was appropriate. In doing so, the Commission "does not act without regard to the previous decision of the town, but rather decides whether '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.'" Id., quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). Further, "[u]nless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty." Id. at 824. Put elsewise, "[t]he commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." Id., citing Police Comm'r of Boston v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996).

A party aggrieved by the Commission's decision may "institute proceedings for judicial review in the superior court [which] . . . shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A." G. L. c. 31, § 44. Pursuant to chapter 30A, § 14, an agency decision may be set aside on judicial review when the court concludes that "the substantial rights of [a] party may have been prejudiced because the decision [was] . . . [b]ased upon an error of law; or . . . [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law."[8] G. L. c. 30A, § 14(7)(c), (g); see

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[8] These are the two grounds which Carey presses on this appeal.

also Craft Beer Guild, LLC v. Alcoholic Beverages Control Comm'n, 481 Mass. 506, 511-512 (2019).

The Supreme Judicial Court (SJC) recently confirmed that, "[i]n reviewing an agency decision, [courts] exercise de novo review on questions of law" but give "substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its . . . enforcement." Id. at 512, quoting Commerce Ins. Co. v. Commissioner of Ins., 447 Mass. 478, 481 (2006). Further, in reviewing a Commission Decision, a court may not substitute its "judgment for that of the commission" but must "accord due deference and weight not only to the commission's 'experience, technical competence, and specialized knowledge' but also 'to the discretionary authority conferred upon it.'" Thomas v. Civil Serv. Comm'n, 48 Mass. App. Ct. 446, 451 (2000), quoting School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 490 (1997).

Finally, in reviewing the Commission Decision under chapter 30A, I must leave to the Commission the "task of making credibility determinations and factual findings." Boston Police Dep't v. Civil Serv. Comm'n, 483 Mass. 461, 474 (2019). "Even if this court would have come to a different conclusion on the evidence presented on a de novo review, fact finding is the role of the commission and not the reviewing court." Id. at 476, citing Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971) ("A court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo").

Here, Carey argues that the Decision was arbitrary and capricious because it failed properly to consider and weigh the alleged biased source of the initial charges against him and the biased nature of the investigation. Carey argues as well that the Commission made an error of law in failing to apply Ontario v. Quon, 560 U.S. 746 (2010), to the search

of Carey's phone. I will consider each argument in turn, applying the appropriate deferential standard outlined above.[9]

II. Decision Was Not Arbitrary or Capricious

"A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." Thomas, 48 Mass. App. Ct. at 451, quoting Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). Carey argues that the internal investigation, conducted by two sergeants who stood to be promoted were Carey to be removed from his position, and begun by an officer motivated to harm Carey, violated the Town's internal affairs policy which requires that all complaints be investigated through a regulated, fair and impartial program.

The Department properly referred the allegations of Carey's criminal conduct to the MSP, which conducted an investigation. Nothing about that investigation is at issue here. Further, JB's statements about Carey's alleged sexual harassment were made in the course of that MSP investigation to MSP investigators, a fact which adds to the credibility of the statements. And, as the Commission found, once the statements came to the Chief's attention, the Department was obligated to investigate. It cannot be that the Department was not permitted to investigate possible harassing conduct simply because a potentially disgruntled officer made the charge. Further, the Commission considered the fact that the investigation was conducted by sergeants who ostensibly reported to Carey and who allegedly stood to gain from his termination. The Commission, *sua sponte*, held an additional day of testimony to hear directly from those officers. The hearing officer concluded, based on the sergeants' testimony and a credibility determination, that there was no bias in the investigation. Having reviewed the testimony, I cannot conclude that

[9] Carey's remaining arguments amount to disputes over the factual findings made by the Commission. As noted, this court may not substitute its judgment on the facts for the Commission's. Having reviewed the record, the facts as found by the Commission were supported by substantial evidence.

the Commission was arbitrary or capricious in its determination that neither actual nor apparent bias or self-interest affected the Department's investigation. Finally, the Commission considered that the Department focused on Carey and did not engage in a wide-ranging review of potential sexual harassment. The Commission concluded, based on the testimony of JA which the Commission credited, that Carey engaged in years-long, systematic harassment of JA thereby violating the Town's and Department's sexual harassment policy.

The Commission considered and weighed the possibility that the source or nature of the investigation was biased and concluded, based on the evidence before it and the credibility determinations it made, that bias did not affect the investigation or its outcome. After a careful review of the record, I cannot conclude that the Decision "lacks any rational explanation that reasonable persons might support." Thomas, 48 Mass. App. Ct. at 451, quoting Cambridge, 43 Mass. App. Ct. at 303.

III. Commission Did Not Commit an Error of Law

Carey argues next that the Commission erred because Armstrong's order that Carey provide the password to the cellphone was unlawful and the subsequent search of the phone violated Carey's rights. Carey relies on Carney v. Springfield, 403 Mass. 604 (1988), and Ontario v. Quon, 560 U.S. 746 (2010) (hereinafter Quon).

In Carney, the SJC held that "public employees cannot be discharged simply because they invoke their privilege under the Fifth Amendment to the United States Constitution not to incriminate themselves in refusing to respond to questions propounded by their employers." 403 Mass. at 608-609. The Commission did not err in failing to apply Carney.[10] In Carney, the police department was investigating criminal conduct, provided Miranda warnings to Carney prior to questioning, and Carney

[10] It is not clear whether Carney or Quon were argued to the Commission, but Carey relies on both before this Court as a basis to reverse and / or remand the case to the Commission.

refused to waive his rights against self-incrimination. Id. at 606-607. Here, Carey was being placed on administrative leave pending an investigation into potential sexual harassment – non-criminal conduct – and Armstrong was collecting Carey's gun, badge, and Department-owned phone prior to Carey's leave. The two situations differ significantly.

More salient, Armstrong's order that Carey provide the password to the phone did not violate Carey's rights against self-incrimination because the facts conveyed by the act of producing the password – namely that the phone had been issued to Carey, was in his possession, and that he knew the password – were already known to the Department. See Commonwealth v. Jones, 481 Mass. 540, 546 (2019) ("Commonwealth may . . . compel testimonial acts of production without violating a defendant's rights under the Fifth Amendment or art. 12 where the facts conveyed [by the act] already are known to the government, such that the individual adds little or nothing to the sum total of the Government's information.") (quotations and citations omitted). Thus, Armstrong was not obligated to comply with Carney prior to ordering Carey to provide the password, because provision of the password would not be incriminatory, and Carey's desire to first consult with counsel in these circumstances does not excuse noncompliance with Armstrong's order. See East Bridgewater v. Division of Unemployment Assistance, 76 Mass. App. Ct. 1102, 2009 WL 4824775, at *2 (2009) (Rule 1:28 decision) (officer not privileged to disobey direct order while seeking advice).[11]

Further, the facts here would satisfy Carney, even if Carey's provision of the password were incriminatory. Carney made clear that, "public employees can be discharged for refusing to answer questions narrowly drawn and specifically related to their job performance, where the answers cannot be used against them in a criminal proceeding." 403 Mass. at 609. Further, when a public employee is compelled to

[11] Carey never provided the password.

answer questions in an investigation, the employer must "specify to the employee the precise repercussions (i.e., suspension, discharge, or the exact form of discipline) that will result if the employee fails to respond." Id. Here, the internal investigation against Carey stemmed from allegations that he was inappropriately liking female employee's Facebook posts. The Department thus had a reasonable basis to review Carey's phone. Further, Armstrong told Carey that he was giving him a direct order more than once. Based on the foregoing, I discern no error of law by the Commission in finding that Carey failed to comply with Armstrong's order.

Relying on Quon, Carey argues next that the Department's search of his phone violated his state and federal constitutional rights. Quon involved a search of a police officer's pager messages, made on a police-issued and owned pager device. The Court ultimately ruled the search constitutional. 560 U.S. at 765. But, in doing so, the Court declined to address the very broad question of an employee's right to privacy in government-owned electronic devices finding that "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." Id. at 760. The Quon Court only assumed, *arguendo*, that the officer had a privacy interest in the texts sent and received on the pager based on statements made to him that were contrary to the written policy. Id. at 758 ("disagreement . . . [was] over whether . . . later statements overrode the official policy."). The Supreme Court did not abrogate the requirement that, for a search to be governed by the federal and relevant state Constitutions, there must be both a subjective and objective reasonable expectation of privacy. See id. at 756-757; see also Commonwealth v. Johnson, 481 Mass. 710, 715, cert. denied sub nom., Johnson v. Massachusetts, 140 S. Ct. 247 (2019) ("A search in the constitutional sense may also occur, however, 'when the government's conduct intrudes on a person's reasonable expectation of privacy.'" (citation omitted)); Id. at 722 ("Even assuming that the defendant had a subjective expectation of privacy, the expectation must be one that

society is willing to recognize as reasonable for the protections of the Fourth Amendment and art. 14 to apply.").

Here, Carey does not contest that the Department manifested a clear policy that the information sent and received on a Department-issued cellphone was subject to search and was not private. It did so directly in the Department's Policy regarding communications systems, which applies to cellphones. The Policy states "Electronic communications are Department-owned resources and are provided as communication tools. There can be no guarantee of privacy for electronic communications." Further, in issuing rules about the types of communications and uses of the phone that were not permitted, the Department indirectly made clear that Department-issued phones were subject to search. The communication policy states, in relevant part:

> 124.3.2.1 Use of electronic communications, including the internet, to access, send or download abusive, offensive or discriminatory messages or material is prohibited. Among those which are considered offensive are any messages or material which contain overt sexual language or images, sexual implications or innuendo or comments that inappropriately address someone's age, gender, race, sexual orientation, religious beliefs, national origin, or disability.
>
> 124.3.2.4 Department employees with access to the World Wide Web are responsible for the content of all text, audio, or images that they place or send over the Internet and for ensuring that the Internet is used in an effective, ethical and lawful manner. *All messages created, sent or retrieved over the Internet are the property of the Department and should be considered public information.*
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> 124.3.2.5 The Department reserves the right *to review all electronic records and communications, access and monitor all messages and files* as it deems necessary and appropriate and delete items from electronic communications systems. (emphasis added).

On this record, Carey cannot credibly argue that he believed he had a privacy interest in the electronic searches of pornographic websites that he conducted on his Department-issued phone. See Quon, 560 U.S. at 760 ("employer policies concerning

communications will of course shape the reasonable expectations of their employees, especially to the extent such policies are clearly communicated."); O'Connor v. Ortega, 480 U.S. 709, 717 (1987) ("Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."); Pottle v. School Comm. of Braintree, 395 Mass. 861, 866 (1985) ("Public employees, by virtue of their public employment, have diminished expectations of privacy.").[12] Nor would such an expectation, if Carey indeed held it, be one society would be willing to recognize. It is difficult to imagine a scenario where society would permit a veil of privacy to be draped over police officers using police-issued and owned cellphones to search for and view pornography while ostensibly protecting and serving the public and while knowing that such use of the phone violated explicit police policy against sending, receiving, accessing or viewing sexually explicit material. Cf. Quon, 560 U.S. at 762 ("Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications."); Attorney Gen. v. McHatton, 428 Mass. 790, 793-794 (1999), quoting Police Comm'r of Boston v. Civil Serv. Comm'n, 22 Mass. App. Ct. 364, 371 (1986) ("Police officers must comport themselves in accordance with the laws that they are

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[12] In other circumstances where a person has a diminished expectation of privacy and that person is on notice that he or she may be subject to government monitoring, the court has recognized no privacy rights in the information collected when it is subsequently accessed by government officials. See Johnson, 481 Mass. at 725 (person subject to GPS monitoring while on probation had "no reasonable expectation of privacy in [that GPS] data [later] accessed by the police . . . to target criminal activity during the probationary period, even where the data was accessed after the probationary period ended"); Commonwealth v. Rosa, 468 Mass. 231, 242-243 (2014) ("the monitoring and recording of . . . telephone calls by jail or prison officials does not violate a criminal defendant's constitutional rights where, as here, the defendant and other participants in the telephone conversation are warned before the call that it will be monitored and recorded").

sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.").

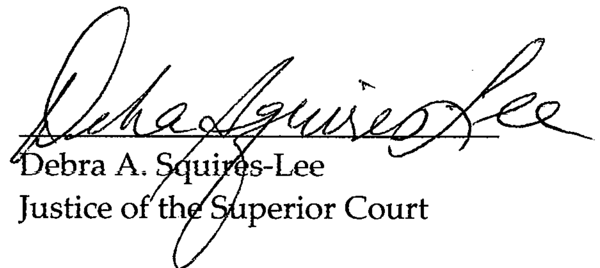
Although not made here, any argument that cellphones are so necessary and ubiquitous that everyone must use them and, therefore, some level of privacy must pertain, fails. These were Department-owned and issued cellphones governed by express rules and policies. "[E]mployees who need cell phones or similar devices for personal matters can purchase and pay for their own." Quon, 560 U.S. at 760. Searching for and / or watching pornography on a cellphone is, for the most part, not illegal. To the extent Carey wished to do so, he was free to do so on his own time and on his own cellphone. Based on the foregoing, I discern no error of law in connection with Armstrong's order that Carey provide his password, or the Department's search of Carey's phone, such that the Decision must be reversed.

Even if the order for the password, or the search itself impermissibly impinged on Carey's constitutional rights, the Commission also found that Carey had sexually harassed a civilian employee for years, had violated the Department's policies regarding proper documentation of items in Department custody when he removed the gun from the evidence room without ensuring its location was documented, and had knowingly filed a false police report. That conduct supports termination. Based on a careful review of the record, I conclude the Commission would have reached the same result based on those three, clear, undisputed violations of Town and Department policy. See Bickford v. Colonel, Dep't of State Police, 76 Mass. App. Ct. 209, 214 (2010) ("When an agency decision rests on both a legitimate and an illegitimate basis, a court

can nevertheless uphold the decision if it is clear that, after excising the illegitimate basis, the agency would have made the same decision.").

ORDER

For the foregoing reasons, the Town of Holden's Motion for Judgment on the Pleadings is **ALLOWED**, and Christopher J. Carey's Motion for Judgment on the Pleadings is **DENIED**. Judgment shall enter for the Defendants.



Debra A. Squires-Lee
Justice of the Superior Court

March 30, 2020