

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

HENRY B. DIAZ,  
Appellant

v.

D1-17-259

CITY OF SOMERVILLE,  
Respondent

Appearance for Appellant:

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Boston, MA 02110

Appearance for Respondent:

Shannon Phillips, Esq.  
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Commissioner:

Christopher C. Bowman

**DECISION**

On December 27, 2017, the Appellant, Henry Diaz (Mr. Diaz), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Somerville (City) to discharge him from the position of police officer from the City's Police Department (Department) for conduct unbecoming a police officer and untruthfulness.

I held a pre-hearing conference at the offices of the Commission on January 23, 2018 and three (3) days of hearing were held at the same location on June 11<sup>th</sup>, July 13<sup>th</sup> and August 17<sup>th</sup>, 2018.<sup>12</sup> A digital recording was created of the hearing and both parties were provided with a CD

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<sup>1</sup> The full hearing was initially scheduled to be held on March 16, 2018, but was continued due to an emergency closure of the State Office building.

of the proceeding.<sup>3</sup> Following the close of the hearing, proposed decisions were submitted by both parties on October 5, 2018.

## **FINDINGS OF FACT**

Based upon the documents admitted into evidence (Exhibits 1-17 & A-M) and the testimony of:

*Called by the City:*

- Lt. Timothy Mitsakis, Somerville Police Department;
- Police Chief David Fallon, Somerville Police Department;
- AA, Civilian witness;
- Lt. Michael Kenneally, Somerville Police Department;

*Called by Mr. Diaz:*

- KT, Civilian Witness;
- Captain Dan Cotter, Somerville Police Department;
- Deputy Chief Stephen Carrabino, Somerville Police Department;
- Henry Diaz, Appellant.

I make the following findings of fact:

1. Mr. Diaz is a resident of Somerville, MA. He has lived in Somerville, MA since moving to the United States from the Dominican Republic in 1986 when he was seven or eight years old. He graduated from Somerville High School and received a Bachelor's degree from Curry College in criminal justice. (Testimony of Appellant)
2. Mr. Diaz served in the United States Army for eight (8) years with three (3) years of active duty from 2003-2006. He was deployed and served in Iraq in combat in 2004/2005. He was honorably discharged from active duty at which time he served for two (2) years in the U.S.

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<sup>2</sup>The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>3</sup> 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 he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, these CDs should be used to transcribe the hearing.

Army Reserve in the intelligence unit out of Fort Devens. Mr. Diaz was honorably discharged from the U.S. Army Reserve, and completed the remainder of the eight years in the “ready reserve list”, a list from which you are selected first if there is a draft. (Testimony of Appellant)

3. In February 2008, Mr. Diaz was appointed as a police officer for the City of Somerville Police Department. Mr. Diaz has no prior discipline in his record. (Stipulated Facts)
4. Mayor Joseph A. Curtatone is the Appointing Authority for the City of Somerville. (Exhibit 2)

*June 30, 2017 Incident*

5. Sometime between 1:41 A.M. and 3:00 A.M.<sup>4</sup> on June 30, 2017, Mr. Diaz, while off-duty from his position as a Somerville Police Officer, was driving down Chelsea Street in East Boston with his friend KT in the passenger seat of his vehicle. (Testimony of Appellant and KT)
6. Mr. Diaz and KT had just left a bar in Maverick Square. (Testimony of Appellant and KT)
7. While at the bar, Mr. Diaz had consumed three (3), sixteen (16) ounce beers from 11:45 P.M. to 2:00 A.M. (Testimony of Appellant)
8. Mr. Diaz was driving at a low rate of speed. (Exhibit 8)
9. Mr. Diaz and KT were searching for a place to eat and their attention was drawn to a restaurant on their left. (Testimony of KT)

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<sup>4</sup> The parties do not agree on the exact time that this incident occurred. The City, apparently relying on a security video from a local restaurant, puts the beginning time at 1:41 A.M. while the Appellant puts the time at approximately 3:00 A.M. Based on the time that two (2) civilians filed a police report with the Boston Police Department regarding this incident, it appears that the security video time may have been off by one (1) hour, putting the correct start time of the incident at 2:41 A.M. Ultimately, however, the exact time is not relevant to whether Mr. Diaz engaged in misconduct or whether there was just cause for the City to terminate his employment.

10. At some point, KT, the passenger in Mr. Diaz's vehicle, saw a male civilian (DB), walk in front of Mr. Diaz's moving vehicle. KT told Mr. Diaz to "stop". (Testimony of KT)
11. Mr. Diaz's vehicle came to a sudden stop, avoiding any contact with the civilian who was crossing the street. (Exhibit 8)
12. DB approached the driver's side of Mr. Diaz's vehicle and they exchanged words back and forth. DB, speaking in Spanish, referred to Mr. Diaz as a "maricon", a derogatory term used to describe gay men. Mr. Diaz then referred to DB as a "maricon." (Testimony of Appellant)
13. DB began to walk away from Mr. Diaz's vehicle, but then turned and pointed back towards Mr. Diaz as the two men appear to exchange words. DB then walked back to the driver's side of Mr. Diaz's vehicle and continued speaking with Mr. Diaz. While this was occurring, AA, a male friend of DB, walked toward Mr. Diaz's vehicle and stood a step or two behind DB. (Exhibit 8)
14. While there is no audio to accompany the video submitted into evidence at the Commission hearing, the video plainly shows that AA, both at this juncture and throughout the entire incident in question here, is an agitator. He continuously jabs his finger in the air and darts back and forth across the street akin to someone in a boxing ring. (Exhibit 8)
15. DB and AA eventually walk backwards toward the sidewalk on the opposite side of the street and Mr. Diaz begins to drive away. (Exhibit 8)
16. AA can then be seen in the video jabbing his finger in the air and apparently yelling something toward Mr. Diaz. Mr. Diaz then stopped and got out of his vehicle. (Exhibit 8)
17. After Mr. Diaz got out of his vehicle, AA made a reference to a gun. (Testimony of KT)<sup>5</sup>

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<sup>5</sup> There is divergent testimony on this point. AA states that there was never any reference to a gun, but, rather, to a "bat or something". Mr. Diaz testified that AA stated "get the gun" *before* he (Mr. Diaz) exited his vehicle. KT, the passenger, testified that AA made a reference to a gun *after* Mr. Diaz stepped out of his vehicle. Ultimately, after carefully listening to the testimony (twice) of the three (3) relevant witnesses and reviewing

18. DB then walked quickly across the street (behind Mr. Diaz's vehicle) and walked toward his own parked vehicle (parked nose-in) which was approximately 2 or 3 car lengths behind Mr. Diaz's vehicle, which was now stopped in the road. (Exhibit 8)
19. Mr. Diaz followed DB to his (DB's) car. Eventually, Mr. Diaz and DB are standing behind DB's car, where the car's trunk is slightly ajar. (Exhibit 8)
20. During this same time period, KT, the passenger in Mr. Diaz's vehicle, got out of the passenger side of Mr. Diaz's vehicle and walked over to where Mr. Diaz and DB were standing (behind DB's car). (Exhibit 8 and Testimony of KT)
21. AA, DB's friend, also walks over to the same location. (Exhibit 8)
22. While KT was walking over to where Mr. Diaz and DB were standing, KT yelled out that Mr. Diaz was a Somerville Police Officer. (Testimony of KT)
23. For just over one (1) minute, the four (4) men (Mr. Diaz, KT, DB and AA) are all located just behind or near DB's car. (Exhibit 8)
24. During this approximately one (1) minute period:
  - A. DB slightly opens and closes the trunk of his car. (Testimony of Appellant and Exhibit 8)
  - B. There is no gun visible in DB's car and Mr. Diaz concluded that DB did not actually have a gun in his car. (Testimony of Appellant)
  - C. AA is jabbing his finger in the air, apparently yelling something at Mr. Diaz. (Exhibit 8)
  - D. Mr. Diaz walked toward AA and exchanged words with him. (Exhibit 8)
  - E. KT got in between Mr. Diaz and AA. (Exhibit 8)

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their prior statements on this matter, I credited the testimony of KT. It is the most plausible scenario and is consistent with what can be seen on the video.

F. Mr. Diaz and DB “belly-bump” each other near the back of DB’s car. (Testimony of Appellant and Exhibit 8)

25. When KT stated that Mr. Diaz was a Somerville Police Officer, AA said words to the effect: “Go back to Somerville you corrupt cop; this is little Colombia; we run this place” to which Mr. Diaz replied with words to the effect: “No, this is America, if you want to be pulling shit like this, go back to Colombia.” (Testimony of Appellant)
26. After approximately one (1) minute, the four men disburse. KT leads Mr. Diaz back to his vehicle; DB walks back across the street; and AA walks back and forth across the street, eventually standing several feet behind Mr. Diaz’s vehicle. While they are disbursing, Mr. Diaz and DB can be seen jabbing their fingers in the air, apparently yelling at each other. At one point, DB appears to raise his middle finger at Mr. Diaz, who is now standing next to the driver’s side of his car. (Exhibit 8)
27. Eventually, Mr. Diaz is standing next to the opened driver’s side door of his vehicle and DB is across the street, leaning against a truck that is parallel-parked on the side of the street. The two men are facing each other and Mr. Diaz can be seen jabbing his finger toward DB. (Exhibit 8)
28. At the 1:45:35 mark in the video, Mr. Diaz takes six (6) or seven (7) quick steps across the street, stands in front of DB and punches DB in the head and side, causing DB to fall backwards onto the ground, at which time Mr. Diaz leans down and punches DB in the head three (3) additional times. (Exhibit 8)
29. The video does not show DB raising his arms or hands before Mr. Diaz initially struck him. (Exhibit 8)

30. The video shows that, while on the ground, DB was in a defensive posture, trying to avoid incoming punches from Mr. Diaz. (Exhibit 8)
31. Mr. Diaz then walks toward AA who begins jumping and skipping around the street, trying to avoid Mr. Diaz. (Exhibit 8)
32. Mr. Diaz eventually starts walking back to the driver's side of his truck. DB has gotten up off the ground at this point and can be seen stumbling toward Mr. Diaz. Mr. Diaz appears to get in his truck and, although it cannot be seen on video, it appears that DB walks in front of Mr. Diaz's truck. (Exhibit 8)
33. Mr. Diaz drove his truck away with KT in the passenger side. (Exhibit 8)<sup>6</sup>
34. At or around 3:19 A.M., DB and AA went to the District 7 Boston police station to report what had happened. (Exhibit 4 and Testimony of AA)
35. The Boston police officer who completed the incident report wrote in part that he "... could observe a large bump on [DB]'s forehead which he [DB] states was caused by the punch from the suspect. He also had a scratch on the back of his neck as well as a scrape on his left forearm caused by the fall after he was hit." (Exhibits 4 & B)
36. On July 7, 2017, the Boston Police filed a criminal complaint against Mr. Diaz for assault and battery. (Exhibit 4)
37. On July 11, 2017, Mr. Diaz was placed on paid administrative leave. (Testimony of Carabino)

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<sup>6</sup> I do not credit the testimony of the Appellant and KT that DB came around to driver's side of Mr. Diaz's truck and punched Mr. Diaz before or while Mr. Diaz was driving away. This alleged incident, which would have been out of sight of the video, simply didn't ring true to me. Even, however, if true, it could not justify the four (4) punches thrown by Mr. Diaz, as that interaction occurred well before this alleged altercation at the driver's side window.

38. On July 28, 2017, a Clerk Magistrate hearing was held. Neither DB or AA appeared. The Magistrate denied the complaint without prejudice and told the Boston Police to reapply if they were able to convince DB or AA to attend a hearing. (Exhibit H)
39. Lt. Mitsakis of the Somerville Police Department completed an internal investigation of the June 30<sup>th</sup> incident. (Testimony of Mitsakis and Exhibit 3)
40. The investigation included a review of the Boston Police documents, video of the incident and interviews with DB, AA, KT and Mr. Diaz. (Testimony of Mitsakis and Exhibit 3)
41. During the interview with Mr. Diaz, Mr. Diaz stated that, at the time he struck DB, he was in fear for his life, DB was going after him and he struck DB out of fear because he thought DB was going to hit him. (Exhibit 9 and Testimony of Mitsakis)
42. Specifically, Mr. Diaz stated during his interview with Lt. Mitsakis that:
- "Male 1 after he belly butts me, he kind of, you know, runs off, keeps on taunting me, you know. I walk towards him, we're arguing back and forth and talking to each other, you know. He's taunting me, taunting me, getting close to me. I remember putting my arms up to get him away from me. He comes back at me, you know. At this point I felt I was in imminent danger and I struck him because I felt that he was going to strike me. I put my hands up, he kept coming at me. He did that maybe about once or so. When I noticed that wasn't enough, I struck. I struck him. He went to the ground. I struck him a couple more times. KT came over, grabbed me and as I'm walking away, the second male starts instigating things, starts walking behind me."
- (Exhibit 9)
43. After providing Mr. Diaz with notice, a local appointing authority hearing was held on November 2, 2017 by a hearing officer designated by the City's Mayor. Mr. Diaz did not testify. (Stipulated Facts)
44. Prior to the local hearing, Mr. Diaz's union representative contacted him and asked Mr. Diaz if he would be interested in discussing a settlement agreement with the Town in which Mr. Diaz would accept some form of punishment short of termination. Mr. Diaz said he wasn't interested because "he didn't do anything wrong." (Testimony of Appellant)



45. Via letter dated December 13, 2017, the Mayor adopted the findings of the hearing officer and terminated Mr. Diaz from his position as a police officer. (Exhibit 2)

46. The Hearing Officer found that:

- “ ... Officer Diaz engaged in conduct unbecoming an officer when he punched [DB] four times, without warning or provocation, on June 30, 2017. The video recorded indisputable evidence of that happened during the incident. Nothing in the video supports Officer Diaz’s claim that he felt in imminent danger before he assaulted [DB]. Rather the video shows Officer Diaz to be the aggressor striding forcefully across the street towards [DB] with a clear purpose to attack [DB].
- Officer Diaz’s “cop instincts” required that Officer Diaz avoid unnecessary conflict, maintain courageous calm in the face of danger and preserve public peace. Officer Diaz could have avoided any escalation of the altercation with [DB] at any time by simply driving away. Instead, Officer Diaz continued to increase the level of conflict by aggressively approaching, in a threatening manner, both [DB] and [AA].. Officer Diaz’s remedy was to call 911, not continue to engage and escalate the animosity.
- Officer Diaz’s behavior throughout the incident, especially since [KT] made [DB], [AA] and nearby bystanders aware that Diaz was a Somerville Police Officer, constituted immoral, improper, disorderly, and intemperate personal conduct which brought discredit upon Officer Diaz himself, upon fellow officers, and upon the Somerville Police Department.
- Officer Diaz further engaged in conduct unbecoming an officer when he made a derogatory comment to [DB] to the affect that “in this country we follow the laws” which was offensive to both [DB] and [AA]. Officer Diaz’s behavior violated his duty to treat every individual with civility, courtesy, sensitivity, and respect.
- I find that Officer Diaz was untruthful during his interview by Lt. Mitsakis. Officer Diaz attempted to justify his unbecoming behavior by claiming that he was acting in self-defense or was reacting to the immediate threat of a gun. The video tape provided positive proof that Officer Diaz was the aggressor when he punched [DB]. Officer Diaz was not acting in self-defense to protect himself against an immediate threat but was clearly on the attack. Officer Diaz contradicted himself during his interview by Lt. Mitsakis when Officer Diaz admitted that he did not believe that [DB] or [AA] actually had a gun.
- Although Officer Diaz has no prior discipline in his record, the brutality of Officer Diaz’s attack upon [DB] at a time when Officer Diaz was not in danger and should have removed himself from conflict, along with the totality

of Officer Diaz's conduct during the incident, coupled with Officer Diaz's untruthfulness in answering Lt. Mitsakis' questions, justify termination of Officer Diaz's employment."

(Exhibit 2)

47. The local hearing officer also completed a review of all disciplinary matters which Mr. Diaz argued showed that he was being subject to disparate treatment and conclude that the matters were not similar. (Exhibit 2)

*Applicable Civil Service Law*

G.L. c. 31, § 43 provides:

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

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law;" Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service;" School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983).

The Appointing Authority's burden of proof by a preponderance of the evidence is

satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there;” Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew;” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he commission’s task.. is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, 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’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority; Id., quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

### *Analysis*

By a preponderance of the evidence, the City has shown that Mr. Diaz engaged in substantial misconduct which adversely affects the public interest. Based upon review of the clear surveillance video of the incident in question, and evidence presented during the course of the hearing, Mr. Diaz did not act in self-defense when striking DB repeatedly on June 30, 2017. Rather, the evidence shows Mr. Diaz was the aggressor during this incident.

There is case law pointing out that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens. Citing four previous decisions of this court, as “but a sample” of the law on the obligations of police officers, the Appeals Court has said:

“These cases teach a simple lesson. 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 \*794 enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Police Comm'r of Boston v. Civil Serv. Comm'n, 22 Mass.App.Ct. 364, 371 (1986). Consistent with these observations, the Appeals Court has upheld the discharge of police officers who behaved inappropriately while off duty. See Police Comm'r of Boston v. Civil Serv. Comm'n, 39 Mass.App.Ct. 594, 601 (1996) (officer lost his firearm while intoxicated and verbally abused other officers); McIsaac v. Civil Serv. Comm'n, 38 Mass.App.Ct. 473, 475, 476 (1995) (officer negligently handled firearm while intoxicated and verbally abused other officers). See also Commissioners of Civil Serv. v. Municipal Court of the Brighton Dist., 369 Mass. 166, 170–171, 338 (1975), cert. denied sub nom. Patuto v. Commissioners of Civil Serv., 429 U.S. 845, 97 S.Ct. 125, 50 L.Ed.2d 116 (1976) (upholding discharge of off-duty police officer who accompanied others while they uttered forged money orders).

The video does not support Mr. Diaz’s claim that he felt imminent danger before he struck DB. Rather, the video shows Mr. Diaz to be the aggressor by striding forcefully across the street towards DB with a clear purpose to strike DB. At that point, DB had withdrawn from the conflict.

More generally, Mr. Diaz failed repeatedly to de-escalate what began as a rather minor and routine incident. Mr. Diaz stopped his truck and exited the vehicle to continue to engage in an altercation with a civilian beginning when he jaywalked. While DB and Mr. Diaz appeared to have a verbal exchange of words, this does not justify the escalation that occurred, including Mr.

Diaz exiting his vehicle. As referenced in the findings, Mr. Diaz exited his vehicle before there was any reference to a gun. Instead of getting out of his vehicle, he had the opportunity to leave the scene and avoid the continued interaction. He admits he was angry during the incident and could not explain why he did not stay in his car and drive away other than it being a bad mistake.

The City has also shown that Mr. Diaz was untruthful. During his recorded interview as part of the internal affairs investigation, he initially told the interviewer that he hit [DB] in self-defense as he felt in imminent danger. He described in detail how he felt he was about to be struck and had no choice but to hit [DB]. During his testimony before the Commission, Mr. Diaz acknowledged that the video does not support his prior statements to investigators. Specifically, he acknowledged during his testimony before the Commission that any alleged raising of the hands by DB would have occurred after Mr. Diaz had repeatedly struck DB. Mr. Diaz's argument that simply remembering things differently does not constitute untruthfulness is not persuasive for two reasons. First, he chose not to testify at the local hearing and offer that explanation at the time the City was deciding whether there was just cause to terminate him as a police officer. Second, his explanation is not plausible. This is not a case of simply failing to remember a minor detail (i.e. – what words were exchanged, how many times he struck DB, etc.). Rather, he stated to investigators that he was in fear of DB and that he continued to strike DB until he was no longer in fear. Mr. Diaz's own testimony, the video evidence and common sense show that this *core argument* by Mr. Diaz (rather than a minor detail) was simply not true. It cannot be attributed to an innocent lapse of memory.

The City did not show, by a preponderance of the evidence, that Mr. Diaz made a derogatory comment to [DB] to the affect that “in this country we follow the laws” which was offensive to both [DB] and [AA] and, according to the City, constituted misconduct.

Rather, I credit the testimony of Mr. Diaz that AA referred to him as a corrupt cop and made references to him [AA] controlling what he called “little Colombia”. In that context, I don’t consider Mr. Diaz’s response to constitute misconduct. As part of this de novo hearing, however, I do find Mr. Diaz’s use of a derogatory term regarding gay men as conduct unbecoming a police officer.

Having determined that Mr. Diaz did engage in the alleged misconduct, I must determine whether the level of discipline (termination) was warranted.

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], s. § 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).

“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 town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. 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.” Id. at 572. (citations omitted).

My findings do not differ significantly from those reported by the City. Similar to the City, I have found that Mr. Diaz engaged in conduct unbecoming an officer and untruthfulness.

The Commission has recognized that a police officer must be truthful at all times and that failure to do so constitutes conduct unbecoming an officer, MacHenry v Wakefield, 7 MCSR 94 (1994). Lying in a disciplinary investigation alone is grounds for termination, LaChance v. Erickson, 118 S. Ct. 753 (1998), citing Bryson v. United States, 396 U.S. 64 (1969). The Commission has stated that “it is well settled that police officers voluntarily undertake to adhere to a higher standard of conduct than that imposed on ordinary citizens,” Garrett v. Haverhill, 18 MCSR at 381, 385 (2005). Specifically, there “is a strong public policy against employing police officers who are untruthful,” Royston v Billerica, 19 MCSR 124, 128 (2006). Therefore, “a police officer that has lost his credibility can no longer effectively perform the duties of the position,” Pearson v. Whitman, 16 MCSR 46, 50 (2003). Consequently, the discharges of police officers based upon their dishonesty have often been upheld by the Commission. The following cases are illustrative:

In Royston v. Billerica, the Commission upheld the discharge of a police officer who “knowingly lied to the Chief during a departmental investigation to cover up” his own misconduct.

In Garrett v. Haverhill, the Commission found that there was reasonable justification for the discharge of a police officer who repeatedly presented false testimony during the departmental investigation of the officer’s misconduct.

In Meaney v. Wobum, 18 MCSR 129, 133-35 (2005), the discharge of a police officer was upheld based, in part, on the officer’s consistent dishonesty and “selective memory” during the departmental investigation of that officer’s misconduct.

In Pearson v. Whitman, the Appointing Authority's discharge of a police officer who had "a problem with telling the truth" was upheld.

In Eisenbeiser v. West Springfield, 7 MCSR 99, 104, the discharge of a police officer was upheld based on, inter alia, the officer's dishonesty as his misconduct was ongoing, intentional and showed no signs of improvement.

And, in Deshamias v. City of Westfield, 23 MCSR 418 (2009), a police officer's discharge was upheld based primarily on the officer's dishonesty about a relatively minor infraction that occurred on his shift.

During his testimony, Mr. Diaz suggested that past negative interactions that he had with now Deputy-Chief Carrabino may have played a role in the City's decision to terminate him here. The evidence simply doesn't support his argument that some relatively minor negative interactions that occurred years ago played any role in the City's decision here.

Mr. Diaz, citing several employees referenced in Exhibit 14, argues that they either received less discipline for similar offenses / rules violations or reached a settlement with the City that resulted in separation from employment to avoid termination. As stated in the findings, Mr. Diaz himself ruled out any type of settlement agreement when the issue was broached by his union representative. I carefully reviewed all of the documents in Exhibit 14 and the parties' arguments regarding whether the actions or inactions by the City showed that Mr. Diaz was subject to disparate treatment. In each case, I have found that the City has distinguished those matters from the instant appeal, either because the misconduct was not as serious, the employees are no longer employed as police officers or the matters were subject to settlement agreements.

Further, even if the City imposed less discipline in the past for similar offenses, which does not appear to be the case here, the Supreme Judicial Court's decision in City of Boston v. Boston



Police Patrolmen's Association, 443 Mass. 813 (2005) would still tend to argue against Mr. Diaz's reinstatement. 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 DiSciullo 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.

Finally, I considered that Mr. Diaz has no prior discipline in his record. While the Commission has consistently stated that progressive discipline is consistent with the requirement of basic merit principles, the seriousness of the misconduct here, which includes pummeling a private citizen who was not posing a physical threat to Mr. Diaz, and then lying about the reasons for this misconduct, warrant termination, even in the absence of prior discipline.

*Conclusion*

For all of the above reasons, Mr. Diaz's appeal under Docket No. D-17-259 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, Commissioners) on April 11, 2019..

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:  
Stephen Pfaff, Esq. (for Appellant)  
Shannon Phillips, Esq. (for Respondent)