

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
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RICHARD EVERTON,
Appellant

v.

TOWN OF FALMOUTH,
Respondent

CASE NO: D1-12-75

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Richard Everton, acting pursuant to G.L.c.31, § 43, duly appealed to the Civil Service Commission (Commission) from a decision of the Town of Falmouth (Falmouth), the Appointing Authority, to terminate him from employment as a Patrolman for the Falmouth Police Department (FPD). A full hearing was held by the Commission on June 21, 2012 and July 17, 2012 at UMASS School of Law at Dartmouth. The hearing was declared private as no party requested a public hearing. Witnesses were sequestered save for the Appellant and Falmouth's designated representative. The hearings were digitally recorded and stenographically transcribed. Thirty-five (35) exhibits were marked.¹ The parties made post-hearing submissions on November 5, 2012.

¹ The Appellant objected to introduction of two exhibits (Nos. 22 & 24). These objections were taken under advisement and subsequently overruled. (*See Tr.II:3-21; Interim Ruling on Motion to Admit Criminal Records into Evidence, dated August 23, 2012*)

FINDINGS OF FACT

Giving appropriate weight to the exhibits, to the testimony of the witnesses (the Appellant, FPD Chief Anthony Riello, FPD Sgts. Brian Loewen and John Doyle, FPD Patrolman Norman Adamson, FPD Dispatcher Diane Lanaham and Bourne Police Officer Christopher Wrighter) and inferences reasonably drawn from the evidence that I find credible, I make the findings of fact set forth below.

The Appellant

1. The Appellant, Richard Everton, was appointed to the position of Patrolman with the FPD in 2008 and served in that position for three and a half years prior to his discharge on February 16, 2012. (*Exh.1;Tr.II:73-74[Appellant]*)

2. Prior to his appointment to the FPD, Mr. Everton had been employed for approximately four years as a Correction Officer with the Barnstable County Sheriff's Department. (*Tr.II:67,71-73[Appellant]*)

3. The Appellant is a veteran with thirteen years as an enlisted member of the United States Army, which included a year and a half tour of duty in Iraq. He was honorably discharged in 2002 or 2003 having attained the rank of Sergeant. (*Exhs. 31 through 34; Tr.II:67-71 [Appellant]*)

4. The Appellant's record with the FPD included three incidents of prior discipline:

- In the winter of 2007-2008, during training at the Police Academy, he lost his driving privileges as a result of driving his police cruiser too fast during icy road conditions which resulted in an accident. (*Tr.II:118-119 [Appellant]*)
- Also, while in training, he received a written warning for disrespectful behavior to a citizen during a traffic stop. (*Exh.13;Tr.II:117-118 [Appellant]*)

- On September 8, 2010, he received a one-day forfeiture of vacation time for another incident of rude and discourteous behavior toward a motorist, whom he told: “don’t threaten me with that shit lady, you don’t support us anyway.”

(Exh.12 & 13; Tr.I:205-207[Riello];Tr.II:73-74, 117-119[Appellant])

5. During his tenure with the FPD, Officer Everton received four written letters of commendation from FPD Chief Riello for his outstanding performance in the line of duty. *(Exhs. 26 thorough29)*

The September 9, 2011 Episode

6. On September 8, 2011, Officer Everton was assigned to the Communications Center (dispatch desk) with civilian dispatcher Diane Lanahan on the 11pm to 7am (midnight) shift. *(Tr.I:41-43[Loewen]; Tr.I:141-142[Lanahan])*

7. Sgt. Brian Loewen was the Shift Commander on the September 8-9, 2011 midnight shift. He was a ten year FPD veteran who had been an acting Police Sergeant since May 2011. He was promoted to permanent full-time Police Sergeant in October 2011. The Shift Commander is the senior officer on duty, responsible for shift assignments and all FPD activity that occurs during the shift. *(Tr.I:40-41[Loewen])*

8. Sgt. John Doyle was the Patrol Supervisor for the September 8-9, 2011 midnight shift. He was an eighteen year FPD veteran who had then been a Police Sergeant for approximately three years. His responsibility as Patrol Supervisor is the senior officer on the road, who would respond to calls for service requiring the attention of a superior officer. *(Tr.I:41[Loewen]; Tr.I:94-95[Doyle])*

9. Earlier on September 8, 2011, the FPD had received a tip that two persons known to the FPD were planning to rob the local Radio Shack that night by breaking in through

the roof. (*Exh. 8; Tr.I:43-44[Loewen]; Tr.I:95-96[Doyle];TR.II:75 [Appellant]*)

10. The midnight shift is typically staffed by the junior-most officers. On the night of September 8-9, only Officer Everton and Officer DeVito had prior “tactical experience” with an operation such as the expected break-in at the Radio Shack. (*Tr.I:137-139 [Doyle]; Tr.II:76[Appellant]*)

11. The FPD midnight shift requires a minimum of five patrol officers in cruisers to patrol the five sectors of the town. On the September 8-9, 2011 midnight shift, six patrol officers (excluding Officer Everton) were available, one more than needed for routine patrol, so Sgt. Loewen and Sgt. Doyle decided to be “proactive” and asked Officer DeVito to take an unmarked pickup truck and conduct surveillance from the roof of the Radio Shack to which he agreed. (*Tr.I:44-4, 59-60 [Loewen]; Tr.I:96 [Doyle]*)

12. Upon arriving at the Radio Shack, Officer DeVito radioed to the shift that he was “in place”, without providing further information out of concern that the potential robbers would have a lookout car and police scanners. (*Tr.I:44-45 [Loewen]; II:76[Appellant]*)

13. Officer DeVito then called Officer Everton on the FPD recorded (land) line to report that he was on the roof and had his radio on low. He asked that Officer Everton make sure that there was no unnecessary chatter on the police radio and that no marked cruisers would be in the area to scare off the attempted robbers. (*Tr.II:76-79,82 [Appellant]*)

14. At 12:20 am, Officer Everton sent the following text message (via the FPD’s internal text messaging program called “CHAT”) to all shift personnel computers:

“Please be advised ****ALL UNITS**** Secret Squirrel, is in effect. DeVito is on the roof of Radio Shack. He is attempting to watch the Friendly’s lot too. If subjects show. We take down the “look out” car first. Then cover the subjects inside the store. Rule one: DO NOT broadcast any activity in this area beforehand, as to not tip off the

subjects. Please call the recorded line if a report worthy event occurs. DeVito's radio is on low, let's not compromise his position by broadcasting radio traffic. Thank you. 372 [Officer Everton's Badge #] Out."

(Exhs.7, 8 & 10; Tr.I:45-47[Loewen]; Tr.96-97[Doyle];Tr.II:78[Appellant])

15. Officer Everton had not discussed the CHAT message with Sgt. Loewen or Sgt. Doyle prior to sending it. When they saw it appear on their computers they were surprised. They both believed that the message should not have been sent without their approval. Their substantive concerns with the message were twofold: (1) it implied the wrong action plan; the proper action should be to arrest the subjects in the store and the lookout was secondary; and (2) calls to the recorded line could not be monitored as easily by the shift supervisor as radio calls, and should not have been discouraged (*Exhs.7 & 11; Tr.I:48-49, 82 [Loewen];Tr.I:97-98, 114[Doyle]*).

16. At 12:27 am, Sgt. Doyle then issued a CHAT message of his own:

"10-22 [disregard] on the last. Identify a crime prior to taking any enforcement action against occupants of any vehicle. DeVito is the man on scene and he will advise when he has and what the circumstances are to determine what actions will be taken. Officer safety will come before anything else."

(Exh.8; Tr.I:47[Loewen]; Tr.I:98-99[Doyle])

17. At 12:31 am, Everton replied by CHAT message directly to Sgt. Doyle so that only Sgt. Doyle would see it:

"I wish you would have come talked to me first before putting that out and making me look like a fool. . . I have been talking to DeVito on cell. I put it out that way because these guys have little tactical experience and may have to be walked through it.

(Exhs 7 & 8; Tr.II:80-81[Appellant])

18. Upon receiving this message, Sgt. Doyle called Officer Everton over the intercom to report to the Sergeant's office. Officer Everton knew he was in trouble and

told Dispatcher Diana Lanahan: “I’ll be right back. I’m going to get into a fight.” (*Exhs. 7 & 10; Tr.I:143[Lanham]; Tr.II:99-100[Appellant]*)

19. In the meeting with Officer Everton, Sgt. Doyle and Sgt. Loewen explained that Officer Everton had exceeded his authority to have issued his initial message without their approval and that they disagreed with the instructions that had been given. Officer Everton agreed that he should have checked first, but reiterated that he had acted at the request of Officer DeVito. The tone of the conversation was civil, no raised voices. Officer Everton acknowledged he had made a mistake but was clearly uncomfortable and agitated at being called down. (*Tr.I:49-50,76-77[Loewen]; Tr.I:99-100,120-121 [Doyle]; Tr.I:221[Riello];Tr.II:81-82{Appellant}*)

20. After a minute or so, Officer Everton turned to leave the room. He was called back by Sgt. Doyle but did not respond. He proceeded back to his duty station at the communications center when he was paged over the intercom by Sgt. Doyle to return to the Sergeant’s office. (*Exh.10; Tr.I:49-50,76[Loewen]; Tr.I:100-102{Doyle}; Tr.II:82, 101-102, 120-122 [Appellant]*)

21. Officer Everton responded back over the intercom: “Negative. I’ll talk to you in the morning after I cool off.” Officer Everton agrees that this conduct was a public refusal to obey a direct order. (*Exhs. 7, 9 & 10; Tr.I:50-51[Loewen]; Tr.I:102[Doyle]; Tr.I:143[Lanahan]; Tr.II:82-83,102-106[Appellant]*)

22. Sgt. Doyle suggested that Officer Everton be sent home for the night. Sgt. Loewen called FPD Captain Dunne, who suggested they make one more attempt to talk with Officer Everton before ordering him to go home. (*Tr.I:52-53,78[Loewen];Tr.I:103-104[Doyle]*)

23. Sgt. Loewen and Sgt. Doyle proceeded to the communications center and Sgt. Loewen told Officer Everton that it would be “in his best interest” to come into the nearby detail room and continue their conversation. Sgt. Doyle interjected that “we are offering you an opportunity here”, to which Officer Everton responded: “Oh, you think so, huh?” Officer Everton asked if that was their “request” or an “order” and, when told it was an order, he got up abruptly from his seat. (*Exhs 7 & 10; Tr.I:53-56, 79-81[Loewen]; 104-105, 128-132 [Doyle];Tr.I:143-144[Lanahan]; Tr.II:82-86,107-109 [Appellant]*)

24. Officer Everton, while agitated, intended to comply with the order and to proceed to the detail room as ordered. *Exhs.8 & 10; Tr.II:83-86 [Appellant]*)

25. Sgt. Loewen and Sgt. Doyle, however, construed Officer Everton’s abrupt actions to be a sign that the situation was about to escalate. Sgt. Doyle saw no point in further discussion and yelled: “Rick, go home!” (*Exhs.8 & 10; Tr.I:54-55, 88 [Loewen]; Tr.I:103-105,130-132 [Doyle]; Tr.I:143-144 [Lanahan]*)

26. After confirming that he was being relieved with pay, and did not have to worry about a meeting that was scheduled with FPD Chief Riello at the end of his shift (for an unrelated matter), Officer Everton packed up and went down to the locker room. He had another brief, cordial encounter with Sgt. Doyle and Sgt. Loewen in the locker room about 45 minutes later. They again told him to go home and “get some sleep” and he left the police station. (*Exh.8; Tr.I:56-58 [Loewen]; Tr.I:105-109 [Doyle]; Tr.I:143-144 [Lanahan]; Tr.II:86-89[Appellant]*)

27. Chief Riello was briefed by Capt. Dunne of the incident in the early morning hours of September 9, 2011 and concurred in the actions taken. Later on September 9, 2011, Officer Everton received a letter from Chief Riello placing him on paid

administrative leave and barring him from the FPD police station, pending an internal investigation of the incident that had occurred that night. (*Exh. 6: Tr.I:205-210 , 220[Riello]*))

28. On October 6, 2011, Officer Everton received a letter from the Falmouth Town Manager informing him of a disciplinary hearing concerning the September 9, 2011 incident. A revised hearing notice was issued on October 17, 2011. The hearing was held on or about October 19, 2011 before Hearing Officer Heather Harper. (*Exhs. 2, 3 & 5*)²

The October 26, 2011 Incident

29. On October 26, 2011, one week following his October 19, 2011 disciplinary hearing, and while still on paid administrative leave, Officer Everton was operating his privately-owned black-and-white 650cc motorcycle at a high rate of speed, traveling northbound on Route 28 in Falmouth and into Bourne. He wore civilian clothes and a full face and head helmet that covered his entire head save for a plastic covered opening for his eyes. There was no insignia or markings of any kind on his apparel or motorcycle to indicate that he was a police officer. (*Exh.25E; Tr.I:153, 160[Adamson]; Tr.II:24,36-37[Wrighter]; Tr.II:90-92 [Appellant]*)

30. According to Massachusetts law, every motor vehicle, including a motorcycle, must be equipped with at least one mirror so placed and adjusted as to afford the operator a clear, reflected view of the highway to the rear and left side of the vehicle. (*Tr.I:202 [Adamson]; See Mass. G.Lc.90,§7*)

31. Officer Everton's motorcycle was equipped with two side mirrors mounted on the handlebars, each about the size of a fist. When operating in a normal seated position, the

² The Hearing Officer's report and Falmouth Town Manager's decision refers to the hearing date as October 6, 2011, which was the date of the original notice of hearing. These references are clearly scriveners' errors. (*Exh.s 1 & 5*)

view in the mirror is obstructed by the operator's elbows so that it is not possible to see what is directly behind the motorcycle without moving the elbow. The mirrors are usually used by moving the elbow and leaning so as to be able to see what was behind the motorcycle before changing lanes. (*Exh. 25E; Tr.II:93-94[Appellant]*)

32. FPD Officer Norman Adamson is a 26 year veteran of the department. On October 26, 2011, Officer Adamson was working traffic duty on the morning shift. He had positioned his marked cruiser along the side of the Route 28 northbound lane, about a half a mile south of the overpass at Thomas B. Landers Road, and in plain view of passing motorists. Traffic was "moderate to heavy". He usually performs this same assignment twice a week in the same spot. He has made hundreds of traffic stops and usually catches a speeding motorist traveling north on Route 28 before the Thomas P. Landers Road overpass. (*Exhs 16, 17 & 23; Tr.I:151-153,157-158,162-165[Adamson]*)

33. The posted speed limit on Route 28 is 55 MPH and reduces to 40 MPH approximately one-half mile before the Otis Rotary in Bourne and then reduces to 25 MPH within the rotary. (*Exhs. 17 & 23; Tr.I:162-163; Tr.II:29[Wrighter]; Tr.129-130[Appellant]*)

34. Shortly before noon, Officer Adamson spotted a northbound motorcycle in the passing lane approaching his location. He clocked the motorcycle, which was in his direct line of sight, by radar to be traveling at 80 MPH. Although he did not know it at the time, Officer Everton was the owner and operator of the motorcycle and knew he was speeding. (*Exh.16 & 17; Tr.I:153[Adamson]; Tr.II:90, 109-116[Appellant]:)*

35. After waiting for a line of traffic to pass, Officer Adamson pulled his cruiser onto the highway and accelerated in an attempt to catch the motorcycle which was in plain

view ahead. Observing that the motorcycle was pulling away, Officer Adamson activated his “blue lights” but not his siren. Officer Adamson had accelerated to a speed in excess of 100 MPH as he approached the Thomas B. Landers overpass but still had not caught up to the motorcycle. Officer Adamson maintained his high-speed pursuit for about another mile, and, then, further “accelerated”, reaching about 110 to 115 MPH, as he saw the motorcycle weaving in and out of traffic and into the breakdown lane ahead. As he reached the Route 151 interchange, he called the police station and was advised to continue pursuit only as far as the town line. As the motorcycle had just crossed the town line into Bourne, Officer Adamson slowed down and deactivated his blue lights and turned back to Falmouth. (*Exhs 16, 17 & 23; Tr.I:153-161, 170-185[Adamson]; Tr.II:22[Wrighter]; Tr.II:109-116[Appellant]*)

36. Meanwhile, Officer Everton proceeded north on Route 28 and when he reached the Otis Rotary, he lost control of the motorcycle which skidded about 140 feet before landing on its left side, sheering off the left mirror and leaking gas from a hole torn in the metal gas tank. Everton was thrown off the motorcycle, tore his clothing and lost a boot. He was treated on scene and eventually transported to the hospital. (*Exhs.16 through 19; Tr.II:23-34[Wrighter]; Tr.II:94-96[Appellant]*)

37. Bourne Police Officer Christopher Wrighter, who had earlier received a “BOLO” (Be On the Look Out) for an erratic motorcycle operator, responded to the report of the accident, along with another Bourne patrolman and several Massachusetts State Police Troopers. Officer Wrighter interviewed an eyewitness who saw the accident and had seen the motorcycle approaching the rotary “too fast” and knew he “was not going to make it.” Officer Wrighter interviewed two other eyewitnesses on scene who had observed

Everton's earlier weaving in and out of traffic and driving in the breakdown lane to pass other motorists. One witness remembered that he saw (Officer Adamson's) Falmouth police cruiser on the side of the road and, soon thereafter (Everton's) motorcycle sped past him doing about 90 MPH, followed by the Falmouth police cruiser. The other eyewitness placed Everton's speed at 100 MPH when the motorcycle passed his vehicle. (*Exhs.17 & 18; Tr.II:24-34[Wrighter]*)

38. The police reports prepared by Officers Wrighter and Officer Adamson, the consistent statements of the eyewitnesses contained in that report and the photographs taken of the scene of the accident all support the conclusion that Officer Everton began to lose control of his motorcycle while still on the pavement at the entrance of the rotary and prior to hitting any patches of sand or gravel to the left of the travel lane, and that his excessive speed was a significant contributing factor to the accident. (*Exhs. 16 through 18, 23, 25A through 25F*)

39. Officer Wrighter cited Everton for Operating to Endanger (Negligent Operation). (*Exhs.17 through 20; Tr.II:34[Wrighter]*)

40. Officer Adamson was upset with Officer Everton for having put him at risk of conducting a high speed chase. After sending Capt. Dunne to the hospital to check on Officer Everton's condition, Chief Riello directed Falmouth Police Sergeant Hamilton, as the superior officer, to give no special treatment to Everton because he was a Falmouth police officer and to issue a citation for Driving to Endanger, Failure to Stop for Police, and Speeding. (*Exhs. 16 & 20;; Tr.I:165-166[Adamson]:Tr.I:211-214 [Riello]*)

41. On December 12, 2011, Falmouth Town Manager Julian Suso issued a letter to Officer Everton, which he received the next day, informing him that the pending

disciplinary hearing against him would be re-opened to consider additional charges stemming from his reckless driving behavior and motorcycle accident on October 26, 2011 for which he had been cited and criminally charged with operating to endanger, failure to stop for a police officer and speeding. (*Exh. 4*)

42. Also on December 12, 2011, Chief Riello issued a letter to Officer Everton in which he requested a “voluntary” response to three questions concerning the accident, to which Officer Everton responded on December 13, 2011.

Q1. Why you failed to stop for a Falmouth police officer pursuing you?

A1. During this time in question, I never observed or heard a Falmouth police officer behind me. Note: I wear a full face helmet.

Q2. Why your speed exceeded 100 miles per hour?

A.2. My speed never approached or exceeded 100 miles per hour.

Q3. The cause of my accident at the Bourne Rotary?

Q.3. Patches of sand and/or loose gravel caused a fishtail.

(*Exhs. 14 & 15*)

43. On February 16, 2012, following an additional evidentiary hearing, Hearing Officer Heather Harper submitted her written findings to Falmouth Town Manager Julian Suso, who adopted the Hearing Officer’s findings of fact and conclusions, in which FPD Chief Riello concurred based on the findings, and terminated Officer Everton from employment as an FPD patrolman, effective immediately, for the following reasons:

“Your behavior during your shift on September 9, 2011 constituted insubordination, discourtesy, and conduct unbecoming a police officer in violation of Falmouth Police Department Rules and Regulations 1, 5 and 11. You deliberately disregarded and refused to comply with lawful orders issued by your superior officers on at least three distinct occasions, including a refusal to meet with the command staff and a refusal to meet with the Police Chief to discuss your conduct during that shift. Your behavior demonstrated your contempt for the rules and regulations that govern order and discipline in the Police Department.

“Furthermore, on October 26, 2011, you recklessly endangered the safety of a fellow Falmouth Police Officer, who pursued you in a police chase, as well as

members of the public. As a result of your driving your personal motorcycle well in excess of the posted, legal speed limit on Route 28 North, and failing to stop for a Falmouth police officer who was pursuing you as you weaved in and out of traffic, you crashed your motorcycle in the Otis Rotary. Your failure to obey the motor vehicle laws and blatant disregard for your own safety and the safety of the public, constitute conduct unbecoming an officer and call your judgment into serious question. Further, your misconduct and failure to acknowledge any responsibility for your actions violates the Town's expectations for the conduct of its police officers.

"Your conduct and lack of judgment, as detailed above and in greater detail in the Hearing Officer report, is unacceptable for a Falmouth police officer. Your insubordinate and discourteous behavior to your superior officers is itself sufficient to warrant your discharge from employment. This behavior coupled with two significant incidents of misconduct within a six week period demonstrates that you are not suited for employment as a Falmouth Police Officer."

(*Exh.. 5 & 21; Tr.I:213-217, 261-264 [Riello]*)

44. This appeal duly ensued. (*Claim of Appeal*)

The Criminal Proceedings

45. Mr. Everton waived his right to jury trial and, after a bench trial on the two criminal complaints (filed by Bourne and Falmouth), at which he did not testify, the Falmouth District Court (Mooney, J) found Mr. Everton guilty on two counts of Negligent Operation of a Motor Vehicle (G.L.c.90,§24(2)(e)), and one count of Failing to Stop for Police (G.L.c.90,§25). He was found not responsible on the charge of Speeding in Violation of a Special Regulation, (G.L.c.90,§18).³ He received a sentence of six months administrative probation and assessment of \$250. (*Exhs. 22 & 24*)

46. The sworn testimony presented to the Falmouth District Court at the criminal trial consisted of evidence from Officers Adamson and Wrighter, as well as from two civilians (one called by the Commonwealth and one called by Mr. Everton) who saw Officer Everton's motorcycle pass them just prior to reaching the Otis Rotary. This testimony

³ The Falmouth District Court Judge explained her finding of "not responsible" on the speeding charge was based on a ruling that "speeding merges with [the] endangerment." (*Exh. 24*)

closely paralleled, and is consistent in all respects with the police reports and other evidence presented to the Commission about the events leading up to and resulting in the October 26, 2011 crash of the motorcycle. The witness called by Mr. Everton, a friend and member of the same Army National Guard unit, who happened to be traveling home on Route 28 at the same time, estimated that Mr. Everton's motorcycle passed him about "70-ish", after the Route 151 interchange, which is the last interchange before reaching the Town of Bourne. (*Exh. 24*)

Evidence of Disparate Treatment

47. At some time in the middle of 2011, an incident occurred at the FPD police station in which an FPD Lieutenant allegedly had "words" with officers under his command and, during this incident, the Appellant alleged that the Lieutenant gave the "middle finger" to the entire shift. This incident was not investigated and no discipline was meted out. Chief Riello had no knowledge of that incident. Had it been brought to his attention, it would have been investigated and may, or may not, have resulted in disciplinary action. (*Tr.I:223-224, 227-231[Riello]*)

48. In June 2009, shortly after Chief Riello assumed his position with the FPD, an FPD Officer was involved in a motor vehicle accident while responding to an alleged domestic violence incident just behind another cruiser, also responding to the call for service, when his cruiser struck the lead cruiser which, in turn, struck a civilian bystander who suffered serious injuries. After an investigation by the Massachusetts State Police, that officer was not criminally charged but was cited for traveling at an excessive speed and too closely behind another cruiser. He was never disciplined and subsequently was promoted to the position of a Detective Patrolman. (*Tr.I:247-254[Riello]*)

49. In November 2010, Officer Everton himself was involved in an on duty accident while responding to a motor vehicle accident in heavy sleet and freezing rainy conditions that had caused many car crashes that day. His cruiser lost traction, rolled off an embankment and pinned him inside the cruiser until he was rescued using the Jaws of Life. The Massachusetts State Police investigated the crash and no citations were issued. (*Ex. 35; Tr.II:58-63[Riello]*)

50. Evidence was introduced concerning misconduct of three other FPD officers. One officer received a two-day suspension for fighting with another officer during a roll call, The second officer was arrested for OUI on two occasions and was not disciplined and was also involved in a fight with his ex-wife's new boyfriend for which he was suspended for 10 days. That officer is still employed with the FPD. The third officer received a 180-day suspension for use of excessive force on a youth during an arrest, and is still employed with the FPD. These incidents all occurred prior to Chief Riello's tenure. As to the third officer, Chief Riello clearly considered the prior misconduct a terminable offense but the officer in question had "towed the line" since then and had given no further cause for discipline. (*Tr.I:238-247[Riello]; Tr.II:52-57, 63-66 [Riello]*)

CONCLUSION

Summary

Falmouth has met its burden to prove just cause to discharge Officer Everton from his position as an FPD Patrolman. The preponderance of evidence established that, on October 26, 2011, Officer Everton's negligent operation of his motorcycle placed the lives and safety of the public in danger, behavior for which he refused to accept responsibility and which has sufficient nexus to his official duties to properly support the

conclusion that his actions amount to conduct unbecoming a police officer and adversely affects the public interest by impairing the efficiency of public service. The incident on September 9, 2011 at the police station would not have justified his termination, and would have warranted a modification of the penalty imposed, save for the more serious misconduct that followed on October 26, 2011.

Applicable Legal Standards

A tenured civil service employee may be discharged only for “just cause” after due notice and hearing, followed by a written decision “which shall state fully and specifically the reasons therefore.” G.L.c.31,§41. An employee aggrieved by such a decision, may appeal to the Commission pursuant to G.L.c.31,§43. Under Section 43, the appointing authority carries burden to prove to the Commission by a “preponderance of the evidence” that “there was just cause” for the action taken. G.L.c.31, §43. See, e.g., Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); In performing its function:

[T]he commission does not view a snapshot of what was before the appointing authority . . . the commission hears evidence and finds facts anew. . . . [after] a hearing de novo upon all material evidence and . . . not merely for a review of the previous hearing held before the appointing officer. There is no limitation of the evidence to that which was before the appointing officer. . . . For the commission, the question is . . . “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.”

Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003) (quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983) (emphasis added)). See also Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823; Cambridge v. Civil Serv. Comm’n, 43 Mass. App.

Ct. 300, 303-05, rev.den., 428 Mass. 1102 (1997). See generally Villare v. North Reading, 8 MCSR 44, reconsidered, 8 MCSR 53 (1995) (discussing de novo fact finding by “disinterested” Commissioner in context of procedural due process).

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, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001). It is the purview of the hearing officer to determine credibility of testimony presented to the Commission. “[T]he assessing of the credibility of witnesses is a preserve of the [commission] upon which a court conducting judicial review treads with great reluctance.” E.g., Leominster v. Stratton, 58 Mass.App.Ct. 726, 729 (2003) See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep’t of Social Services, 439 Mass. 766, 787 (2003) (where live witnesses gave conflicting testimony 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)

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, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983); The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the “merit principle” which governs Civil Service Law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and “separating employees whose inadequate performance cannot be corrected.” G.L.c.31,§1.

The September 9, 2011 Police Station Incident

Officer Everton issued his September 9, 2011 CHAT memo that precipitated the confrontation with his superior officers with good intentions, believing he and Officer DeVito were using their experience in tactical operations to support the FPD’s efforts to capture the gang that was planning to rob the Radio Shack that night. Some commanders might well have seen these officers’ initiative as a positive trait, taken the suggestion to use discretion and limit on-air communications due to the intelligence that the robbers were monitoring police radio transmissions as tactically wise, and seen the risk of arresting innocent parties waiting in a vehicle at that hour as less critical than having the opportunity to catch the entire gang. There was no evidence that the robbery attempt actually occurred.

Nevertheless, Sgt. Doyle and Sgt. Loewen, as the commanding officers on duty, have the prerogative, essential to a paramilitary organization such as the FPD, to expect that their lawful orders will be obeyed. To the extent that they deemed it necessary for such CHAT messages to be cleared with them and differed on the tactical judgments conveyed in the message, their command judgments are controlling. Although the evidence does not unequivocally demonstrate that FPD rules and regulations clearly spell out these requirements, Officer Everton, himself, acknowledged that he was wrong to have sent the message without checking with his superior officers in advance. Had he done so, the ensuing quarrel probably would never have occurred.

Officer Everton knew his superiors were upset with his message when he saw Sgt. Doyle's CHAT that nullified what he had just sent and which prompted Officer Everton to send a private message to Sgt. Doyle. While that message was not insubordinate and the initial meeting with his superiors was clearly frosty, the preponderance of the evidence fails to establish any direct act of insubordination up to that point.

The situation changed, however, when Officer Everton was paged to report back to his superiors and he responded "negative, I'll talk to you in the morning when I cool off". Sgt. Loewen recognized his lack of command experience in this type of escalating situation, and deferred to the more experienced Sgt. Doyle, as well as calling upon his superior officer, Capt. Dunne, for guidance. Had Capt. Dunne been on scene and available to intercede, as an experienced supervisor, he may have had a better chance to assess what was then a relatively benign confrontation and diffuse it through verbal counseling. Ultimately, however, the call was left to Sgt. Loewen and Sgt. Doyle, who

had already concluded that Officer Everton had been insubordinate by his intercom response to them and should be sent home.

I find that the final confrontation in the communications center was not an act of insubordination as Sgt. Doyle and Sgt. Loewen portrayed it. I find that Officer Everton did, in fact, intend to comply with any lawful “order” to continue a discussion and did, in fact, comply with the subsequent order relieving him of duty. His attitude, however, led him to act in a way and make statements that his superiors were fully justified to conclude were rude and unbecoming, and warranted his relief from duty. He definitely had “lost his cool”, as his own prior intercom response acknowledged. The testimony of the FPD dispatcher, who was the only percipient witness not personally involved in the confrontation, supports this conclusion.

Since the appointing authority hearing of the evidence regarding the September 9, 2011 argument did not result in any decision until after the October 26, 2011 incident, it is not clear what level of discipline might have resulted had there been no motorcycle accident. Chief Riello suggested that termination of Officer Everton would be justified solely for his behavior on September 9, 2011, but the preponderance of evidence does not support his conclusion, I do not find that the misconduct exhibited by Officer Everton on that date, his first offense of insubordination,⁴ was established to be so egregious that it was incapable of remediation and required discharge from employment. I agree with the Appellant that, as to that offense, the Commission would be warranted to modify the penalty and reduce the discipline to a suspension.

As it turned out, however, the September 9, 2011 incident did not occur in a vacuum,

⁴ Officer Everton had been disciplined previously for discourtesy and cockiness toward the public. (Exhs. 12 & 13)

The October 26, 2011 Motorcycle Incident

The credible and consistent testimony from the numerous eyewitnesses to Officer Everton's driving behavior on October 26, 2011 leaves no doubt in my mind that he was operating his motorcycle at speeds in excess of 100 miles per hour as he proceeded along Route 28 toward the Otis Rotary, weaving in and out of traffic as he went. I also find that even though he may not have actually seen Officer Adamson's FPD cruiser, any failure to do so was the result of his inattention and/or improper placement of his rear view mirror and/or and obstructions to view that prevented him from observing the road behind him as the law required. His excessive speed, erratic driving behavior and inattention combined to cause an FPD officer to initiate a risky, high-speed chase, cause his own accident and, all of those events subjected other members of the public to risk of injury.. Falmouth is fully warranted to conclude that such conduct by a member of its police force is unbecoming a police officer and substantially impairs the efficiency of the public service.

The fact that Officer Everton was operating his own motor vehicle off-duty and out of uniform does not excuse this behavior. Off-duty misconduct properly can be the basis for discipline when the behavior has a "significant correlation" or "nexus" between the conduct and an employee's fitness to perform the duties of his public employment. See, e.g., City of Cambridge v. Baldasaro, 50 Mass.App.Ct. 1, 4, rev.den., 432 Mass, 1110 (2000); School Committee of Brockton v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 491-92, rev.den., 426 Mass. 1104 (1997); Timperly v. Burlington School Committee, 23 MCSR 651 (2010) (misconduct by off-duty school custodian in public park).

In this regard, the Commission takes into account the case law that imposes special obligations upon police officers, who carry a badge and a gun and all of the authority that accompanies them, and which requires police officers to comport themselves in an exemplary fashion, especially when it comes to exhibiting self-control and to adhere to the law, both on and off duty.

“[P]olice officers voluntarily undertake to adhere to a higher standard of conduct 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 implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.”

Attorney General v. McHatton, 428 Mass. 790, 793-74 (1999) and cases cited. See also Falmouth v. Civil Service Comm’n, 61 Mass.App.Ct. 796, 801-802 (2004); Police Commissioner v. Civil Service Comm’n, 39 Mass.App.Ct. 894, 601-602 (1996); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 475-76 (1995); Police Commissioner v. Civil Service Comm’n, 22 Mass.App.Ct. 364, 371, rev.den. 398 Mass. 1103 (1986); Pellot v. City of Haverhill, 21 MCSR 205 (2008) (demotion from sergeant to patrol officer for associating with a relative engaged in drug dealing); Dodge v. Town of Montague, 17 MCSR 20 (2004) (demotion from sergeant to patrol officer for poor off-duty judgment)

In addition, Falmouth was rightly concerned with Officer Everton’s failure to accept responsibility for his actions on October 26, 2011.⁵ His attempt to attribute his accident to hitting a patch of sand, his assertion that he never exceeded 80 MPH and his denial that speed was the real cause of his accident all were wholly discredited. Even the one witness he called to testify at his criminal trial, a personal friend, put his speed as he

⁵ This reluctance is in contrast to his admission of wrongdoing in over-reacting to his superiors’ admonishment of his unauthorized and unprofessional behavior on September 9, 2011.

approached the Otis Rotary at “70-ish” when he probably should have been slowing down to 40 MPH or less. See City of Cambridge v. Civil Service Comm’n, 43 Mass. 300, 303 (1997) (“The city was hardly espousing a position devoid of reason when it held that a demonstrated willingness to fudge the truth in exigent circumstances was a doubtful characteristic for a police officer. . . . It requires no strength of character to speak the truth when it does not hurt.”)

The Appellant’s criminal conviction on two counts (G.L.c.90,§24(2)(a) and G.L.c.90,§25) for his behavior on October 26, 2011 corroborates my conclusion, but I reach that conclusion independent of the fact of the convictions themselves. The testimony and findings at the criminal trial clearly show that the conviction under G.L.c.90,§24(2)(a) was based on the prosecution’s proof beyond a reasonable doubt, based on substantially similar evidence as presented to the Commission, that Officer Everton had been speeding and driving erratically in a negligent manner on a public way “so that the lives or safety of the public might be endangered.”

The basis for the Falmouth District Court finding that Officer Everton “refuse[d] or neglect[ed] to stop when signaled to stop by any police officer” in violation of G.L.c.90,§25, is less clear. There was no direct testimony from any witness at the criminal trial or before the Commission that Officer Everton actually saw Officer Adamson’s cruiser in pursuit with his blue lights flashing (as opposed to several other witnesses who did). Thus, it is not certain whether the criminal conviction for “failure to stop” was supported by an inference that Officer Everton did see that he was being pursued and “refused” to stop, or was based on a “neglect” to stop due to inattention, which seems the more likely grounds, based on the evidence presented during the criminal trial.. I do not

rely on the G.L.c.90,§25 conviction, however, because, as I found above, Officer Everton's cruiser was in plain view and he should have seen Officer Adamson's cruiser as he passed him and later gave pursuit, but for his neglect in observing the road, all of which is supported by independent evidence presented at the Commission hearing.

Modification of Penalty

G.L.c.31, Section 43 also vests the Commission with the authority to affirm, vacate or modify the penalty imposed by the appointing authority. The Commission has been delegated with "considerable discretion", albeit "not without bounds", to modify a penalty imposed by the appointing authority, so long as the Commission provides a rational explanation for how it has arrived at its decision to do so. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594, 600 (1996) and cases cited; Falmouth v. Civil Service Comm'n, 61 Mass.App.Ct. 796, 800 (2004); Faria v. Third Bristol Div., 14 Mass.App.Ct. 985, 987 (1982) (remanded for findings to support modification)

Since the facts found, as to the September 9, 2011 incident, vary from those upon which Falmouth had determined to discharge Officer Everton, it would be appropriate that the Commission consider whether to exercise its discretion to modify the penalty imposed. Although Officer Everton has a limited prior history of discipline and an otherwise positive record of public service, I conclude the exercise of the Commission's discretion to modify the penalty of a discharge is not warranted here. Falmouth established by a preponderance of evidence that Officer Everton's actions in connection with his October 26, 2011 motorcycle accident, standing alone, do provide just cause to terminate Officer Everton from his position with the FPD for the reasons set forth in the notice of termination, namely, conduct "unbecoming a police officer", "failure to obey

the motor vehicle laws” and “lack of judgment” that had endangered the safety of a fellow Falmouth Police Officer and the safety of the public, as well as his “failure to acknowledge any responsibility” for his actions. While I take a different view of the evidence concerning the earlier September 9, 2011 episode at the police station, I agree that Falmouth’s decision to terminate Officer Everton must stand in view of the serious nature of his subsequent misconduct relating to the October 26, 2011 incident.

The Appellant’s contention that he has received disparate treatment from other similarly situated FPD officers is not well-founded. Some of the incidents involved officers who had engaged in rude behavior or fighting and got off with little or no discipline, mostly under a prior chief. I agree that these examples give some credence to the suggestion that, as compared to the September 9, 2011 incident, termination for that offense would not have been warranted. These examples, however, have no direct bearing on the more serious offense that I found did warrant termination arising from the October 26, 2011 motorcycle accident.

The one example of alleged disparate treatment of an officer who had been cited for negligent operation of a motor vehicle in June 2009, involved an accident in the line of duty. Although a tragic mistake, occurring on Chief Riello’s watch, that officer was not criminally charged or convicted. In fact, Officer Everton crashed his cruiser while operating at an excessive speed in the line of duty in November 2010 and, similarly, was not disciplined for causing that on-duty accident. I do not find these examples similarly situated to Officer Everton’s wholly unjustified driving behavior on October 26, 2011.

Accordingly, for the reasons stated above, the decision of the Town of Falmouth to discharge the Appellant, Richard Everton, is affirmed and the appeal of the Appellant is hereby ***DENIED***.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis McDowell & Stein, Commissioners) on November 14, 2013.

A True Record. Attest:

Commissioner

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

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

Notice to:

Joseph A. Padolsky, Esq. (for Appellant)

Tim Norris, Esq. (for Respondent)