COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

DANIEL DESMOND,
Appellant

v. D1-14-50

TOWN OF WEST BRIDGEWATER,
Respondent

Appearance for Appellant:
Timothy M. Burke, Esq.
David B. Fisher, Esq.
Law Offices of Timothy M. Burke
160 Gould Street, Suite 100
Needham, MA 02494-2300

Appearance for Respondent:
David T. Gay, Esq.
John L. Holgerson, Esq.
Gay & Gay, P.C.
73 Washington Street
P.O. Box 988
Taunton, MA 02780

Commissioner:
Christopher C. Bowman

DECISION AFTER REMAND

On December 11, 2014, the Civil Service Commission (Commission) issued a decision (Desmond v. Town of West Bridgewater, (27 MCSR 645 (2014)) affirming the Town of West Bridgewater (Town)'s decision to terminate the Appellant, Daniel Desmond (Mr. Desmond) from his position as police officer.

On April 21, 2016, the Superior Court (Desmond v. Town of West Bridgewater, Suffolk Sup. Ct. No SUCV 2015-0074-D (2016)), issued a decision stating in relevant part that: "There is no serious dispute that the evidence regarding Mr. Desmond's conduct supported a finding that

he testified untruthfully in court and misused the CGIS system. There is, accordingly, no serious question that discipline was warranted."

In regard to the severity of the discipline, the Court stated in part that "Considering Mr. Desmond's case on its own, the Commission's findings regarding the nature of the misconduct amply supported its determination not to overturn the termination as unduly harsh." However, the Court also found that I "failed to make several crucial findings" to determine whether the Town "violated the principle of uniformity and equitable treatment in terminating Mr. Desmond" while retaining another police officer who, several years earlier, also offered "false testimony" in a Court proceeding. The Court stated in part that "the key question is not whether the Town's inaction justifies overturning a so-called 'valid decision'. It is whether the differential treatment arose from favoritism, contrary to the civil service law."

The Court went on to state that: "Desmond did advance a reason for the different treatment, grounded in favoritism, namely that Desmond and Lt. Flaherty had an angry encounter. The Commission's job as fact-finder is to resolve such disputes, but, again, it did not do so. Its rationale for leaving this issue open – that Lt. Flaherty did not terminate Desmond and that 'all of the supportable charges against Mr. Desmond stand independent of any action taken by Lt. Flaherty' – has force on the question of misconduct, but falls short on the question of discipline. Lt. Flaherty's report resulted in unsubstantiated charges that the decision-makers most decidedly did adopt. The decision-makers not only found misconduct; they also decided that termination was the remedy; based upon all of the charges, including the ones rejected by the Commission. Lt. Flaherty's animus, if any, therefore may well have played into the termination decision, even if some of his assertions had a basis. Where no explanation existed on the record for the disparate treatment, the Commission erred in not resolving the factual

dispute. If there was no argument, then the Commission needed to explore whether there was some other reason for the different treatment." (emphasis added)

After receiving the Court's decision, I re-opened the hearing on this matter, re-heard from Mr. Desmond and Lt. Flaherty, and, for the first time, heard from three (3) additional percipient witnesses to resolve the factual dispute regarding whether or not there was an angry encounter between Mr. Desmond and Lt. Flaherty.[1]

It is undisputed that, on June 17, 2013, an annual mandatory firearms qualification training for several West Bridgewater police officers occurred at an outdoor firing range in East Bridgewater. Present at the training session were: Lt. Flaherty; Mr. Desmond; four (4) other West Bridgewater police officers; and one (1) police officer from the East Bridgewater Police Department. It is also undisputed that, at some point, Lt. Flaherty received a phone call from the Police Chief informing him that a sergeant from the West Bridgewater Police Department had committed or attempted to commit suicide.[2] Upon receiving this information, Lt. Flaherty called together the West Bridgewater police officers who were present, including Mr. Desmond, and passed on this troubling information. What occurred immediately after this is in dispute.

According to Mr. Desmond, immediately after Lt. Flaherty passed on this information, he (Mr. Desmond) said "What the fuck." Then, also according to Mr. Desmond, Mr. Desmond "looked directly at Vic [Lt. Flaherty] and said 'You fucking killed him; I hope you're happy.'" Mr. Desmond attributed his purported outburst to his understanding that the police sergeant who committed suicide was the subject of an internal review being conducted by Lt. Flaherty. Lt. Flaherty testified that Mr. Desmond did not say "you fucking killed him; I hope you're happy."

[1] As part of the remand hearing, I also accepted three (3) exhibits from the Appellant (Remand 1 through 3); and one exhibit (Remand Exhibit 4) from the Town. I left the record open for the Town to submit additional exhibits, which were submitted and marked as Remand Exhibits 5 through 11. Finally, I allowed the Town's motion to submit one additional exhibit, which was marked as Remand Exhibit 12.

[2] Tragically, the police sergeant did indeed commit suicide.

As part of the re-opened hearing, I heard from the following three (3) West Bridgewater police officers who were present at the firing range on June 17, 2013 and were present when Lt. Flaherty passed on the troubling information about the West Bridgewater police sergeant:

1. Sergeant Russell Regan;
2. Sergeant Timothy Nixon; and
3. Police Officer Kenneth Thaxter.

Sgt. Regan has been a member of the W**B**PD for eleven (11) years and has had a professional relationship with Mr. Desmond during that time. Sgt. Nixon has been a member of the W**B**PD for twelve (12) years and has known "Danny" for approximately twenty (20) years. Officer Thaxter has also been a member of the W**B**PD for approximately twenty (20) years (beginning part-time) and has socialized with Mr. Desmond over the years that he has known him.

I found the testimony of each of these three (3) witnesses to be highly credible. They listened to the questions carefully. They offered candid, unvarnished responses regarding their recollections about an incident that occurred three (3) years prior without any apparent regard as to whether it would paint Mr. Desmond (or Lt. Flaherty) in a positive or negative light. While each of them, given the passage of time, understandably had a somewhat different recollection of Mr. Desmond's initial verbal response that day ("Oh fuck" (Testimony of Sgt. Regan); no verbal response (Testimony of Sgt. Nixton); "Oh no" (Testimony of Officer Thaxter)); none of these three individuals remember hearing Mr. Desmond say to Lt. Flaherty: "You fucking killed him; I hope you're happy." It is inconceivable to me that, had Mr. Desmond actually made those damning statements to Lt. Flaherty, that none of these witnesses would have heard and/or remembered it. I find that the purported angry encounter between Mr. Desmond and Lt. Flaherty, as testified to by Mr. Desmond, did not occur. Having determined that this angry

encounter did not occur, it could not have caused Lt. Flaherty, who conducted the investigation against Mr. Desmond, to be biased against him.

As referenced above, the Court also stated: "If there was no argument, then the Commission needed to explore whether there was some other reason for the different treatment." Mr. Desmond did not put forth any other reason that Lt. Flaherty would be biased against him.

That leaves the issue of why the Town, several years prior, chose to retain another police officer who, as described by the Superior Court, also offered "false testimony" in a Court proceeding and whether the differential treatment arose from favoritism.

Even prior to the re-opening of this hearing, I had considered the already-undisputed fact that, many years earlier, another West Bridgewater police officer, whose testimony in federal district court was described by the United States Court of Appeals as being "riddled with implausibilities and inconsistencies" faced no disciplinary action.

The following is undisputed. In May of 2001, Officer Michael Kominsky of the West Bridgewater Police Department conducted a motor vehicle stop that resulted in the arrest of a passenger named Marcel Henderson for a firearms offense. A motion to suppress the firearm from evidence in the case was heard in the Federal District Court in Boston by the Honorable Mark Wolf in late 2002. Officer Michael Kominsky testified at the motion to suppress. Judge Wolf denied the motion to suppress and Henderson's trial began in mid-November, 2002. At the start of the trial, the prosecution provided Henderson's attorney with information that he had requested in 2001 concerning complaints made about the conduct of Officer Michael Kominsky during motor vehicle stops which evidence was relevant to the issues at the motion to suppress hearing. Due to the government's failure to provide the aforementioned information about Officer Kominsky, Judge Wolf declared a mistrial in Henderson's trial and scheduled a

reopening of the hearing on the motion to suppress. Testimony on the renewed motion to suppress was taken by Judge Wolf and he denied the motion in late December, 2002. Marcel Henderson was tried and convicted in 2003 and had his conviction overturned on appeal by the First Circuit Court of Appeals on September 8, 2006.

The First Circuit Court of Appeals' decision to overturn the conviction was based largely upon its belief that Kominsky was not a credible witness as it stated that "…we have found that Kominsky's testimony was riddled with implausibilities and inconsistencies, and that it was disbelieved by the district court in important respects and contradicted by law enforcement witnesses in others. Under these circumstances, we are left with a firm and definite conviction that the district court's critical finding that Kominsky credibly testified that Henderson was not wearing a seat belt was clearly erroneous." The Court reversed the decision allowing the motion to suppress and vacated Henderson's conviction.

In their post-hearing brief, the Town, regarding the issue of whether there was deferential treatment toward Mr. Kominsky, concedes that " … Kominsky and Desmond have not been treated with uniformity concerning their respective testimonies, at least up to this point in time."

As stated in the Superior Court decision, however, " … the key question is not whether the Town's inaction justifies overturning a so-called 'valid decision.' It is whether the differential treatment *arose from favoritism, contrary to the civil service law*." (*emphasis added*)

As part of the re-opened hearing, I heard testimony on the issue of whether favoritism caused the Town to take no disciplinary action against Mr. Kominsky:

- Donald Clark, who served as the Town's Police Chief from 2004 until 2016;
- Raymund Rogers, who, from approximately 1998 until 2007 or 2008, served as the Lieutenant in charge of internal affairs; and
- Victor Flaherty, the lieutenant who conducted the investigation into Mr. Desmond and

who was recently promoted to Police Chief after Mr. Clark's retirement.

Based on their collective testimony, there is no dispute that Robert Kominsky, the father of Officer Michael Kominsky, served as the Town's Police Chief from 1997 until 2004. To put this in context, Officer Kominsky testified before Judge Wolf in 2002 (while his father was the Police Chief); and the Court of Appeals decision, which offered the most damning description of Officer Kominsky's testimony, was issued in 2006 (while Mr. Clark served as Police Chief).

As part of the re-opened hearing, the Town, as argued in their post-hearing brief, sought to show that the only person to show favoritism toward Officer Kominsky was Lt. Rogers, who has not been employed by the Town since 2008. According to the Town, the record clearly shows that, while Robert Kominsky served as Police Chief, Lt. Rogers was the person delegated with responsibility (by the Board of Selectmen) for disciplining Officer Kominsky to avoid a conflict of interest. The Town argues that Lt. Rogers, in 2002, was aware of potential problems regarding Officer Kominsky's testimony in federal court, as well as other performance issues, and that Lt. Rogers failed to investigate and/or take appropriate disciplinary action.

Chief Clark, who made the recommendation to terminate Mr. Desmond, testified that he did not show any favoritism toward Mr. Kominsky. In his testimony, he pointed to a 2004 incident in which then-Sergeant Clark wrote up Officer Kominsky for insubordination when he told Sgt. Clark to "go fuck yourself." Further, Mr. Clark testified that he did not become aware of the Court of Appeals decision until years after it was issued in 2006, and that his decision not to pursue discipline against Kominsky was because too much time had elapsed since 2002, at which time, according to Mr. Clark, the matter should have been previously investigated.

Lt. Rogers testified that approximately two (2) weeks after the Court of Appeals decision was issued in 2006, he printed out a copy of the decision, put it on Chief Clark's desk and said to

Chief Clark, "Have you seen this? I don't know what we're going to do about it" and that Chief Clark replied by saying "Don't worry about it; I'll take care of it." That testimony by Lt. Rogers did not sound plausible to me. Lt. Rogers acknowledged during his testimony that he had a poor working relationship with Chief Clark. Lt. Rogers was angry that then-Sgt. Clark had been chosen over him to become Police Chief and 2004 and he acknowledges that he attempted to convince other members of the Department to thwart Mr. Clark in his role as Police Chief. Further, Lt. **Rogers** testified about being demoralized by purported efforts by Chief Clark to strip him of his duties, including internal affairs, soon after Mr. Clark became Police Chief. Against this backdrop, I simply don't believe that, in 2006, Lt. **Rogers** walked into Chief Clark's Office to discuss the Court of Appeals decision. I find that this conversation did not happen.

I do, however, find that shortly after the Court of Appeals decision was issued in 2006, Chief Clark did indeed become aware of the Court's decision, which contained the damning description of Officer Kominsky's testimony. The record shows that the decision was prominently featured in a local newspaper and, based on the testimony of the three police officers (who also testified about the fire range conversation), I infer that, at or around the same time, that news article was posted in the Police Department. During his testimony, Chief Clark was unable (or unwilling) to even identify the *year* in which he may have become aware of the 2006 Court of Appeals decision. Even then-Lt. Flaherty recalls having a conversation with Chief Clark in 2010 in which he recalls that Chief Clark was already aware of the Court's decision. To me, the most plausible scenario is that Chief Clark was aware of the Court's decision upon it being published in the local newspaper – and posted in the Police Department – in 2006. That turns to the issue of why, upon becoming aware of the Court of Appeals decision, Chief Clark did not initiate disciplinary proceedings against Mr. Kominsky.

Chief Clark testified that, whenever he became aware of the decision, he believed it was too late to conduct an investigation regarding testimony offered in 2002, and that Mr. Rogers, in his capacity as head of internal affairs, and having been delegated responsibility for disciplining Mr. Kominsky, should have investigated the matter back in 2002. Chief Clark denied showing any favoritism toward Officer Kominsky, pointing to the fact that he wrote Officer Kominsky up for the previously-referenced insubordination in 2004 when he (Clark) was a sergeant. I had to consider this testimony in the context that Mr. Clark appears to have a strong friendship with former Police Chief Robert Kominsky, Officer Kominsky's father. In addition to a long term professional relationship with Robert Kominsky, Chief Clark has had an ongoing social relationship with him. Chief Clark has previously been deer hunting with Robert Kominsky, has visited his home socially, and since sometime around 2007 to the present, has been regular golfing partners with Robert Kominsky and other local Chiefs.

Also, in assessing whether favoritism played a role in not pursuing disciplinary action against Officer Kominsky, I do credit that portion of Lt. Rogers's testimony regarding his role in the 2004 incident regarding Officer Kominsky's insubordination. According to Lt. Rogers, he told then-Chief Kominsky that he was going to suspend Officer Kominsky for three (3) days for his insubordination and Chief Kominsky told Lt. **Rogers** that the discipline should be limited to a written warning. Officer Kominsky was ultimately suspended for two (2) days for that incident.

In sum, after reviewing all of the testimony that I have deemed credible and the relevant exhibits, and being guided by commonsense, there does appear to be some indicia that favoritism played a role in failing to investigate and/or discipline Officer Kominsky, in 2002 (while Officer Kominsky's father was the Police Chief) and/or 2006 (while Mr. Clark served as Police Chief), regarding Officer Kominsky's 2002 testimony in federal court. Put another way, Chief Clark,

whenever he learned of the 2006 Appeals Court decision, should have initiated an investigation to determine if disciplinary action should be taken against Officer Kominsky. He did not.

I make this finding, however, without the benefit of ever hearing from Officer Kominsky, or his father, Robert Kominsky. In this regard, it is of concern to me that, by following the Superior Court's decision on remand, we have risked having a de facto disciplinary hearing regarding a tenured civil service employee (Officer Kominsky) who has never received notice of any charges against him, let alone all of the other protections afforded to tenured civil service employees. While the Court decision suggests that we are solely evaluating the actions (or inactions) of the *Appointing Authority*, that cannot happen without first examining the underlying actions of *Mr. Kominsky*, for which there was never any internal investigation and/or charges filed.

For the sake of this decision, however, and consistent with the instructions of the Court, I have, as referenced above, found that Mr. Kominsky and Mr. Desmond have not been treated with uniformity; that there does appear to be some indicia that favoritism played a role in failing to investigate and/or discipline Officer Kominsky; but that there was no animus against Mr. Desmond that may have contributed to the decision to terminate him.[3]

That turns to the issue of whether the Commission, based on the disparate treatment here,

[3] As part of the remand hearing, I also, once again, reviewed the MCAD decision in which Chief Clark was a witness, in addition to reviewing the parties' arguments regarding this issue. In summary, an MCAD hearing officer made sixty-one (61) findings of facts which, either explicitly or implicitly, make references to Chief Clark's credibility. For example, findings 30, 36 and 39 explicitly state: "I credit Clark's testimony." Findings 23 and 25 state that the hearing officer does not credit Clark's testimony. Specifically, Finding 23 of the MCAD decision states: "I do not credit Clark's testimony that he spoke to Collins regarding the initial denial of IOD. I find that it is more likely that he consulted with Collins after Complainant filed her union grievance in this matter." Finding 25 of the MCAD decision states: "Chief Clark testified that he questioned whether a March 28 injury had even occurred on the job or that it was related to an earlier on the job injury. He believed the injury may have been (sic) occurred while Complainant was grooming or riding her horse, although he had received the medical information from Dr. Mikus stating that the injury related back to Complainant's earlier injuries. I do not credit his testimony." In regard to that finding, Chief Clark, in summary, was simply expressing his "belief" regarding his skepticism that an on-duty incident resulted in an employee's injury, notwithstanding a doctor (who was not present when the injury occurred) stating in a report that the on-duty incident occurred as described by the employee. Respectfully, I do not find that credibility assessment, nor the one referenced in MCAD finding 23, to be comparable to the allegations against Mr. Desmond.

which appears to have been the result of favoritism toward Officer Kominsky many years ago, should vacate or modify the Town's decision to terminate Mr. Desmond in 2014. On this point, the Superior Court, on remand, stated in relevant part:

> " … One might argue that it is beneficial to remove at least one dishonest officer from the force, even if the Town refused to discharge them all. That argument does not justify favoritism, particularly where the record before the Commission suggests that the officer who has retained employment may have committed the more serious offenses. Indeed, there is no reason why the Town needs to settle for any dishonesty among its police officers and command. It could achieve uniform and equitable treatment by terminating both dishonest officers, or neither of them. The one thing it may not do is terminate two similarly situated civil service employees in violation of the principle of uniformity and [] equitable treatment." (emphasis added)

To me, the Superior Court's position is clear: If the Town does not take steps to terminate Officer Kominsky, it may not terminate Mr. Desmond.

In 2005, the Supreme Judicial Court, in City of Boston v. Boston Police Patrolmen's Association, 443 Mass. 813 (2005), also addressed the issue of disparate treatment. In that case, a Boston police officer had a number of disciplinary charges lodged against him including one or more for untruthfulness. He was terminated from his position by the Department and, subject to the collective bargaining agreement, he sought an arbitrator's review. The arbitrator found that some of the charges against the police officer (i.e. – excessive or improper force) could not be substantiated while others (knowing[ly] enter[ing] inaccurate, false and incomplete information in a department report and making false criminal allegations against a private citizen) were substantiated.

In regard to the issue of disparate treatment, the SJC described a portion of the arbitrator's decision as follows:

> "The arbitrator determined that termination was too harsh a sanction for DiSciullo, in light of evidence offered by the association that, under the department's current and immediate past leadership, police officers found to have engaged in similar or more serious misconduct

had received penalties short of termination. She reasoned that suspending DiScuillo without pay for one full year would sufficiently 'impart the message that officers must be held to the highest standards of integrity and professionalism.'"
City of Boston v. Boston Police Patrolmen's Association, ibid., at p. 817.

Ultimately, the SJC vacated the arbitrator's decision, concluding that it would be repugnant to public policy requiring that police officers be truthful and obey the laws in the performance of their official duties. As part of that decision, the SJC stated in relevant part:

" … That other police officers may have received lesser sanctions for their serious misconduct avails nothing here. Each case must be judged on its own facts, and the factual record in those cases is not before us. In any event, there is no suggestion that the reasons for DiSciullo's termination were pretexts or motivated by improper considerations. Nor do we credit the association's argument that the prior dispositions worked an estoppel of the department's termination in this case. Leniency toward egregious police misconduct in the past (assuming such leniency occurred) cannot lead a police officer to commit reprehensible actions in the expectation that he will receive a light punishment."
City of Boston v. Boston Police Patrolmen's Association, ibid., at p. 822, footnote 9.

Citing this SJC decision, the Town argues that the Commonwealth's explicit, well-defined public policy that police officers be truthful and obey the law in performance of their official duties controls the outcome here and mandates that *Mr. Desmond's* termination as a West Bridgewater police officer must be affirmed, even in light of the fact that the Town has taken no action against Officer Kominsky for allegedly engaging in similar misconduct. I agree.

Although the Town, then and now, failed to initiate the same type of disciplinary investigation against Officer Kominsky that it did with Mr. Desmond, this does not warrant a decision by the Commission to return Mr. Desmond to his position as a police officer. To do so would be contrary to years of precedent-setting judicial decisions stating that a finding of untruthfulness against a police officer warrants, and potentially compels, the police officer's termination.

While modification of Mr. Desmond's penalty is not warranted here, the Town's inexplicable

failure to initiate action against Officer Kominsky, which appears to have been driven by personal favoritism, is, indeed, contrary to the civil service law, which requires uniform treatment of all civil service employees.

The Town, through the testimony of now-Chief Flaherty and statements in its post-hearing brief, has hinted that an investigation could still be commenced against Officer Kominsky. It appears, however, that no such action has been taken by the Town.

Although the Commission lacks the authority to order the commencement of a disciplinary investigation against Officer Kominsky, G.L. c. 31, § 72 states that:

> "The commission or administrator [HRD], upon the request of an appointing authority, shall inquire into the efficiency and conduct of any employee in a civil service position who was appointed by such appointing authority. The commission or the administrator may also conduct such an inquiry at any time without such request by an appointing authority. After conducting an inquiry pursuant to this paragraph, the commission or administrator may recommend to the appointing authority that such employee be removed or may make other appropriate recommendations." (emphasis added)

Consistent with the authority granted to the Commission under Section 72, along with the Commission's inquiry which effectively took place regarding the Town's inaction as part of this appeal, I recommend that the Town, forthwith, initiate proceedings to determine whether disciplinary action is warranted against Officer Kominsky.

Conclusion

For all of the above reasons, Mr. Desmond's appeal under CSC Docket No. D1-14-50 is hereby ***denied***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on December 8, 2016.

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:
Timothy M. Burke, Esq. (for Appellant)
David T. Gay, Esq. (for Respondent)
John L. Holgerson, Esq. (for Respondent)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
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DANIEL DESMOND,
Appellant

v. D1-14-50

TOWN OF WEST BRIDGEWATER,
Respondent

Concurring Opinion of Commissioners Stein, Ittleman, Tivnan and Camuso

We fully concur with the analysis and conclusion of the Commission contained in Chairman Bowman's written remand decision, which appropriately hews to the instructions that were provided by the Superior Court in ordering a review of the Commission's prior decision and affirms the termination of Mr. Desmond on the credible evidence that "just cause" and not personal animus was the determining factor in that decision.

We write to express our opinion that this decision must be narrowly construed to apply to the specific facts of the case. In particular, we urge that the decision should not be used to infer that, in other future disciplinary appeals, an appointing authority necessarily must be precluded from imposing discipline that meets the "just cause" standard solely because, at some prior time, another employee was treated more leniently for a similar infraction, whether due to nepotism or some other reason that caused the appointing authority to treat that other employee differently. We believe that the scope of the Commission's de novo "just cause" hearing in a disciplinary appeal must remain focused solely on whether the action taken by the appointing authority's action with respect to the appellant appearing before the Commission is justified under basic merit principles, supported by just cause and free from undue bias or other unlawful retaliatory

or discriminatory motives. In particular, we do not believe that civil service law requires, or that it would be wise for the Commission to impose, as a "quid pro quo" for upholding the termination of one unsuitable public safety officer, that the appointing authority, for the sake of "uniformity", be compelled to reach back (here more than a decade) and revisit claims of civil service violations involving another allegedly unsuitable employee whose case did not, and never had, come before the Commission. In our view, such a requirement would be problematic for several reasons.

First, as this appeal illustrates, consideration, on their merits, of prior incidents that involved no disciplinary action call for holding a "mini-trial", that requires reliance on stale, hearsay evidence about events that may have occurred years earlier, and often calls for drawing inferences about disputed facts without the benefit of percipient evidence from all relevant witnesses, some who are no longer available. The Commission has consistently resisted this type of "trial within a trial", narrowly limiting disparate treatment evidence to undisputed facts established by the record of a past discipline. It would be unwise for the Commission to deviate from that practice.

Second, the Commission has not construed the requirement under civil service law that discipline be meted out "uniformly" to mean that, absent some unlawful bias, identical discipline must be applied to every similarly situated or comparable case. The ultimate purpose of discipline in civil service is "remedial", not punitive, and an appointing authority must be entitled to the exercise of sound discretion to tailor a discipline to the appropriate level that is sufficient to effect remediation without being excessive. That determination, necessarily, must take into account the specific facts of each case and the specific character and employment

record of each employee. Civil service law should not be forced into adopting a rote approach to discipline that applies, too literally, a principle that "one-size-fits-all".

Third, we fully concur with Chairman Bowman that, especially when it comes to civil service employees in the public safety arena, the critical principle that applies here lies with City of Boston v. Boston Patrolman's Ass'n, 443 Mass. 813 (2005), in which the Supreme Judicial Court teaches that there can be no room for the idea that "prior dispositions worked an estoppel" of an appointing authority's termination of an employee who commits "reprehensive actions", and such "[l]eniency toward egregious police conduct in the past . . . cannot lead a police officer to commit reprehensive acts in the expectation that he will receive a light punishment." Nepotism and other forms of arbitrary and capricious favoritism have no place in civil service and must be scrutinized and rooted out when they appear. Nevertheless, in its primary role as an appellate adjudicatory body, the Commission had neither the mission nor the resources to undertake, as part of every appeal brought before it, the sort of inquiry into, and remediate, the past practices of an appointing authority on independent matters stretching back a decade or more such as the one we have been obliged to address here. Any move in that direction to blend the Commission's appellate function with its discretionary investigatory authority (concurrent with the power of the state Human Resources Division, by the way, which has the primary administrative and audit oversight of all municipal civil service communities), as laudatory as it may seem in theory, would be both unwise and impractical. Thus, we would have tread much more lightly before weighing in, here, on whether or not the Town of West Bridgewater should be required to reopen its handling of any issues involving Officer Kominsky. We would leave that matter to the sound discretion of the Town in the first instance and would not, in any way, imply that its action or inaction should impact the independently justified decision to terminate Mr. Desmond.

/s/ Paul M. Stein
/s/ Cynthia A. Ittleman
/s/ Kevin M. Tivnan
/s/ Paul A. Camuso
Commissioners