

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

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

**JOSE CHAVES,**  
Appellant

v.

**Case No. D-01-15**

**TOWN OF HUDSON,**  
Respondent

Appearance for Appellant:

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133 Merrimack Street  
Lowell, MA 01852

Appearances for Respondent:

Kimberly A. Rozak, Esq.  
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Commissioner:

Paul M. Stein<sup>1</sup>

**DECISION**

**Procedural History**

Pursuant to G.L. c. 31, § 43, the Appellant, Mr. Jose Chaves (“Appellant” or “Mr. Chaves”), filed a timely appeal with the Civil Service Commission (“Commission”) on January 10, 2001, contesting the decision of the Chief of Police of the Town of Hudson (“Town”), the Appointing Authority, to terminate his employment as a police officer with the Hudson Police Department (“HPD”) on January 4, 2001, for violating the rules and regulations of the HPD.

This appeal has been pending before the Commission for quite some time due to its unusually complex procedural history. On or about June 23, 2000, Mr. Chaves filed an appeal

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<sup>1</sup> The Commission acknowledges the assistance of Law Clerk Beverly J. Baker, Esq., in the drafting of this decision.

with the Commission pursuant to G.L. c. 31, §§ 42 and 43, disputing a sixty (60) day suspension by the Town.<sup>2</sup> In response to the Town's Motion to Dismiss Mr. Chaves' G.L. c. 31, § 42 claim, the Commission bifurcated the appeal and handled the Section 42 and Section 43 claims separately. A full hearing was held on the Section 42 claim on October 22, 2001 and, in a decision dated January 24, 2002, the Commission dismissed the Section 42 portion of the appeal. At this time, the entire appeal was incorrectly marked as closed in the Commission's case tracking system, rather than just the Section 42 portion. Because a full hearing and decision had yet to be rendered on the Section 43 issue, the Commission held Mr. Chaves' instant termination appeal in abeyance until the Section 43 appeal was resolved. During the appeal of the Section 43 claim, a final adjudication was further delayed by an interlocutory appeal by Mr. Chaves regarding the validity of the Chief of Police as the Appointing Authority for the HPD, during which time the Section 43 proceeding was suspended. On September 2, 2004, the Superior Court issued a decision affirming the Commission's January 24, 2002 decision and found that the Police Chief is the Appointing Authority for the position of police officer for the HPD<sup>3</sup>. On October 9, 2008, the Commission issued its decision on the merits of Mr. Chaves' Section 43 claim and upheld the sixty (60) day suspension.

In the instant matter, a status conference was held at the offices of the Commission on April 12, 2011. Two (2) days of full hearing were held at the same location on September 15, 2011 and October 3, 2011<sup>4</sup>. The witnesses were sequestered at the request of Mr. Chaves and the hearing was declared private. The hearing was recorded stenographically. The parties submitted post-hearing briefs.

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<sup>2</sup> Chaves v. Town of Hudson, CSC, No. D-00-2850

<sup>3</sup> Superior Court, Civil Docket #SUCV2002-01362-H

<sup>4</sup> Previously, the Appellant had filed a Motion for Summary Judgment, which the Commission denied without prejudice. In addition, at the time of the hearing, the Respondent filed certain motions in limine, which were also denied.

## **FINDINGS OF FACT**

Based on the thirty (30) exhibits entered into evidence, the stipulations of the parties, the testimony of:

*Called by the Town:*

- Lt. Michael D. Burks, Sr., HPD;
- Sgt. Christopher John Shea, HPD;
- Capt. David Stephens, HPD;
- Mr. Demitrios M. Moschos, Esq., Mirick O'Connell;
- Chief Richard A. Braga, Jr., HPD;

*Called by Mr. Chaves:*

- Officer John M. Donovan, HPD;
- Mr. Jose Chaves, Appellant;

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. Mr. Chaves was a Patrol Officer for the HPD. He was appointed as a Reserve Officer in 1980 and became a full-time Patrol Officer in 1988. (Testimony of Mr. Chaves)
2. At the time of the hearing, Mr. Chaves was sixty-four (64) years old. During the pendency of this appeal, Mr. Chaves petitioned the Middlesex County Retirement Board for, and was granted, an ordinary retirement on or about May 20, 2005. (Testimony of Mr. Chaves)
3. Previously, on or about March 13, 2003, Mr. Chaves had applied for disability retirement with the Middlesex County Retirement Board due to various heart issues. Mr. Chaves' application indicates that he ceased to be able to perform all of the essential duties of his position in January 2000. (Ex. AA 27; Testimony of Mr. Chaves)

4. In 1984, Mr. Chaves made a complaint to the Middlesex District Attorney's office that drunk driving cases were being dismissed by the HPD in exchange for payment by defendants. The investigation led to the resignation of the then-Chief of Police, who was demoted to Lieutenant and the retirement of a prosecutor. (Testimony of Mr. Chaves)
5. Following Mr. Chaves' involvement in the above matter, he was bypassed for full-time employment with the HPD in approximately 1985. He filed a bypass appeal with the Commission, which was allowed. (Testimony of Mr. Chaves)
6. Also, in approximately 1985, Mr. Chaves filed a federal lawsuit against the Town, the Selectmen, and the then-Chief of the HPD for the failure to appoint him to a full-time position. (Testimony of Mr. Chaves)
7. On or about April 7, 1987, Mr. Chaves was terminated by the then-Chief of Police. Mr. Chaves appealed his termination and, upon the recommendation of a hearing officer, the Chief agreed to reduce the termination to a seven (7) month suspension. (Exs. AA 16 & 17)
8. Around the same time, in or about 1987, Mr. Chaves filed a second lawsuit against the Board of Selectmen of the Town in state court. The parties entered into a settlement agreement on or about December 17, 1990, that affected the discipline that Mr. Chaves had received to date. First, the Town, per agreement, removed a written reprimand from Mr. Chaves' personnel file that he received on or about October 26, 1984. Second, the Town further reduced Mr. Chaves' seven (7) month suspension to a written reprimand. In exchange, Mr. Chaves agreed to voluntarily dismiss with prejudice both Chaves v. McGee, et al., No. 85-2728-K (D. Mass. filed 1985) and Chaves v. Bd. of Selectmen of the Town of Hudson, et al., No. 87-5810, which was pending in Middlesex County. (Ex. AA 20)

9. At one point, Mr. Chaves served as the local vice president of the International Brotherhood of Police Officers (IBPO). His duties included filing grievances and assisting union members with grievances with the Police Chief or Town. (Testimony of Mr. Chaves)
10. On or about June 22, 1998, Mr. Chaves testified on behalf of a fellow police officer at an arbitration proceeding regarding sexist comments that Capt. Stephens allegedly made about the officer. (Testimony of Mr. Chaves)
11. From at least 1998 through 2000, it was common for officers to joke with each other at the police station to “blow off steam” and “have a few laughs.” (Testimony of Officer Donovan)
12. On or about November 20, 1998, Mr. Chaves made several negative comments about superior officers in the break room at the police station, in the presence of other officers. (Testimony of Lt. Burks; Ex. AA 8)
13. Shortly after this incident, Chief Braga assigned Lt. Burks to conduct an investigation regarding Mr. Chaves’ comments. (Testimony of Lt. Burks; Ex. AA 8)
14. As part of his investigation, Lt. Burks interviewed Mr. Chaves and the other officers that were present in the break room when Mr. Chaves allegedly made the comments. (Testimony of Lt. Burks; Ex. AA 8)
15. During the investigation, on or about January 12, 1999, Lt. Burks interviewed Mr. Chaves about the incident that had occurred in the break room. Mr. Chaves was accompanied by his union representative, an attorney from the IBPO. Lt. Burks informed Mr. Chaves that he was entitled to a union representative, but he was not entitled to an attorney, nor could the representative be an attorney. Mr. Chaves eventually agreed to answer Lt. Burks questions on the advice of the attorney. (Ex. 8; Testimony of Lt. Burks)

16. During the interview, Lt. Burks asked Mr. Chaves several questions that he had prepared in advance, along with some follow-up questions. Mr. Chaves was not limited to simply giving a yes or no answer and was allowed to answer the questions during the interview in any way he wanted. In addition, Mr. Chaves was permitted to ask Lt. Burks questions, which he did and which Lt. Burks answered to the best of his ability. (Ex. 8; Testimony of Lt. Burks)
17. Mr. Chaves' negative comments about his superior officers and behavior in the break room may have been intended to be a joke, but they were taken too far and went on for too long to be considered within the "normal" range of joking at the station. (Ex. AA 8)
18. On or about February 25, 1999, Chief Braga notified Mr. Chaves that he was receiving a three (3) day suspension for the negative remarks he made towards his supervisors on or about November 20, 1998. Mr. Chaves' behavior violated Rule 6.1, Public Criticism of the Department, and Rule 7.01, Insubordination, of the HPD Rules and Regulations. Mr. Chaves suspension was effective in early March 1999. (Ex. AA 18)
19. On or about May 5, 1999, Mr. Chaves signed an affidavit ("May Affidavit") under the pains and penalties of perjury that was intended to support a charge of Prohibited Practice and was later filed with the Massachusetts Labor Relations Commission ("LRC") (Ex. JT 2)
20. On or about July 1, 1999, a Charge of Prohibited Practice was filed with the Commonwealth of Massachusetts Labor Relations Commission ("LRC") against the HPD on behalf of Mr. Chaves by the IBPO, Local 363 ("Union"). The first charge alleged that the HPD retaliated and discriminated against Mr. Chaves for testifying at the arbitration proceeding on behalf of a fellow officer. The second charge alleged that the HPD denied Mr. Chaves his right to

have his union representative present at an investigatory interview. The May Affidavit was attached to the Charge of Prohibited Practice. (Ex. JT 1)

21. On or about July 28, 1999, Mr. Chaves was advised that the HPD was conducting an Internal Affairs investigation regarding a complaint that had been filed against him by a citizen. On or about September 13, 1999, Mr. Chaves was informed that as a result of the continuing investigation, he was being placed on administrative leave with pay, effective September 13, 1999. Mr. Chaves was required to turn in his police issued firearm and to place his license to carry firearms with the HPD for holding. (Ex AA 21)
22. On or about December 23, 1999, Mr. Chaves signed another affidavit (“December Affidavit”) under the pains and penalty of perjury. The December Affidavit was attached to the Union’s Motion to Amend Charge of Prohibited Practice, filed with the LRC. The motion was denied on or about January 19, 2000. (Ex. JT 3)
23. When Mr. Chaves signed both the May and December Affidavits, he was aware he was doing so under the pains and penalties of perjury and that by doing so, it meant that he was swearing to the fact that everything in the affidavits was true. (Testimony of Mr. Chaves)
24. On or about January 18, 2000, the HPD filed a Motion of Objection and Motion to Dismiss the Union’s Prohibited Practice Charge filed with LRC, based on alleged false statements contained in Mr. Chaves’ May Affidavit and December Affidavit. The statement that the HPD alleges to be false is as follows: “Prior to the incidents described below<sup>5</sup>, I was never disciplined in any way for so long as I have been employed by the Town of Hudson Police Department.” This statement appears as paragraph three (3) in the May Affidavit and paragraph two (2) in the December Affidavit. (Exs. AA 14, JT 2 & JT 3)

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<sup>5</sup> The incidents Mr. Chaves is referring to have to do with his comments and behavior in the break room on or about November 20, 1998, and the subsequent investigation and discipline.

25. Mr. Chaves' statements in paragraph three (3) of the May Affidavit and paragraph two (2) of the December Affidavit, which pertained to his lack of prior discipline were, in fact, false statements. (Exs. AA 16, AA 17, & AA 20)
26. Both the May and December Affidavits, which were submitted to the LRC, also contain the following false statement referring to Mr. Chaves' interview with Lt. Burks concerning the incident that occurred in the break room on or about November 20, 1998: "I was only permitted question with a 'yes' or 'no' answer. I was not permitted to tell my side of the story." This statement appears in paragraph eight (8) of both the May and December Affidavits and is false. (Exs. JT 2 & JT 3)
27. On or about March 7, 2000, Mr. Chaves received notice that the HPD was contemplating discipline against him. On or about March 24, 2000, a hearing officer was appointed by Chief Braga. The Appointing Authority held a Section 41 hearing on or about April 4, 2000, May 2, 2000, and May 8, 2000. (Ex. AA 19)
28. On or about April 25, 2000, the hearing officer assigned to Mr. Chaves' hearing issued a ruling requiring Mr. Chaves to testify. (Ex. AA 19)
29. On the advice of his attorney, Mr. Chaves refused to testify at his Section 41 hearing. (Testimony of Mr. Chaves)
30. On or about June 21, 2000, the hearing officer issued a ruling finding that Mr. Chaves violated numerous Rules and Regulations of the HPD and that there was just cause to suspend him without pay for sixty (60) days. The hearing officer's findings were adopted by Chief Braga and Mr. Chaves was immediately suspended through approximately August 21, 2000. (Ex. AA 19)



31. On or about September 6, 2000, Mr. Chaves filed a Section 42 and Section 43 appeal with the Commission, contesting his sixty (60) day suspension. (Ex. JT 4)
32. On or about May 23, 2000, the LRC decided to dismiss the Union's charge of prohibited labor practice against the Town. (Ex. AA 24)
33. On or about June 6, 2000, the Union sought reconsideration from the LRC, arguing that the LRC erroneously determined that there was insufficient evidence of unlawful motion. Upon review, the LRC affirmed its prior dismissal on or about November 28, 2000. (Ex. AA 25)
34. On or about July 19, 2000, Capt. Stephens was assigned by Chief Braga to conduct an investigation regarding Mr. Chaves' refusal to testify at his Section 41 hearing and his submission of false affidavits. (Testimony of Capt. Stephens; Ex. AA 10)
35. As part of his investigation, Capt. Stephens interviewed several members of the HPD and one of Mr. Chaves' attorneys. On or about August 9, 2000, Capt. Stephens interviewed Mr. Chaves to discuss his filing of allegedly false affidavits. (Ex. AA 10)
36. When asked whether he reviewed the May Affidavit prior to signing it, Mr. Chaves' response was "not really." When asked the same question, with respect to the December Affidavit, Mr. Chaves responded "I did not review it, but I signed it. I was not aware what was said in the affidavit. I have no idea how to make out an affidavit." (Ex. AA 10)
37. During the interview with Capt. Stephens, Mr. Chaves acknowledged that he is aware that if a person signs a document purporting it to be true then it is that person's responsibility to know what he or she is signing. (Ex. AA 10)
38. Also during the interview, when asked if Mr. Chaves supplied the information in the affidavit to his attorney, Mr. Chaves responded that he did not. When asked where the

attorney obtained the information to prepare the affidavit, Mr. Chaves answered “I don’t know, reports maybe.” (Ex. AA 10)

39. Capt. Stephens obtained authorization from Mr. Chaves to speak to the attorney who had prepared the December Affidavit. The attorney informed Capt. Stephens that his usual practice was to send a copy of every affidavit he prepares to his client at the client’s home and that he remembered doing this with Mr. Chaves’ affidavit. (Ex. AA 10)

40. On or about September 7, 2000, following the discussion with Mr. Chaves’ attorney, Capt. Stephens conducted a follow-up interview with Mr. Chaves over the telephone. During this interview, Capt. Stephens asked Mr. Chaves if he had received a copy of the December Affidavit from his attorney at his home prior to signing it. At this point, Mr. Chaves admitted that he had received a rough draft and that he made some changes to it and returned it to his attorney (Ex. AA 10)

41. Mr. Chaves’ statements about the December Affidavit in the second interview with Capt. Stephens were inconsistent with statements he made in his first interview and his testimony before the Commission. Specifically, Mr. Chaves said at the second interview that he received a rough draft of the affidavit from his attorney, made some changes on it and sent it back, whereas in the first interview and in his testimony before the Commission, Mr. Chaves claimed that he did not review the December Affidavit prior to signing it. (Ex. AA 10; Testimony of Mr. Chaves)

42. Following Capt. Stephens’ investigation, Capt. Stephens concluded that the HPD’s allegations against Mr. Chaves were sustained. Capt. Stephens recommended that Mr. Chaves “receive severe discipline commensurate with his violations of law and Department Rules and Regulations.” Additionally, Capt. Stephens recommended that the matter of Mr.

Chaves' allegedly false affidavits "be referred to the District Attorney for assessment of criminal violations." (Ex. AA 10)

43. On or about December 5, 2000, Mr. Chaves was notified via letter that there was to be a formal Section 41 hearing on December 12, 2000, to determine whether he should be discharged from his position of police officer from the HPD. The reasons given by Chief Braga for Mr. Chaves' contemplated discipline were: (1) Mr. Chaves' refusal to take the witness stand at his Section 41 hearing; (2) Mr. Chaves' alleged false affidavits filed with the LRC; and (3) Mr. Chaves' failure to be truthful with the investigating officer during the investigation of the alleged false affidavits. (Ex. JT 7B)

44. On or about January 4, 2001, following Mr. Chaves' Section 41 hearing on or about December 12, 2000, Mr. Chaves was provided with written notification that he was discharged from his employment as a police officer with the HPD. Mr. Chaves was terminated based on the reasons set forth in the hearing officer's findings<sup>6</sup> and for violating the HPD's Rules and Regulations. Specifically, Mr. Chaves was found to have violated Rule 4.1 – Conduct Unbecoming an Officer, Rule 7.0 – Orders, Rule 7.01 – Insubordination, Rule 6.9 – Truthfulness, and Rule 9.20 – Testifying at Investigation.

45. On or about January 24, 2002, the Commission denied Mr. Chaves' Section 42 appeal in this pending matter. (Ex. JT 5A)

46. On or about October 9, 2008, the Commission upheld Mr. Chaves' prior sixty (60) day suspension. (Ex. JT 4)

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<sup>6</sup> The hearing officer determined that there was just cause to terminate Mr. Chaves based on three separate charges: (1) Mr. Chaves' refusal to take the witness stand; (2) Mr. Chaves' alleged false affidavits; and (3) Mr. Chaves' failure to be truthful with the investigating officer during the investigation of the false affidavits. (Ex. JT 7A)

## CONCLUSION

Pursuant to G.L. c. 31, § 43, a “person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission . . . .” The statute provides, in pertinent part:

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of the evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

G.L. c. 31, § 43.

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.” Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997); Comm’rs of Civil Serv. v. Mun. Ct. of Bos., 359 Mass. 211, 214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. of Brockton v. Civil Serv. Comm’n, 43 Mass. App. Ct. 486, 488 (citing Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)).

The Appointing Authority’s burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its

truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.” Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

While the Commission makes *de novo* findings of fact, “the Commission’s task, however, is not to be accomplished on a wholly blank slate.” Town of Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006). “Here, 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. (citing Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)). As a result, “the commission owes substantial deference to the appointing authority’s exercise of judgment in determining whether there was ‘reasonable justification’ shown.” City of Beverly, 78 Mass. App. Ct. at 188.

“In making that analysis, the commission must focus on the fundamental purposes of the civil service system – to guard against political considerations, favoritism, and bias in governmental employment decisions . . . .” City of Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304, rev. den., 426 Mass. 1102 (1997) (citing Murray v. Second Dist. Court of E. Middlesex, 389 Mass. 508, 514 (1983); Kelleher v. Personnel Adm’r of the Dept. of Personnel Admin., 421 Mass. 382, 387 (1995); Police Comm’r of Bos. v. Civil Serv. Comm’n, 22 Mass. App. Ct. 364, 370, rev. den., 398 Mass. 1103 (1986)). “When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission.” City of Cambridge, 43 Mass. App. Ct. at 304. “It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id. (citing Sch. Comm’n of

Salem v. Civil Serv. Comm'n, 348 Mass. 696, 698-99 (1965); Debnam v. Belmont, 388 Mass. 632, 635 (1983); Comm'r of Health & Hosps. of Bos. v. Civil Serv. Comm'n, 23 Mass.App. Ct. 410, 413 (1987)).

Absent significant differences between the Commission's findings of fact and those found by the appointing authority, or a substantially different interpretation of the relevant law, "the commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." Town of Falmouth, 447 Mass. 814 at 824 (citing Police Comm'r of Bos. v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996)).

Applying these principles to this appeal, I conclude that the Town has met its burden of proof and had just cause to terminate Mr. Chaves. The preponderance of the evidence establishes that Mr. Chaves filed affidavits containing false statements with the LRC and violated Rule 6.9, regarding truthfulness, of the HPD's Rules and Regulations.

The Town provided three reasons for Mr. Chaves' termination: (1) Mr. Chaves' refusal to take the witness stand at the Appointing Authority's sixty (60) day suspension hearing held in April and May 2000; (2) for allegedly filing false affidavits with the LRC dated May 11, 1999 and December 23, 1999; and (3), Mr. Chaves' alleged untruthfulness with the investigating officer, Capt. David Stephens, during the investigation of the alleged false statements in the affidavits. Each reason will be discussed separately below. In addition, the Town states that, in connection with the three reasons provided for Mr. Chaves' termination, he violated the following Rules and Regulations of the HPD: Rule 4.1 – Conduct Unbecoming an Officer, Rule 7.0 – Orders, Rule 7.01 – Insubordination, Rule 6.9 – Truthfulness, and Rule 9.20 – Testifying at Investigation.

### Refusal to Take the Witness Stand

The first reason provided by the Town for Mr. Chaves' termination was his refusal to take the witness stand during the Appointing Authority's hearing to determine whether Mr. Chaves should be suspended for sixty (60) days without pay. The Town argues that by refusing to take the witness stand, Mr. Chaves violated a lawfully issued subpoena and the hearing officer's ruling. The Town also claims that the subpoena served as a *de facto* order from the Chief of Police. It is Mr. Chaves' position that the purported order for Mr. Chaves to testify the hearing was invalid.

In Dykas v. City of Worcester, 23 MCSR 521 (2010), an officer in the Worcester Police Department was suspended and terminated for his failure to testify at the Section 41 hearing concerning his contemplated termination. In Dykas, the Commission held that the City did not have just cause to terminate the officer for his refusal to testify at his Section 41 hearing and that the officer could choose to testify, or not, and that he cannot be required to testify at his own hearing. That being said, an Appointing Authority is not left without recourse if an Appellant refuses to testify at a Section 41 hearing; the Appointing Authority still has the option to continue its internal investigation and, in addition, is permitted to draw a negative inference from the fact that the Appellant did not testify. Dykas, 23 MCSR at 527. "If the Appellant is willing to risk that such an inference will be made, which could lead to a negative outcome for himself, then he must be permitted to do so as the hearing is being held in order to protect his rights." Id. The Superior Court recently affirmed the Commission's decision, stating:

The Court agrees with the Civil Service Commission that the Section 41 hearing is held in order to protect the due process rights of the employee rather than to provide an opportunity for the city's Appointing Authority to conduct a further inquiry as to whether the charges are supported by the evidence and whether there is just cause to discipline an employee. The City is not prejudiced by an officer's refusal to testify at the Section 41 hearing.

City of Worcester v. Mass. Civil Serv. Comm'n & Dykas, Suffolk Sup. Ct. Civ. Action No. SUCV2010-04182 (July 19, 2012).

In light of Dykas, I conclude that the Town could not order or subpoena Mr. Chaves to testify at his own Section 41 hearing and, therefore, the Town did not have just cause to terminate Mr. Chaves on this ground.

Alleged False Affidavits

The second reason provided by the Town for Mr. Chaves' termination is for allegedly making false statements in both the May Affidavit and the December Affidavit, which Mr. Chaves signed under the pains and penalties of perjury. Specifically, the Town takes issue with Mr. Chaves statement: "Prior to the incidents described below, I was never disciplined in any way for so long as I have been employed by the Town of Hudson Police Department." This statement appears as paragraph three (3) in the May Affidavit and as paragraph two (2) in the December Affidavit.

This statement is false. Mr. Chaves was terminated from his employment with the HPD in 1987. Although his termination was subsequently reduced to a seven (7) month suspension and ultimately, following a settlement agreement, to a written letter of reprimand, this does not change the fact that Mr. Chaves did receive discipline by the HPD prior to the incident that occurred in the break room. Although the discipline did take place a number of years ago, Mr. Chaves could reasonably be expected to recall something as serious as being terminated or a lengthy seven (7) month suspension. At no point did Mr. Chaves request to view his personnel file, which contained the written letter of reprimand.

In addition, both affidavits also contain a false statement related to Mr. Chaves' interview with Lt. Burks. Paragraph eight (8) in both the May and December Affidavits



contains the statement: “At the meeting, I was only permitted questions with a ‘yes’ or ‘no’ answer. I was not permitted to tell my side of the story.” According to Lt. Burks’ credible testimony and his detailed investigation report, Lt. Burks did not instruct Mr. Chaves to only provide a “yes or no” answer and many of Mr. Chaves’ responses were indeed more than just a yes or no. Furthermore, Mr. Chaves was permitted to ask questions of Lt. Burks; Mr. Chaves asked Lt. Burks three (3) questions which Lt. Burks answered to the best of his ability.

Mr. Chaves argues that both of the affidavits were drafted by his attorneys. As to the May Affidavit, Mr. Chaves testified at the Commission’s hearing that he “glanced through it and then . . . signed it.” Mr. Chaves also testified that he did not review the December Affidavit before he signed it since he was told it was basically the same as the first affidavit.

As a police officer, Mr. Chaves was aware of the importance of reviewing documents, such as incident reports, prior to attending a court proceeding. Despite the fact that Mr. Chaves was aware that his affidavits would be used to support the LRC filing, he admits that the affidavits did not get the same level of scrutiny he would normally apply. “The duty imposed on a police officer to be truthful is one of the most serious obligations he or she assumes, because, among other things, it may compromise the officer’s ability to serve as a credible witness in the prosecution of a criminal case.” Robichau v. Town of Middleborough, 24 MCSR 352, 361 (2011).

Since there is some discretion as to what, and for how long, a prosecutor may be required to make disclosures under the so called “Brady Rule,” claims of untruthfulness against a police officer carry significant consequences and must be carefully scrutinized, but the Commission generally must defer to the judgment of a law enforcement agency on this point, which is lawfully grounded in constitutional law.

Id. (citations omitted). Truthfulness is especially important when reducing something to writing and signing it, under the pains and penalties of perjury, as Mr. Chaves did. While Mr.

Chaves' prior discipline occurred many years prior to his signing of the affidavits, it is his recent false statement that is the concern here.

By making false statements in his affidavits, Mr. Chaves violated Rule 6.9 of the HPD's Rules and Regulations – Truthfulness, which states, in pertinent part: "Officers shall speak the truth at all times." (Ex. AA 9) As a result, the HPD had just cause to discipline Mr. Chaves on this ground.

*Alleged Untruthfulness During Investigation*

In July 2000, Chief Braga directed Capt. Stephens to conduct an investigation following Mr. Chaves' refusal to take the stand during his Section 41 hearing and the alleged false affidavits. The third reason cited by the Town for Mr. Chaves' termination is his alleged failure to be truthful with Capt. Stephens, the investigating officer, during this investigation.

As part of his investigation, Capt. Stephens interviewed several members of the HPD, one of Mr. Chaves' attorneys, and Mr. Chaves, on two separate occasions. During Capt. Stephens' initial interview with Mr. Chaves, Mr. Chaves made statements to the effect that he had "not really" read the affidavits and that he had just signed them. Capt. Stephens then obtained authorization from Mr. Chaves to speak to the attorney who had prepared the December Affidavit. The attorney informed Capt. Stephens that his usual practice was to send a copy of every affidavit he prepares to his client at the client's home and that he remembered doing this with Mr. Chaves' affidavit. Following this conversation, Capt. Stephens conducted a second interview with Mr. Chaves via telephone. During this interview, Capt. Stephens asked Mr. Chaves if he had received a copy of the December Affidavit from his attorney at his home prior to signing it. At this point, Mr. Chaves admitted that he had received a rough draft and that he made some changes to it and returned it to his attorney. Mr. Chaves' admission about

the December Affidavit in the second interview with Capt. Stephens appears more plausible and I conclude that it was this second statement that is closer to the truth. The problem, however, is that statement was inconsistent with the statements Mr. Chaves made during his first interview and which he repeated in his testimony before the Commission, to the effect that he had not seen the errors in the affidavits because he had not paid much attention to them before signing, which I find not to be completely truthful.<sup>7</sup>

Alleged untruthfulness during an investigation could be enough to warrant discipline, even termination. I have concerns, however, regarding the potential bias of Capt. Stephens. Mr. Chaves' and Capt. Stephens have both made negative comments about one another in the past, comments that personally offended Capt. Stephens. When Mr. Chaves testified on behalf of a fellow officer during an arbitration proceeding on or about June 22, 1998, he suggested that Capt. Stephens had issues with female police officers, was "aggressive," and "likes to conduct investigations." Mr. Chaves also allegedly made negative remarks about Capt. Stephens during the incident that took place in the break room. Furthermore, during Mr. Chaves' suspension hearing before the Commission, Capt. Stephens testified, in sum and substance, that he has no respect for Mr. Chaves as an officer and that he took personal offense to the comments Mr. Chaves made about him during the arbitration proceeding. (Ex. AA 26) In addition, Capt. Stephens stated that he "never cared for Officer Chaves as an officer." (Ex. AA 26) As mentioned above, the fundamental purposes of the civil service system are "to guard against political considerations, favoritism, and bias in governmental employment decisions . . . ." City of Cambridge v. Civil Serv. Comm'n, 43 Mass.App.Ct. 300, 304, rev. den., 426 Mass. 1102

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<sup>7</sup> The preponderance of evidence makes it more likely that Mr. Chaves' admission during his second interview with Capt. Stephens, that he did read and revise the December Affidavit, was true, from which I infer that his statements during the initial interview with Capt. Stephens and his testimony before the Commission were not truthful.

(1997) (citations omitted). Based on Capt. Stephens' prior testimony before the Commission, I find that he likely brought his bias into the investigation of Mr. Chaves. As the sole investigating officer in the matter, Capt. Stephens' bias against Mr. Chaves must be taken into account. Had Mr. Chaves been charged only with untruthfulness in statements made to Capt. Stephens, I would find that Capt. Stephens' bias tainted the charge and it would not stand as just cause for termination.

Having determined, however, that it was appropriate to discipline Mr. Chaves, based on the proven charge of filing of false affidavits and violation of Rule 6.9 of the HPD's Rules and Regulations, the Commission must determine if the level of discipline imposed, i.e., termination of a police officer, should be sustained or modified in the exercise of the Commission's discretion. Given the nature of the offense – untruthfulness – and Mr. Chaves' disciplinary history, which includes a lengthy sixty (60) day suspension and also involved several instances where Mr. Chaves' either failed to tell the truth or withheld evidence, and the conclusion that Mr. Chaves was also less than truthful in his testimony before this Commission, I decline to modify the discipline imposed by the Town.

For the foregoing reasons, Mr. Chaves' appeal under Docket Number D-01-15 is hereby *denied*.

Civil Service Commission

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Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [ABSENT]; Ittleman, Marquis, McDowell, and Stein, Commissioners) on July 25, 2013.

A True Record. Attest:

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Commissioner

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

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

Notice:

Kevin E. Buck, Esq. (for the Appellant)

Kimberly A. Rozak, Esq. (for the Respondent)