

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DAVID DEOLIVEIRA,
Appellant

v.

D-04-200

CITY OF TAUNTON,
Respondent

Appellant's Attorney:

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Appointing Authority's Attorney:

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Commissioner:

Christopher Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, David DeOliveira (hereinafter "Appellant"), is appealing the decision of the Appointing Authority, the City of Taunton (hereinafter "Appointing Authority" or "City"), to suspend him for eighteen (18) months from his position as a police officer. The Appellant withdrew his appeal under G.L. c. 31, § 42 at the commencement of the full hearing on April 16, 2008.

A hearing was held at the offices of the Civil Service Commission on April 16, 2008, May 19, 2008 and June 6, 2008. As no written notice was received from either party, the hearing was

declared private. Per agreement of the parties, members of the Appellant's family, none of whom were witnesses, were allowed to attend the hearings. Seven tapes were made of the hearings. All witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs.

FINDINGS OF FACT:

Thirty-two (32) documents were entered into evidence and the following witnesses testified before the Commission:

Appointing Authority Witnesses:

- Lieutenant James Coelho (hereinafter "Lt. Coelho");
- Carol Travis Travis(hereinafter "Ms. Travis");
- Patrolman Jayson LaPlante (hereinafter "Officer LaPlante");
- Sergeant Kevin Medas (hereinafter "Sgt. Medas");
- Patrolman Michael Morais (hereinafter "Officer Morais");
- Patrolman Eric Moura (hereinafter "Officer Moura");
- Police Chief Raymond O'Berg (hereinafter "Chief O'Berg");
- Sergeant Carlos Silva (hereinafter "Sgt. Silva");

Appellant Witnesses:

- Appellant, David DeOliveira (hereinafter "Appellant");
- Ms. Kerri Medas (hereinafter "Ms. Medas");
- John-Paul Thomas (hereinafter "Mr. Thomas").

Per agreement of the parties, I also admitted the criminal trial transcript of the testimony of Helvio Silveira and Lynn Costa, marked as Exhibits 30 and 31 respectively.

Based on the above-referenced exhibits and testimony, I make the following findings of fact:

1. The Appellant is a tenured civil service employee of the City, and has been employed as a police officer with the Taunton Police Department since 1997. He had previously been employed as a firefighter for the City. Prior to becoming a firefighter, he served in the United States Marine Corps for four years. (Testimony of Appellant)
2. Sergeant Kevin Medas (hereinafter "Sgt. Medas") has been employed by the Taunton Police Department since 1984. He is the Sergeant Supervisor in charge of community policing and grants for the Department, a position that he has held for eight (8) years. Before that assignment, Sgt. Medas was the Appellant's supervisor. (Testimony of Sgt. Medas; Exhibit 20)
3. The Appellant and Sgt. Medas developed a friendship as teenagers over twenty (20) years ago, prior to the Appellant becoming a Taunton police officer. (Testimony of Appellant and Sgt. Medas) Their friendship was strained in 1997 when Sgt. Medas, then unmarried, dated the Appellant's former girlfriend, Carol Travis. (Testimony of Sgt. Medas)
4. In 1998, Sgt. Medas married Kerri Wilkerson (now Medas); they subsequently had two children together. (Testimony of Medas)
5. The Appellant continued to have an "on-again, off-again" relationship with Carol Travis from 1994 to 2001. They never married, but they had a son, who was born in 2001. (Testimony of Appellant and Travis)
6. In early November 2003, Kerri Medas filed for divorce from Sgt. Medas, though the two continued to live together in the family home until June 2004. (Testimony of Sgt. Medas)
7. In December 2003, the Appellant began dating Kerri Medas. (Testimony of Appellant and Kerri Medas) The romantic relationship between the Appellant and Sgt. Medas's now ex-wife lasted until October 2004. (Testimony of Appellant)

8. In January 2004, Sgt. Medas began dating Carol Travis, the former girlfriend of the Appellant. (Testimony of Sgt. Medas)
9. After carefully listening to their testimony, and being guided by reason and common sense, I find that there was a personal animus between the Appellant and Sgt. Medas in 2004 as a result of their respective dating relationships at the time. (Testimony, demeanor of Appellant and Sgt. Medas)

Altercation on March 15, 2004

10. On March 15, 2004, at approximately 5:00 P.M., the Appellant concluded visitation with his son and dropped him off at Carol Travis's place of employment in Taunton. (Testimony of Appellant and Ms. Travis)
11. Ms. Travis put the child in his car seat and drove along West Britannia Street, Hopewell Street, and then Broadway Street toward the Taunton Green. (Testimony of Ms. Travis, Exhibit 14D)
12. The Appellant followed a few cars behind Ms. Travis toward the Taunton Green area. (Testimony of Ms. Travis, Testimony of Appellant)
13. The Appellant planned to go to the police station to drop off a detail slip. (Testimony of Appellant)
14. While driving, Ms. Travis was communicating via Nextel with Sgt. Medas. She also saw Sgt. Medas pass her on Broadway driving north. She and Sgt. Medas spoke via Nextel about going to CVS in the "Hart's Four Corners" area of Taunton. (Testimony of Ms. Travis, Testimony of Sgt. Medas)
15. After Sgt. Medas passed Ms. Travis on Broadway, he also passed the Appellant on Broadway and waved to the Appellant. The Appellant alleged that Sgt. Medas "flipped him off," but

Sgt. Medas denies this. Sgt. Medas then took a right onto Randall Street to loop around to meet Ms. Travis. (Testimony of Sgt. Medas, Testimony of Appellant, Exhibit 14E)

16. There was a considerable amount of testimony before the Commission regarding if and when the Appellant changed his travel route that day to follow Sgt. Medas. Although I make no finding on this issue, there is no dispute that the Appellant, Sgt. Medas and Carol Travis eventually arrived at the intersection of Hart Street (the road they were traveling on) and County Street (the cross street) in Taunton ("Hart's Four Corners") in their respective vehicles. (Testimony of Appellant, Sgt. Medas and Carol Travis) Exhibit 14A is an aerial photograph of the Hart's Four Corners intersection. (Exhibit 14A)
17. As referenced in Finding 14, Sgt. Medas and Carol Travis were planning to stop at a CVS drugstore, which would require a left turn onto County Street and then an immediate right turn into the CVS, which is located on County Street. (Testimony of Sgt. Medas and Carol Travis; Exhibits 14A and 14F)
18. At the intersection, there are two travel lanes: the left lane allows drivers to turn left on to County Street or stay straight on Hart street; the right lane allows drivers to make a right-turn only, on to County Street. (Testimony of Ms. Travis, Testimony of Sgt. Medas, Testimony of Appellant, Exhibits 14A and 14B).
19. At the intersection, Ms. Travis stopped her vehicle at a red light in the left lane, as she planned on turning left on to County Street and then turning right into the CVS. (Testimony of Ms. Travis). Sgt. Medas stopped his vehicle two vehicles behind Ms. Travis in the left lane, planning to follow Ms. Travis to the CVS. (Testimony of Ms. Travis, Testimony of Sgt. Medas)

20. According to Sgt. Medas, the Appellant drove up beside him, in the right lane, and motioned for Sgt. Medas to roll down the passenger window of Sgt. Medas's truck, which Sgt. Medas did. (Testimony of Sgt. Medas and Appellant)
21. The Appellant testified that once Sgt. Medas rolled his passenger window down, he asked Sgt Medas "what is your problem?" and also asked Sgt. Medas, "why did you flip me off?" (Testimony of Appellant)
22. Both the Appellant and Sgt. Medas acknowledged during their testimony before the Commission that the verbal altercation at the stop light was contentious and laced with vulgarities. (Testimony of Appellant and Sgt. Medas)
23. Sgt. Medas testified that during the heated verbal exchange at the stop light, the Appellant challenged him by saying, "let's take care of this behind the buildings." (Testimony of Sgt. Medas) During cross examination, the Appellant acknowledged saying words to this effect. (Testimony of Appellant)
24. On the important point of whether the Appellant challenged Sgt. Medas to "take care of this behind the buildings", and in regard to his overall testimony before the Commission, I found Sgt. Medas's testimony to ring true. He offered straightforward answers and he did not try to embellish his answers or try to testify to facts that he could not remember. He did not answer in a self-serving manner and his answers had the type of detail and uniqueness that reinforced their reliability. (Testimony, demeanor of Sgt. Medas)
25. I did not find the Appellant to be a credible witness. Many of his answers defied reason and common sense and appeared to be geared solely toward portraying himself in the best light, as opposed to offering a reliable account of the events that unfolded at Hart's Four Corners

on the day in question. Examples of his lack of candor are referenced in various findings of fact below. (Testimony, demeanor of Appellant)

26. Sometime during the above-referenced verbal exchange at the stop light, Sgt. Medas called the Chief of Police, Raymond O'Berg via Nextel to report the encounter. Chief O'Berg replied via Nextel and ordered Sgt. Medas to go to the police station and write out a blotter (an official police notebook entry) concerning the incident at the stoplight. Sgt. Medas disregarded this order and chose to proceed to the CVS Pharmacy. (Testimony of Chief O'Berg, Testimony of Sgt. Medas)
27. When the light turned green, Ms. Travis, followed by Sgt. Medas, turned left at the corner of Hart and County on to County Street. The Appellant, still situated in the right-turn only lane, proceeded straight through the light staying on Hart Street. (Testimony of Appellant, Sgt. Medas and Ms. Travis)
28. After passing through the intersection, Ms. Travis and Sgt. Medas turned right into the parking lot where the CVS in question is located. Ms. Travis parked in front of the building. Sgt. Medas parked next to her to the left of her vehicle. (Testimony of Ms. Travis and Sgt. Medas)
29. Exhibit 14A shows two vehicles parked to the left of the building perpendicular to other parking spaces on the side of the CVS building. Those two spaces are where Ms. Travis and Sgt. Medas were parked. Ms. Travis, her son, and Sgt. Medas entered the CVS. They split up to purchase different products and met again at the store register. (Testimony of Ms. Travis, Testimony of Sgt. Medas, Exhibit 14A)

30. The Appellant continued straight through the stop light and parked in the driveway of a house at the corner of County Street and Hart Street. That house belonged to John-Paul Thomas (hereinafter “Thomas”), a friend of the Appellant’s. (Testimony of Appellant)
31. A “strip mall” with multiple stores, including a Dunkin Donuts and a restaurant named “Classic Pizza”, is located across the street from the home of John-Paul Thomas on Hart Street. The CVS pharmacy in question is located behind that strip mall. (Exhibit 14A)
32. After parking his vehicle at the Thomas residence, the Appellant knocked on the front door. The Appellant testified that after nobody answered the door, he walked across the street to get something to eat or drink from the Dunkin Donuts or Classic Pizza¹. (Testimony of Appellant)
33. The Appellant testified that “the pizza place was kind of busy; so I walked toward Dunkin Donuts.” The Appellant testified that he then ended up at the CVS Pharmacy, located behind the strip mall in question, where he saw Sgt. Medas’s Ford Expedition parked in front of the CVS. I find it improbable that the Appellant’s visit to the CVS after the heated exchange at the stop light was, as he suggested during his testimony, a coincidence. Rather, the most plausible explanation is that the Appellant intended to continue the confrontation that had occurred only moments earlier. This was yet another answer by the Appellant that undermined his credibility. (Testimony, demeanor of Appellant)
34. Similarly, I find that it stretches the bounds of reason and common sense that it was a further coincidence that John-Paul Thomas, the Appellant’s long-time friend and the owner of the home that the Appellant had just left, happened to leave his home moments later and drive to

¹ The Appellant’s post-hearing brief states that the Appellant walked across the street “to get something to eat or drink and to try and speak to Kevin Medas again.” (*emphasis added*) That was not this Commissioner’s recollection of the Appellant’s testimony and it prompted me to review the Appellant’s tape-recorded testimony. In his testimony before the Commission, the Appellant testified that he did not learn that Sgt. Medas’s Ford Expedition was parked in the CVS parking lot until after he crossed the street and after he walked around the strip mall.

the CVS parking lot with two of his male friends in tow. Mr. Thomas's testimony before the Commission was not plausible and was inconsistent with his prior testimony and statements, including how long he remained in his vehicle after entering the CVS parking lot. More generally, I did not find Mr. Thomas to be a credible witness. In addition to being inconsistent with his own prior statements, his answers appeared to be geared solely toward portraying his friend, the Appellant, in the most favorable light. I give no weight to his testimony. (Testimony, demeanor of Mr. Thomas)

35. The Appellant acknowledged during his testimony that he waited outside the CVS for Sgt. Medas to exit the store. (Testimony of Appellant)

36. Sgt. Medas and Ms. Travis eventually exited the CVS; Sgt. Medas walked to his vehicle and Ms. Travis walked to her vehicle and she went to place her son in the back seat of her vehicle. (Testimony of Sgt. Medas and Ms. Travis)

37. During his testimony before the Commission, the Appellant acknowledged that he followed Sgt. Medas to his vehicle in the CVS parking lot and that Sgt. Medas got into his vehicle and shut the door with the window up. (Testimony of Appellant)

38. Sgt. Medas testified that he got into his vehicle, started it and put it into drive. The Appellant motioned for him to roll down his window, which Sgt. Medas did. (Testimony of Sgt. Medas) The two men exchanged words, and then the Appellant spat in Sgt. Medas's face. (Testimony of Sgt. Medas)

39. The Appellant denies spitting in the Appellant's face while standing at the driver's side door of Sgt. Medas's Ford Expedition in the CVS parking lot on the day in question. As referenced above, however, I found Sgt. Medas to be a more credible witness whose version of events on the day in question was more plausible than the Appellant's. The Appellant's

lack of candor continued during the line of questioning regarding the events at the CVS parking lot. Asked if he was “angry” with Sgt. Medas at the time, the Appellant, incredulously, stated, “absolutely not” despite acknowledging that the two men had just engaged in a vulgarity-laced dispute and the Appellant had challenged Sgt. Medas to settle the dispute “behind the buildings.” (Testimony, demeanor of Appellant and Sgt. Medas) Further, in separate testimony before the Commission, Kerri Medas, (called to testify by the Appellant) who was dating the Appellant at the time of this incident, described a strikingly similar incident in which the Appellant spit in her face sometime in 2004 after he discovered that she had spoken to an ex-boyfriend. I found her testimony to be credible. (Testimony of Kerri Medas)

40. Sgt. Medas then rolled up his window and, for the second time that day, called the Police Chief. The Chief told him to go to the police station. (Testimony of Sgt. Medas, Testimony of Chief O’Berg)
41. Sgt. Medas then cracked his door open so that the Chief could hear the Appellant through the Nextel phone. (Testimony of Sgt. Medas)
42. The Appellant then grabbed the vehicle door open and started punching Sgt. Medas in the head and face. Sgt. Medas was still in his vehicle. (Testimony of Sgt. Medas)
43. Carol Travis was a percipient witness at the CVS parking lot on the day in question. After she left the CVS Pharmacy, she walked to her vehicle and started to put her son in his car seat. She then looked up and could see in Sgt. Medas’s passenger window. She saw Sgt. Medas in his vehicle leaning over the passenger side. She saw the Appellant punching Sgt. Medas from the driver’s side of the Ford Expedition. (Testimony of Ms. Travis)

44. I found Carol Travis to be a good witness who offered credible testimony. She had a calm demeanor; she thoughtfully considered each question and offered consistent answers that held up to scrutiny under cross-examination. (Testimony, demeanor of Carol Travis)
45. The Appellant then pulled Sgt. Medas out of the vehicle by his shirt collar, causing Sgt. Medas to fall on the ground. (Testimony of Sgt. Medas)
46. Sgt. Medas's truck moved forward and collided with a parked vehicle. (Testimony of Sgt. Medas)
47. Sgt. Medas testified that when he fell to the ground, the Appellant positioned himself above him and delivered another series of punches. The Appellant kicked Sgt. Medas in the head and chest. Sgt. Medas grabbed the Appellant's leg to prevent him from kicking again. (Testimony of Sgt. Medas)
48. The Appellant testified before the Commission that he was acting in self defense and only struck Sgt. Medas after Sgt. Medas twice opened his truck door and struck the Appellant with the door. Further, the Appellant testified he had no place to run. (Testimony of Appellant) The Appellant's testimony on this point, particularly in regard to his statement that he had no place to run while standing in a CVS parking lot, did not ring true and I did not find his overall testimony regarding his interaction with Sgt. Medas in the CVS parking lot to be credible. (Testimony, demeanor of Appellant)
49. The Appellant also denied kicking Sgt. Medas while Sgt. Medas was on the ground. (Testimony of Appellant) The Appellant's denial is refuted by the credible testimony of percipient witness Carol Travis, who had now walked over to the Ford Expedition where she saw Sgt. Medas on the ground "in the fetal position" being kicked by the Appellant. (Testimony of Ms. Travis)

50. While on the ground, Sgt. Medas grabbed the Appellant's shoe, which was a black pullover boot, and threw it toward the vehicles. (Testimony of Sgt. Medas)
51. The altercation continued and Sgt. Medas was grabbed by two men, identified as John-Paul Thomas (the friend of the Appellant who owned the home the Appellant had just come from) and Owen Tirrell, both of whom held Sgt. Medas by each arm. They were yelling "stop it", but they continued to hold Sgt. Medas's arms. Neither men restrained the Appellant (Testimony of Sgt. Medas and Ms. Travis; Exhibit 31)
52. Officer Michael Morais was the first police officer to arrive on the scene after having received a radio call to report to the CVS parking lot at Hart's Four Corner. (Testimony of Morais)
53. When he arrived, Officer Morais observed Sgt. Medas's vehicle up against another vehicle. Officer Morais also observed Sgt. Medas with a bump on his head and dried blood. Officer Morais spoke with Sgt. Medas and asked him if he wanted an ambulance. Sgt. Medas responded that he did want an ambulance, and Officer Morais then called a patrol supervisor. (Testimony of Morais)
54. Officer Morais did not speak with the Appellant at the scene. (Testimony of Morais)
55. After the altercation, Sgt. Medas was taken by ambulance to Morton Hospital. Sgt. Medas was having difficulty breathing. (Testimony of Sgt. Medas) He sustained bruising around his ear, bleeding in the back of his head and two broken ribs. Exhibits 15B and 15C depict Sgt. Medas's injuries. (Testimony of Sgt. Medas, Exhibits 15B and 15C). Sgt. Medas sustained injuries to his head, face and chest, as well as fractures to his ribs. (Exhibit 17).
56. Taunton Police Officer Jayson LaPlante (hereinafter "Officer LaPlante") was approximately one-half mile away from the CVS when he received a radio dispatch to proceed to the scene.

He pulled into the parking lot from behind the Dunkin Donuts. He exited his cruiser and called for the Appellant to come to him. He observed that the Appellant's knuckles were bleeding and he had an injury to his elbow. He told the Appellant to calm down and waited for a supervisor to arrive. The Appellant told Officer LaPlante that he was struck by Sgt. Medas's door and he had to defend himself. Officer LaPlante heard Sgt. Medas say "he put the boots to me", referring to the Appellant. (Testimony of Officer LaPlante, Testimony of Appellant, Exhibit 5)

57. Sergeant Carlos Silva (hereinafter "Sgt. Silva") also responded to the CVS parking lot on March 15, 2004. He took photos of the Appellant at the scene and photos of Sgt. Medas at the Hospital. (Testimony of Sgt. Silva; Exhibit 15A through 15F)

58. Exhibit 15A shows the hand of the Appellant, with the knuckles scraped, the swollen left elbow, and a woman's car at the bottom right. Exhibit 15B shows Sgt. Medas's right hand with scrapes and his face with cuts and bruises. Exhibit 15C shows the back of Sgt. Medas's bleeding head and Sgt. Medas's injured chest. (Exhibits)

59. When Lt. James Coelho, who would later be charged with investigating this matter, arrived at the scene, he saw Sgt. Medas's vehicle smashed into another vehicle. Sgt. Medas was already in an ambulance and Lt. Coelho observed him in the ambulance, lying on a gurney with a contusion on his forehead, a split lip and bleeding from the back of his head. (Testimony of Lt. Coelho)

60. Lt. Coelho also observed the Appellant standing on the side of the CVS. Lt. Coelho spoke with the Appellant, with Morais, and the civilian witnesses. Lt. Coelho spoke with Carol Travis at the hospital. (Testimony of Lt. Coelho, Exhibit 10, Exhibit 11 and Exhibit 12)

61. Lt. Coelho called an ambulance for the Appellant, but the EMTs just administered first aid for his swollen elbow and scrapes on his knuckles. The Appellant declined to go to the hospital. (Testimony of Lt. Coelho)
62. Lt. Coelho then cleared the scene, went to the police station, and then went to the hospital with Sgt. Silva to interview Sgt. Medas. Lt. Coelho took Sgt. Medas's statement at the hospital. (Exhibit 13) Lt. Coelho wrote his own report of the incident. (Exhibit 6) Lt. Coelho also prepared an accident report because of the collision of Sgt. Medas's vehicle with the other parked vehicle. (Exhibit 9, Testimony of Lt. Coelho)
63. After the initial investigation regarding the instant matter, the Appellant was charged with the following violations of the Rules and Regulations of the Taunton Police Department:

Required Conduct:

24. Personal Relationships – All officers shall be considerate and polite at all times to all department personnel and maintain good relationships with their superiors and their fellow officers in the spirit of mutual concern for their common objective.

Prohibited Conduct:

1. Conduct unbecoming of an officer – The commission of any specific act or acts of immoral, improper, disorderly, or intemperate personal conduct which reflects discredit upon the officer himself, upon his fellow officers or upon the Police Department.
 6. Discourtesy – Being rude, impolite, contemptuous or insolent to an officer of rank, to a fellow officer or to a member of the public.
- (Exhibits 1 and 2)

64. Following the investigation, the Taunton Municipal Council held a disciplinary hearing for the Appellant and Sgt. Medas. At the hearing, Chief O'Berg recommended that the Appellant be suspended for eighteen (18) months without pay and also that he receive counseling on anger management and personal relationships. For Sgt. Medas, Chief O'Berg recommended a letter of reprimand in his personnel file. (Exhibit 25) This recommendation was based on Sgt. Medas disobeying the Chief's directive to return directly to the police

station. (Testimony of Chief O'Berg) He recommended the 18-month suspension for the Appellant because the Appellant was the instigator of this incident, but he did not believe it was a firing offense. (Testimony of Chief O'Berg)

65. The Municipal Council imposed an 18-month suspension on the Appellant and required him to attend anger management classes and psychological counseling at his own expense. Prior to returning to duty, the Appellant was required to receive a certificate from a licensed psychologist or psychiatrist that he is fit to perform the duties of a police officer. He was also notified that any further disciplinary infractions or violations of department rules, regulations or policies will result in his immediate termination. (Exhibit 2)

66. The Municipal Council demoted Sgt. Medas, but the demotion was later rescinded and a warning letter was placed in his personnel file as part of a settlement agreement reached by the parties after Sgt. Medas appealed the demotion to an arbitrator. (Exhibit 22)

67. The Appellant was tried in the Taunton District Court from May 15-18, 2007 on criminal charges of Assault and Battery with a Dangerous Weapon, and Assault and Battery. The jury found him not guilty on both counts. (Stipulated Fact, Testimony of Appellant).

68. On May 5, 2004 the Appellant appealed the decision of the Appointing Authority to the Civil Service Commission. The matter before the Commission was continued on multiple occasions due to the pending court action.

CONCLUSION

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300,304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v.

Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when 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." Id. at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of 44444by impairing the efficiency of public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997).

The Appointing Authority's burden of proof is one of a preponderance of the evidence which 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). In reviewing an appeal under G.L. c. 31, §43, if the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, 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." Watertown v. Arria, 16 Mass.

App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975) and Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

By a preponderance of the evidence, the City of Taunton has shown that David DeOliveira engaged in conduct unbecoming of a police officer, in violation of the Rules and Regulations of the Taunton Police Department, and there was reasonable justification to suspend the Appellant for eighteen (18) months.

On March 15, 2004, the Appellant was engaged in an off-duty physical altercation with Sergeant Kevin Medas. As part of the three days of hearings before the Civil Service Commission, I carefully reviewed the testimony of four percipient witnesses to the March 15, 2004 altercation, including the Appellant, Sergeant Medas, Carol Travis and John-Paul Thomas. It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Department of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

For the reasons detailed in the above findings, I found Sergeant Medas and Carol Travis to be reliable witnesses. I fully credited their testimony in regard to the events that transpired in the CVS parking lot on March 15, 2004.

Conversely, for the reasons also cited in the above findings, I did not find the Appellant or John-Paul Thomas to be reliable witnesses. I did not credit their testimony in regard to the events that transpired in the CVS parking lot on the day in question.

Having fully credited the testimony of Sergeant Medas and Carol Travis, I conclude that the Appellant, after a heated exchange at an intersection in which he challenged Sgt. Medas to settle a personal dispute, "behind the buildings", waited for Sgt. Medas to exit a CVS, followed him to his vehicle; spit in Sgt. Medas's face and then repeatedly punched Sgt. Medas, both while Sgt. Medas was in his truck and after the Appellant dragged Sgt. Medas from the truck, causing Sgt. Medas to fall to the ground.

The Appellant claims he was acting in self-defense because Sgt. Medas allegedly struck him in the arm with his car door. I do not credit his testimony in regard to being struck in the arm with the car door. However, even if it were true that Sgt. Medas struck him with the door of his truck, the Appellant had multiple opportunities to retreat or disengage Sgt. Medas. Instead, the Appellant stopped alongside of Sgt. Medas's vehicle at the corner of Hart Street and County Street and loudly argued with him. He followed Sgt. Medas and Ms. Travis to CVS and waited in the CVS parking lot for them to exit. When Sgt. Medas and Ms. Travis came out of the store, the Appellant followed Sgt. Medas to his truck and argued with him. Even if Sgt. Medas did hit the Appellant on the elbow with his car door, the Appellant had the opportunity to retreat before resorting to force. He could have simply walked away and let Sgt. Medas leave the scene. Sgt. Medas was already in his car and had placed it in drive. Sgt. Medas was clearly getting ready to leave.

Sgt. Medas was not engaging the Appellant in a fight when he was in his truck. Rather, he was calling Chief O'Berg and trying to report what happened. The Appellant, instead of leaving

the scene, continued to instigate a fight with Sgt. Medas. He remained at the door of the vehicle, and Sgt. Medas opened the door so that the Appellant could hear the Chief on the other end of the Nextel. The Appellant reached in and started punching Sgt. Medas. Unlike the Appellant, Sgt. Medas was positioned in his vehicle and had no place to retreat. The Appellant then pulled Sgt. Medas out of the vehicle and onto the ground, continued to punch him and kicked him while he was on the ground. Self-defense did not require him to use any level of force against Sgt. Medas, let alone the amount of force he did use. This force resulted in serious injuries to Sgt. Medas, which required him to seek treatment at the hospital.

I also conclude that the Appellant had his friends; John-Paul Thomas, Peter Thomas and Owen Tirrell come to the CVS parking lot to assist him. He had parked at their house on Hart Street before going across the street to wait for Sgt. Medas and Ms. Travis to exit the CVS. As referenced above, I discredit the testimony of John-Paul Thomas that his presence at the CVS was coincidental. His testimony was not consistent with respect to prior statements he provided on how long he, his brother, and Tirrell were sitting in the car and his answers appeared to be geared solely toward portraying the Appellant in the most favorable light. The sequence of events leads to a reasonable conclusion that the Appellant intended to confront Sgt. Medas at the CVS parking lot and had asked his friends, John-Paul Thomas, Peter Thomas and Owen Tirrell, to come to the CVS to provide "back up." This further supports the conclusion that the Appellant was the aggressor in this situation and instigated the physical fight with Sgt. Medas when he had many opportunities to continue down a different path.

The violent actions of the Appellant on March 15, 2004 were inexcusable; were unbecoming of a police officer and reflected poorly on the Taunton Police Department. Police officers must "comport themselves in accordance with the laws that they are sworn to enforce and behave in a

manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into the 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.” Meaney v. City of Woburn, 18 MCSR 129, 133 (2005), citing Police Comm’n of Boston v. Civ. Serv. Comm’n, 22 Mass. App. Ct. 364, 371 (1986).

Although the Appellant waived his procedural appeal with the Commission under G.L. c. 31, § 42, he has raised the issue that the citizen complaint process, outlined in the collective bargaining agreement, was not followed in this matter, as evidence that there was some degree of personal bias or ulterior motives in regard to the discipline imposed. There was not a citizen complaint in this matter. It was the Chief himself who investigated and recommended discipline. The Chief himself directed the investigation, and he was also involved in the matter by virtue of his telephone conversations with Sgt. Medas during the incident. The Appellant was not carrying out his duties when he assaulted Sgt. Medas. As this situation did not involve a citizen complaint, the City was not bound to the citizen complaint procedure prior to conducting a hearing and imposing discipline on the Appellant and Sgt. Medas. The Chief did not “receive” a complaint that triggered the contractual process. The Chief initiated the investigation which led to the charges and the Municipal Council Hearing. Further, the citizen complaint process would require the Chief or his designee to sit on the three-member panel. Under the circumstances of this case, where the Chief himself initiated the investigation and recommended discipline, that would make little sense.

Moreover, even if the Appellant had not waived his appeal under Section 42, there is no evidence that the Appointing Authority did not comply with the procedural requirements articulated in G.L., c. § 41. Rather, the Appellant is arguing that the Appointing Authority may not have complied with provisions of the collective bargaining agreement. If a collective bargaining agreement contains a conflict between any of its provisions and any of the statutes enumerated in M.G.L. c. 150E, § 7(d), then the terms of the collective bargaining agreement shall prevail. Civil Service law does not contain one of the statutes enumerated in § 7(d), that yield to contrary provisions of a collective bargaining agreement. Dedham v. Dedham Police Ass'n, 46 Mass. App. Ct. 418, 420 (1999), citing, Fall River v. Teamsters Union Local 526, 27 Mass App. Ct. 649, 651 (1989). The provisions of G.L. c. 31, § 41 prevail in this matter and, as referenced above, the evidence shows that the procedural requirements enumerated in this section of the statute were complied with..

The Appointing Authority had reasonable justification for finding that the Appellant's conduct on March 15, 2004 violated Required Conduct Rule 24 (Personal Relationships) and Prohibited Conduct Rules 1 (Conduct Unbecoming a Police Officer) and 6 (Discourtesy).

Pursuant to G.L. c. 31, § 43, the Commission must also pass judgment on the penalty imposed by the appointing authority. Town of Falmouth v. Civil Service Commission, 447 Mass. 814 (2006). In doing so, the Commission determines 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). While the Commission has the authority to modify the penalty imposed by the Appointing Authority, 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 Appointing Authority on the basis of essentially similar fact finding without an adequate explanation. Town of Falmouth, citing, Police Commissioner of Boston v. Civil Service Commission, 39 Mass. App. Ct. 594 (1996).

The circumstances of this violent incident, where the Appellant was clearly the aggressor, do not warrant a modification of the penalty.

For all of the above reasons, the Appellant's appeal under Docket No. D-04-200 is hereby *dismissed*.

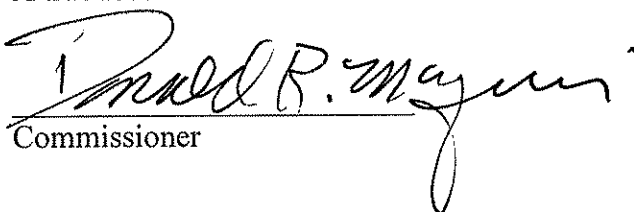
Civil Service Commission



Christopher Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor, Commissioners) on September 4, 2008.

A true record. Attest:



Commissioner

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

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

Notice to:

Peter J. Berry, Esq. (for Appointing Authority)

Robert M. Spiegel, Esq. (for Appointing Authority)
Daniel J. McColgan, Esq. (for Appellant)