COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street – Suite 200
Boston, MA 02114
617-979-1900

JAMES C. CLARK,
Appellant,

v.

BOSTON POLICE DEPARTMENT,
Respondent

Docket Number:	D-24-001
Appearance for Appellant:	Kenneth Anderson, Esq. Anderson, Goldman, Tobin & Pasciucco, LLP 50 Redfield Street, Suite 201 Boston, MA 02122
Appearance for Respondent:	Omar Bennani, Esq. Boston Police Department Office of the Legal Advisor One Schroeder Plaza Boston, MA 02120
Commissioner:	Shawn C. Dooley

SUMMARY OF DECISION

A majority of the Commission voted to modify the decision of the Boston Police Department, reducing a 15-day suspension of a police officer to a 10-day suspension based on the lack of any prior discipline, and the fact that this offense took place eight years ago with no other issues.

DECISION

On January 3, 2024, the Appellant, James C. Clark (Appellant), pursuant to the provisions of G.L. c. 31, § 41, appealed to the Civil Service Commission (Commission) from a decision by the Boston Police Department (BPD) to suspend him for 15 working days for his violation of Department Rule 102 §3 - Conduct Unbecoming. On February 6, 2024, the Commission held a remote pre-hearing conference. On April 24, 2024, I held an in-person full hearing at the offices of the Commission. The hearing was recorded via Webex, and copies of the hearing were provided to the parties.[1] Both parties filed Proposed Decisions. For the reasons set forth below, the Appellant's appeal is allowed in part.

FINDINGS OF FACT

The Respondent, BPD, entered one exhibit (Resp. Exhibit 1) and the parties jointly entered eight exhibits (Joint Exhibits 1-8) into evidence. At the Commission's request, the Respondent provided post hearing two additional exhibits (Post Exhibits 1-2) that were accepted by the Appellant's counsel and entered into evidence. Based on the documents submitted and the testimony of the following witnesses:

Called by the BPD:

- Detective Lucas Taxter, Sergeant, Boston Police Department

Called by the Appellant:

- James Clark, Appellant

[1] A link to the audio/video recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from other credible evidence, a preponderance of evidence establishes the following findings of fact:

1. The Appellant was born and raised in the City of Boston. *(Testimony of the Appellant)*
2. The Appellant has been a sworn member of the BPD since March 26, 1997, and is currently assigned to the Fugitive Unit. (*Joint Ex. 1*; *Testimony of the Appellant*).
3. At the time of the incident in question, July 2016, the Appellant was assigned to work in the Brighton neighborhood of Boston. *(Testimony of the Appellant)*
4. On July 18, 2016, the Department's Anti-Corruption Division (ACD) initiated an investigation into allegations that the Appellant had falsified a Brighton District Court complaint form, which falsely indicated that his acquaintance, LS, had been arrested and charged with assault and battery. The Appellant provided this form to LS, who then presented it to his employer, the MBTA, as a reason for his absence from work on July 4, 2016. *(Joint Ex. 2)*.
5. On March 13, 2017, the results of the ACD's investigation were forwarded to the BPD's Internal Affairs Division (IAD) for further review and, after conducting its own investigation into the allegations, the Appellant was found in violation of Department Rule 102 §3 (Conduct Unbecoming) and the Appellant was issued a 15-day suspension. *(Joint Ex. 1, 2, and 3)*.
6. The Appellant appealed the decision of IAD and on May 8, 2023, a hearing was held at BPD headquarters. The charge of violating Department Rule 102 §3 (Conduct Unbecoming), was sustained. *(Joint Exhibit 1)*

JULY 2016 INCIDENT

7. The Appellant was raised in a Boston neighborhood. His best friend lived across the street. His best friend's older brother, LS, also lived across the street for his entire childhood. LS was roughly ten years older than the Appellant, and the Appellant regarded him as an older brother type figure. *(Joint Ex. 1; Testimony of the Appellant).*
8. The Appellant's mother still lives in his childhood home and LS still lives across the street. *(Joint Ex. 1; Testimony of the Appellant).*
9. On or about July 4, 2016, during roll call at District 14, the Appellant received a call from LS. *(Joint Ex. 1; Testimony of the Appellant).*LS told him that he did not return home the night before because he had been out with another woman. He stated that his partner would kick him out of the house if he did not have an "alibi". He asked for the Appellant's assistance by providing some form of proof that he had been arrested. The Appellant told LS there was nothing he could do to help and ended the conversation. *(Joint Ex.4; Testimony of the Appellant)*
10. Later that day the Appellant decided to use a paper complaint application to assist LS in providing a false alibi of being arrested and informed him of this plan. *(Joint Ex. 3&.4; Testimony of the Appellant)*
11. Prior to July of 2016, the Boston Municipal Court system and the Boston Police Department had transitioned away from paper complaint applications and moved to a computerized system where complaint applications were filed electronically. *(Joint Ex. 3&4; Testimony of the Appellant)*
12. Although the complaint applications were no longer used by the courts, the old paper Application for Criminal Complaint was stored in a storage closet in the station. *(Joint*

Ex.4; Testimony of the Appellant)

13. The Appellant filled out the form and included LS's real name and address in the section "information about the accused" and checked a box falsely indicating that the "accused" had been arrested. *(Joint Ex. 5; Testimony of the Appellant; Testimony of Sgt. Det. Taxter)*
14. The Appellant wrote down an incident number on the form that only contained seven numerals whereas BPD incident numbers contain nine numerals. He also wrote down a false name as the reporting officer, a fictitious incident address, and listed a repealed firearms statute as the offense code. *(Joint Ex. 5, 7, and 8; Testimony of the Appellant)*
15. The Appellant then met with LS and provided him with a physical copy of the complaint form. *(Joint Ex. 1, 2, 3, 11, and 12; Testimony of the Appellant)*
16. LS was employed by the MBTA, had experienced prior attendance issues with his employer, and was on a "last chance agreement" with the MBTA that specified he would be terminated if he failed to come to work. LS failed to come to work for the MBTA on July 4, 2016. (*Joint Ex. 6, 11, and 12*)
17. On July 11, 2016, LS provided his MBTA employee union liaison with the criminal complaint form provided by the Appellant. *(Joint Ex. 6, 11, and 12)*
18. LS was subsequently placed on administrative leave and was provided notice of the abeyance of discipline, pending the outcome of his criminal matter. MBTA officials soon learned that no criminal charges had been filed with the court. LS resigned from his position with the MBTA, in lieu of discharge. He then admitted that he had overslept and had received the form from the Appellant. *(Joint Ex. 1, 6, 11, and 12)*
19. On August 2, 2016, LS was interviewed by ACD. He stated that he had been employed by the MBTA as a bus driver and that he was on a last chance agreement, which meant

that if he missed another shift he would be terminated. He stated that he did not report to work on July 4, 2016, and called the Appellant for help. He told the Appellant he needed proof that he was arrested. LS stated that he thought that he told the Appellant about his last chance agreement. *(Joint Ex. 2, 3, 11, and 12)*

20. On September 26, 2016, the Appellant was also interviewed by ACD. On the advice of counsel, he asserted his 5th Amendment and Article 12 rights against self-incrimination. *(Joint Ex. 2 and 3)*
21. On June 13, 2018, the Appellant was interviewed by IAD. He admitted filling out the complaint form and giving it to LS but adamantly denied knowledge of LS's last chance agreement with his employer. He said that he did not know where LS worked and believed the form would be shown to LS's partner. *(Joint Ex. 2, 3, 4, and 10)*
22. The ACD decided to refer the case to the District Attorney's Office, which in turn referred it to the State Ethics Commission. *(Joint Ex. 2 and 3)*
23. On May 27, 2021, the State Ethics Commission voted "to find reasonable cause to believe that [the Appellant's] actions violated section 23(b)(2)(ii) of the conflict-of-interest law, General Laws chapter 268A, and authorized adjudicatory proceedings." *(Joint Ex. 1 and 6)*
24. On June 30, 2021, the State Ethics Commission determined, "in lieu of adjudicatory proceedings, the public interest would be better served by publicly discussing the facts revealed by the preliminary inquiry and explaining the application of the law to those facts" via a "public education letter" to the Appellant. No fines or other punishments were imposed by the State Ethics Commission. *(Joint Ex. 6)*

25. On March 27, 2023, Superintendent Dottin, who is the Chief of BPD's Bureau of Professional Standards, brought a complaint of Conduct Unbecoming against the Appellant. **(***Post Exhibit 1***)**
26. On May 8, 2023, Richard Dahill, Deputy Superintendent of BPD and Chief Administrative Hearings Officer, held a hearing to hear the appeal on this matter. *(Joint Exhibit 1)*
27. On September 20, 2023, Deputy Superintendent Dahill issued his decision finding that the Appellant demonstrated conduct unbecoming of a Police Officer thereby violating BPD's Rule 102 section 3. *(Joint Exhibit 1)*
28. Deputy Superintendent Dahill did note in his decision that, while it was beyond the scope of the hearing, he "did observe some mitigating factors which could be taken into consideration" for lessening the suspension. He found that the Appellant was "sincere in acknowledging his mistake and that it appeared to be a momentary lapse in judgement." He also noted "that this occurred several years ago and the (the Appellant) was publicly reprimanded as a lesson by the State Ethics Commission." *(Joint Exhibit 1)*
29. On December 22, 2023, the Appellant received notice from Deputy Superintendent James Miller that he was being suspended for 15 days to be served from December 25, 2023 to December 29, 2023; January 8,2024 to January 12, 2024; and January 22, 2024 to January 25, 2024. **(***Post Exhibit 2)*

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be disciplined for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefor." G.L. c. 31, § 41. An employee aggrieved by the decision may appeal to the Commission. G.L. c.

31, § 43. Under section 43, the appointing authority carries the burden to prove "just cause" for the action taken by a "preponderance of the evidence." Id. See, e.g., Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass. App. Ct. 411, rev. den., 726 N.E. 2d 417 (2000).

In performing its review, the Commission hears evidence and finds facts anew. Examining an earlier but substantially similar version of the same statute, the Supreme Judicial Court said: "'We interpret this as providing for a hearing de novo upon all material evidence and a decision by the commission upon that evidence and not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer.'" Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

The Commission determines just cause for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civ. Serv. Comm'n, 43 Mass. App. Ct. 486, 488, rev. den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). As noted above, basic merit principles require that discipline of a tenured civil service employee must be remedial, not punitive, designed to "correct inadequate performance" and "[only] separating employees whose inadequate performance cannot be corrected." G.L. c. 31, §1. As stated by the SJC in Falmouth v. Civ. Serv. Comm'n, 447 Mass. 814, 823-825 (2006):

> "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority, a role to which the statute speaks directly. G.L. c. [31], §43 ('The commission may also modify any penalty imposed by the appointing authority.') Here the commission does not act without regard to the previous decision of the [appointing authority], 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).
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> "Such authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the "equitable treatment of similarly situated individuals.' Citing Police Comm'r of Boston v. Civ. Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996). However in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system – 'to guard against political considerations, favoritism and bias in governmental employment decisions." Id. (citations omitted).
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> "Unless the commission's findings of fact differ significantly from those reported by the [Appointing Authority] or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. 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."
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> Id. at 572 (citations omitted).

ANALYSIS

The facts in this case are not in dispute, and the Appellant acknowledges that his actions were unbecoming of a Police Officer and in violation of the Boston Police Department's rules surrounding conduct. I found the Appellant to be honest regarding the facts of this case. He fully accepted responsibility for his actions and stated that his actions warrant discipline, albeit lesser than imposed.

I do not credit the argument that the Appellant offered in mitigation that he deliberately filled out the form in such a manner as to ensure that no one would think that this was a legitimate arrest report. The reality is that, if one were to believe every aspect of the Appellant's telling of the events, he did use his position to create a report designed to mislead his friend's partner. He also took no action to ensure that this document would not be used for any other

purposes. Because of this lack of judgement, it was used to mislead the MBTA in hopes that his friend would not be terminated.

However, I do agree with Deputy Superintendent Dahill in that mitigating factors should be taken into account when determining the punishment. The Appellant is a twenty-seven-year veteran with no other prior discipline, has worked in some of the busiest neighborhoods of Boston, and served on the former Mayor's security detail. It is also worth noting that while this matter was pending, he was promoted to and is still a member of the Fugitive Unit – a highly selective, specialized unit within BPD.

Further, the BPD chose to refer this to the District Attorney's office, which chose not to prosecute this matter and instead referred it to the State Ethics Commission. The State Ethics Commission in turn determined that "the public interest would be best served by the issuance of a Public Education Letter" as his punishment. In the Public Education Letter they wrote that,, "the public interest would be better served by publicly discussing the facts revealed by the preliminary inquiry and explaining the application of the law to those facts" rather than proceeding with adjudicatory proceedings. They further stated that "this letter should be sufficient to ensure your understanding of and future compliance with the conflict of interest law." While certainly not the strongest of punishments, this is the avenue that the BPD initially took to determine discipline as opposed to bringing charges themselves against the Appellant. I do feel that fact, and the punishment already imposed upon the Appellant, are mitigating factors that should have been taken into account when determining the additional discipline.

I am troubled that this matter has taken nearly 8 years to resolve, including waiting two years after the State Ethics Commission's determination and punishment before the BPD decided to bring a complaint against the Appellant (it then took another nine months to dole out the

discipline). While I understand the workload of the BPD, it is telling that this infraction was well known by his superiors and yet they exhibited no sense of urgency in addressing it. Further, during this time, not only had the Appellant not received any other discipline, BPD chose to promote him to the Fugitive Unit. As this Commission also stated in Godere v. the City of Chicopee, 102 Mass. App.Ct.1103 (2023) (unpublished M.A.C. Rule 23.0 summary decision), "there is something inherently wrong with basing discipline on untruthfulness that the City has been aware of for seven years."

While I am aware that this is an internal matter and the Department makes the argument that adjusting discipline when the facts are not in dispute is beyond our scope, the lack of action for so long and the referral to the Ethics Commission lends an appearance that this individual is now being subjected to a somewhat arbitrary level of discipline. If the Appellant's lack of judgement was so severe as to warrant this level of punishment, why wait so long? Why not move forward quickly to ensure that any discipline was remedial in nature at the time?

I further find that delaying the discipline seven and a half years resulted in an increased financial penalty and results in more punitive discipline than if the suspension was issued at the time of the incident. The Appellant's pay has increased significantly during this period of inaction resulting in the discipline having a greater impact financially than if it was imposed in a timely manner. The delays surrounding this case were of no fault of the Appellant and he should not be subject to a greater financial burden due to BPD's inability to make a timely decision.

Further, in reviewing other BPD discipline cases (although none that follow this precise fact pattern), the 15-day penalty, in addition to the issuance of a Public Education Letter, seems out of the norm for a first offense. At the hearing, BPD was unable to provide similar cases to justify a suspension of this length. While I agree that Appellant's actions represented a serious

lapse in judgement, some consideration must be given to the lack of any prior discipline over a lengthy career, his otherwise exemplary record, the inordinate amount of time between the underlying event and the discipline imposed, and the increased financial penalty that would not have been realized if this was dealt with in a timely fashion. In addition, the State Ethics Commission determined that the issuance of a Public Education Letter would best serve the public interest, and this fact was not contested by the BPD.

CONCLUSION

For all of the above reasons, the Appellant's appeal filed under Docket No. D-24-001 is allowed in part and his 15-day suspension is modified to a 10-day suspension.

Civil Service Commission

/s/ *Shawn C. Dooley*
Shawn C. Dooley
Commissioner

By a 3-2 vote of the Civil Service Commission (Bowman, Chair -Yes; Dooley, Commissioner – Yes; Markey, Commissioner – Yes; McConney, Commissioner – No; and Stein, Commissioner – No) on September 19, 2024.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Kenneth Anderson, Esq. (for Appellant)
Omar Bennani, Esq.. (for Respondent)

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Docket Number: D-24-001

OPINION OF COMMISSIONERS McCONNEY AND STEIN

The delay in James Clark's discipline, a period of more than seven years, in no way diminishes the seriousness of his conduct.

The fact that Department complaints are created via electronic means while Mr. Clark utilized a paper complaint and the fact that LS was in a last chance agreement with his employer are extraneous to this matter. We are presented with a sworn officer that engaged in conduct unbecoming (BPD Rule 102 section 3) when he used official means to create a document (on or about July 4, 2016) for an unofficial purpose, as a personal favor to a friend.

Notwithstanding the seriousness of the matter: a September 26, 2016 interview with the Department's Anti-Corruption Division (ACD) leading to a referral to the District Attorney's Office, and a subsequent referral to the State Ethics Commission resulting in June 30, 2021 public reprimand; an Internal Affairs investigation resulting in the conduct unbecoming charge; and a May 8, 2023 hearing upholding said conduct unbecoming charge, Mr. Clark has emerged with a light discipline.

We do not believe that Mr. Clark's discipline was based on political concerns, favoritism, or bias but for appropriate and legitimate reasons to maintain the decorum, respect, and integrity – albeit belatedly – of the chain of command within the Department. Thus, his conduct does not warrant a modification of his discipline.

We agree with the Boston Police Department's September 20, 2023 decision to suspend Mr. Clark for fifteen days, and thus vote "No" for modification of the discipline.

CIVIL SERVICE COMMISSION

/s/Angela C. McConney
Commissioner

/s/Paul M. Stein
Commissioner

September 19, 2024