COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

ROY FREDERICK,

Appellant

v. Docket No. D-06-235

BOSTON POLICE DEPT.,

Appointing Authority

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Commissioner: Daniel Henderson, Esq.

DECISION

Pursuant to the provision of G.L. c. 31, §43, Appellant, Detective Roy Frederick, (hereafter "Frederick" or "Appellant"), timely appealed the decision of the City of Boston Police Department (hereafter "Department" or "BPD") suspending him for one (1) year without pay for five (5) violations of Department Rules and Regulations, (Specifications I through V) pertaining to an ongoing, personal, intimate relationship with a criminal suspect. Detective Frederick is a City of Boston Police Department Detective and

contends that just cause does not exist for the City of Boston Police Department to suspend him for one year and that the Appointing Authority has used disparate treatment in disciplining him.

A hearing was held on July 23, 2007, before Commissioner Daniel M. Henderson. Sixteen (16) documents were entered as exhibits at the hearing, and the parties did file a Joint Motion to Add Exhibit 17, after the hearing. This motion was allowed on August 2, 2007 and Exhibit 17 was added to the record. Post-hearing briefs or proposed decisions were filed by both parties.

FINDINGS OF FACT

Based on the documents admitted into evidence (Exhibits 1-17), and the testimony of witnesses: Boston Police Superintendent Daniel Linskey, Suffolk County Assistant District Attorneys Amy McNamee and Gerald Stewart and the Appellant Roy Frederick, I find the following:

1. Detective Roy Frederick has worked as a police officer for the City of Boston for approximately nineteen (19) years, without any prior discipline. (Testimony of Frederick)
2. Detective Frederick has been a member of the Boston Police Department Drug Control Unit ("DCU") for approximately ten (10) years. The Drug Control Unit is a prestigious assignment in the City of Boston Police Department due to the high activity and public exposure. The high activity allows for extra income because of the numerous arrests and court

appearances made by members of the Drug Control Unit. Police Officers are paid extra, as court time for court appearances. (Testimony).

3. On the late afternoon of July 24, 2003, a surveillance of 248-250 Warrant Street, Boston was conducted by the Area B-2 Drug Control Unit (hereafter "DCU"). Detective Roy Frederick was an active member of that DCU squad on that date. Officers William Shaw and Kenneth Hearns and Detective Sergeant Daniel Linskey were also members of that squad on that day. (Exhibit 10, testimony of Frederick and Linskey,)

4. The DCU squad decided to work in the area of Copeland and Warren Streets, monitoring drug activity on that date, due to numerous complaints they had received. Officer Kenneth Hearns, also a member of the DCU, although alone in his vehicle, was working with Officer Shaw and Detective Frederick that day. Detective Sergeant Linskey was the commander of that DCU squad that day. (Exhibit 10 and testimony)

5. A confidential informant ("CI") was utilized by this Drug Control Unit squad that day. A CI is generally a person who is familiar with the area and the drug scene. There is a process by which a CI is registered for use by a Boston Police Department (BPD) squad. The person is identified and then registered with an identification number. The person is qualified by testing for reliability, accuracy and determined to be free of any outstanding criminal matters. The CI is observed by the squad the entire time he or she is being used by the squad. The CI is searched before and after each attempted controlled buy of drugs or other police mission. The

CI in this case was sent into the house at 248- 250 Warren Street because the DCU had obtained information that there was drug dealing going on in that building and they wanted the CI to attempt a controlled buy of drugs there. (Exhibits 3, 10 and testimony).

6. Officer Kenneth Hearns was parked across the street from 248- 250 Warren Street, watching the building and was in radio communication with Detective Roy Frederick and Officer William Shaw, who were behind him somewhere in another vehicle. (Exhibit 10).

7. The CI came out of the building of 248-250 Warren Street five minutes later and went back to the vehicle of Officer Shaw and Detective Frederick. The CI told them that he was not able to make a drug buy inside the building. However the CI said that upon leaving the building he was able to observe a woman in a black dress with a large quantity of crack cocaine on her person. The CI made a drug purchase from this woman. This woman seemed to be working with two other women, standing with her (Exhibits 3, 10 and testimony of Linskey and Frederick).

8. About ten minutes after that, Officer Hearns observed a black female in front of 250 Warren Street who fit the description of the woman given by the CI, from whom the CI had made a drug buy. The description of the woman (wearing a black dress) was given by the CI to Detective Frederick. That description was then relayed to Officer Hearns by radio by Detective Frederick. (Exhibit 3, 10, testimony of Linskey and Frederick).

9. The CI told Frederick that he bought drugs from a woman whose description fit the woman who later after the arrest, turned out to be Jane Doe. Jane Doe had not been a target of this drug investigation and did not live at the targeted address that was under investigation, (248-250 Warren street). (Exhibit 3, 10, and testimony of Linskey and Frederick).

10. Officer Hearns radioed Frederick and Shaw and told them that he had a black female outside that fit the description of what they gave him. Approximately five minutes later, Frederick, Shaw and the CI drove by, past the black female (Jane Doe) and identified her as the one that sold the CI drugs. (Exhibit 10 and testimony).

11. In the meantime Detective Frederick drove on to station B-2 to drop off the CI and to pick up Det.-Sgt. Linskey. Det.-Sgt. Linskey had been at the station doing paper work and monitoring the activities of the DCU squad by radio. Frederick did pick-up Linskey and they returned to the 248-250 Warren St. area. (Testimony of Linskey and Frederick)

12. Officer Hearns waited another 15-20 minutes and watched as Jane Doe remained outside and met up with two black males. (Exhibit 10,).

13. Both black males were well-known to the DCU squad as drug dealers from prior arrests. One of the black males was the former boyfriend of Jane Doe, and the father of her baby. (Testimony Linskey and Exhibit 10).

14. Officer Hearns observed the former boyfriend hug and kiss Jane Doe while they stood outside the building at 248-250 Warren Street. (Testimony of Linskey).

15. Jane Doe then got into a SUV as a passenger with two other females, one of whom was a 13 year old juvenile. The SUV then drove away. (Exhibits 3, 10, testimony of Linskey).

16. The vehicle with Frederick and Linskey in it pulled alongside the SUV and at that point, Jane Doe seemed to recognize them or their vehicle since she tried to conceal her identity by sliding down in her seat. (Exhibit 3, testimony of Frederick and Linskey)

17. Sergeant Detective Daniel Linskey was the Commander of the DCU squad that day and it was Linskey's intention to have the SUV pulled over by a marked cruiser. As Frederick's vehicle followed the SUV, a radio call was made for a marked cruiser to pull over the SUV. (Testimony of Linskey).

18. After the SUV was pulled over, at the corner of Washington St. and Columbia Rd., Officer Hearns approached the passenger side of the SUV where Jane Doe was seated and asked her to step out of the vehicle. Jane Doe seemed a little intoxicated and she would not stand still. She kept turning toward the fence area and would not follow any instructions. Officer Hearns said he could see a bulge right between her breasts and he thought the drugs were there because that information had been to him by the CI. (Exhibit 10 and testimony).

19. Detective Frederick, Sergeant Linskey and Officer Shaw arrived at the scene of the stop about 2-3 minutes after the SUV had been pulled over. Linskey immediately exited his vehicle to assist Hearns. (Testimony of Linskey).

20. Frederick also exited the vehicle to assist. He began talking to the young girl that was in the SUV and Sergeant Linskey was talking to the driver. It is not clear where Officer Shaw was at that time. (Exhibit 10, testimony).

21. Jane Doe would not comply with Officer Hearns' instructions, so Officer Hearns grabbed her arm and she bit him on the hand and on his fingers. Officer Hearns grabbed her by the arms and flipped her to the ground and handcuffed her. (Exhibit 10 and testimony of Linskey).

22. At one point while at the scene, after Jane Doe struggled with Hearns, Detective Frederick told Jane Doe to calm down and cooperate. (Testimony of Linskey).

23. The 13 year old female and the other female (driver) admitted to having cocaine in their possession and handed over the drugs to the police. The 13 year old had approximately 7 grams of cocaine in her possession and the other woman had approximately 15 individual (clear plastic) baggies of crack cocaine. They were arrested for possession of a class B substance and Jane Doe was also arrested for assault and battery on a police officer, in addition to the drug charges. (Testimony of Linskey).

24. Jane Doe was taken to the station, B-2 for booking and search, along with the other two females. At the station, Jane Doe handed over a quantity of drugs that were in her possession. (Testimony of Linskey).

25. Upon his arrival at the station, Frederick went upstairs to the DCU office to begin work on the arrest report. Jane Doe and the other two women remained downstairs for the booking process at the booking desk. Later,

while at the booking desk, Detective Roy Frederick spoke with Jane Doe and told her to "knock it off" and she agreed to cooperate with the booking procedure. He also scolded her about biting Officer Hearns and fighting with him. She then apologized to Officer Hearns. (Exhibit 10 and Testimony of Linskey).

26. During the booking process a Board of Probation (BOP) criminal record check was conducted for Jane Doe and the other two female arrestees. The BOP criminal record check is conducted at a specialized computer terminal at the station. Frederick normally conducted these BOP checks for the DCU squad because he was good at it. However it is not entirely clear that he did the BOP check for this arrest or for Jane Doe in particular. (Exhibit 3,10, and testimony of Frederick and Linskey)

27. It is an integral part of the arrest-booking process to conduct a BOP check on any person who has been arrested in order to determine if they have a criminal record and if they have any outstanding warrants and for bail purposes. It is especially important when a person is being charged with a drug offense in order to determine if it is a second or subsequent drug offense, because subsequent drug offenses carry an enhanced penalty. (Testimony of Linskey)

28. Jane Doe had a long criminal record at the time of her arrest on July 24, 2003, which includes both felony and misdemeanor convictions. (Exhibit 11)

29. She has a felony conviction from 1997, wherein she was convicted of Larceny over $250. She received a 90-day jail sentence which was suspended for one year. (Exhibit 11).

30. She also had seven (7) (G.L. c.209A) civil restraining orders noted on her criminal record. These civil restraining orders had been taken out against her by five different people. (Exhibit 11)

31. The Appellant knew Jane Doe from the Orchard Park neighborhood of Boston, where they both had grown up. Although Jane Doe is a few years younger than Frederick, he knew of her as a family acquaintance, a friend of his younger sister, prior to 2000. After 2001, the Appellant knew Jane Doe as someone he would meet sporadically at his mother's house, where Doe would be visiting the Appellant's brother and sister. Jane Doe would stop by his mother's house to visit and braid his brother's hair. The Appellant would also stop by his mother's house and on occasion see Jane Doe there. (Exhibit 10 and testimony of Linskey and Frederick)

32. Detective Roy Frederick compiled and signed the DCU incident report relative to the arrest of Jane Doe and the two other women. He signed the report as the Reporting Officer; however all of the members of the DCU squad participate in and contribute to the content of the report. The writing of the report is a group effort and this is the normal routine. Frederick voluntarily put in the report that Jane Doe recognized his vehicle before the SUV was stopped, thereby admitting familiarity with Jane Doe. This is an example of Frederick's apparent unawareness of any wrongdoing on

his part. He did not try to hide his relationship with Jane Doe. He also signed the report, as the "Reporting Officer", again not trying to conceal his involvement with the arrest of Jane Doe. These are examples of Frederick's naiveté, bad judgment or lack of consciousness of guilt. These are not the acts of someone trying to conceal or obscure an improper relationship.(Exhibit 3,10, and testimony of Frederick and Linskey)

33. Jane Doe was ultimately charged with Trafficking Cocaine, Inducing a Minor to Sell Cocaine, and Assault and Battery on a Police Officer. Trafficking Cocaine is a serious felony charge that has exclusive jurisdiction in Superior Court. There is a minimum/mandatory jail sentence for anyone convicted of a drug trafficking charge. (Testimony of Linskey and ADA Gerald Stewart).

34. All three of the female co-defendants were charged with trafficking in cocaine by virtue of the total weight of the drugs found on all three of them equaling 14 grams. The three co-defendants were charged as joint venturers in a common criminal enterprise, the sale of illegal drugs. (Exhibit 3, testimony of Frederick and Linskey)

35. Sergeant-Detective Linskey knew at the time of the arrest that Detective Frederick was familiar with Jane Doe. Linskey had been introduced to Jane Doe by Frederick some months earlier. This introduction occurred in the parking lot behind police station B-2. Jane Doe was at B-2 to report that she had been the victim of domestic violence, by her boyfriend and father of her child. She was angry at her boyfriend and wanted to give the

Police some information about her boyfriend's other criminal activity. She was willing to provide information about her boyfriend's drug activity and where he kept his drug stash. However, it was determined by Frederick and Linskey that Jane Doe was not willing to become a confidential informant (CI) for them but was willing to provide information as an "*anonymous source*." Jane Doe did eventually provide information to the police that led to an arrest pertaining to a homicide. At a later date but before her own arrest in these matters she did provide information on her boyfriend. This information aided in a police investigation but did not lead to an arrest of her boyfriend. (Testimony of Frederick and Linskey)

36. Jane Doe had not been used as a (CI) *confidential informant* for the Boston Police Department either prior to or after her arrest and arraignment in this matter. She had not gone through the qualifying process that the BPD requires to register a person as a CI. Jane Doe was not being used as a "*cooperating defendant"* after her arrest and arraignment by either the BPD, or the Suffolk County District Attorney's Office. A defendant is sometimes used as a cooperating defendant. This is done by the defendant providing information on other criminal matters in exchange for leniency on sentencing in their own pending criminal matters. A process is followed to designate a defendant as a cooperating defendant. This process involves coordinating notice and negotiation among the District Attorney's Office, the defendant's attorney and the police officers on the case. (Testimony of Linskey)

37. However, Detective Sergeant Linskey did not know at the time of Jane Doe's arrest that she had been a long time close family friend of Frederick and that Frederick had a one-time sexual encounter with her in 2001. If Linskey had known this, at the time of Jane Doe's arrest, he would have removed Frederick immediately from any involvement with the case and subsequently notified the District Attorney's Office of the situation. (Testimony of Linskey)

38. The purpose of removing Frederick immediately from the case would be to avoid any potential conflict of interest accusations or other defenses being raised by the defendants. Since Jane Doe had been observed by the DCU squad kissing and hugging her boyfriend at the scene of the drug sale, it might then be proposed that Jane Doe had been arrested simply for retaliation by a jealous and spurned DCU squad member. The Police and the District Attorney are also obligated by court rules, during the pre-trial process, to formally notify the defendant's attorney of any facts or circumstances that might be viewed as exculpatory. (Testimony of Linskey, McNamee and Stewart)

39. The Boston Police Department has a policy or practice of non-contact between police officers and a criminal defendant after arrest and arraignment in court. The purpose of this policy is to avoid any potential violation of the attorney-client relationship during the pendency of the matter in court. A criminal defendant may only be properly contacted by the police by way of the District Attorney through the defendant's

attorney. Any direct contact by the police with the defendant could be determined by the Court to be improper and thereby jeopardize the prosecution of the case.(Testimony of Linskey, ADA McNamee and ADA Stewart)

40. Jane Doe was arraigned on September 18, 2003, on multiple felony charges and $20,000 bail was set. She was appointed an attorney. (Exhibit 4 and testimony of ADA Stewart)

41. At no time did Detective Frederick tell Sergeant Linskey that he was having conversations with Jane Doe, post-arrest and post-indictment, without her attorney present. If communication were to occur, the process then would have been formalized through the District Attorney's office and Jane Doe's attorney, to qualify her as a cooperating defendant. Arrangements and negotiations would have been initiated about her possibly cooperating with authorities on other cases in order to gain consideration on her own case. As the commander of that squad, the fact that one of his detectives was having conversations with a defendant, without the defendant's attorney present, was information Linskey felt he should be aware of. (Testimony of Linskey).

42. Frederick knew or should have known generally about Jane Doe's criminal activity and criminal record since he had background information on her and the opportunity to inquire of her. He and his family knew her most of his life. He knew that she had suffered domestic abuse at the hands of her boyfriend. He knew that she also had some involvement as a

party in other domestic relations restraining orders. He knew that her boyfriend was a drug dealer with a criminal record. He knew that her boyfriend was the father of her child. He knew where she lived. He knew that she was familiar with the street scene and that he had obtained information from her regarding criminal activity by other people. He saw her sporadically, both before and after her arrest, at his mother's house and spoke with her on the telephone. He thereby had the opportunity to inquire of her about these matters. It seems reasonable that he would have inquired about these matters since he and his family might be affected in some way by their relationship with her. If he did not inquire from her about her criminal record, or criminal activity, it was negligent, especially considering his experience as a Police Officer and Detective(Exhibits 3, 4, 5, 11 and testimony)

43. Sometime in 2001, the Appellant had a one-time consensual sexual encounter with Jane Doe. The Appellant did not have any other sexual contact with Jane Doe thereafter in 2001 after this one-time episode, nor in 2002, or in 2003. (Frederick testimony)

44. Jane Doe did have contact with the Appellant in person and via telephone in 2003 both before and after her arrest and in 2004. Frederick had given her his cellular phone number and she called him sporadically. Sometime before her arrest in this matter, she telephoned and offered Frederick information about crimes or the whereabouts of persons wanted for certain crimes. Frederick referred her to an FBI agent regarding information she

had regarding bank robberies on the South Shore. Frederick also referred her to the BPD Gang Unit regarding information she had on the location of someone wanted regarding a homicide. This information did prove helpful and the person was eventually arrested on the homicide and convicted. (Frederick and Linskey testimony).

45. Frederick's intent in staying in telephone contact with Jane Doe was to keep lines of communication open in the event that she came across information, in the future, that might prove helpful to the police in investigating crimes and making arrests. (Frederick testimony)

46. I find that Frederick did not intend to imply to Doe that he would help her with any police or court problems she might find herself in. He did not intend to imply that he would help her regarding her arrest by his DCU squad. Frederick believed that he made this clear to Doe. He even told her in a telephone conversation that he was not involved in any deal with her, that he was just giving her advice. (Testimony of Frederick, demeanor and exhibits)

47. However it is also not unlikely that Jane Doe interpreted this receptiveness by Frederick to the information she was providing to him, as an implied offer to help her if she were arrested and involved in the criminal court process. This possibility is based on their long term friendly relationship, her supplying of information on other crimes and their one-time sexual encounter. These factors supported an implied offer to provide her with some sort of help if she were arrested and charged with a crime. However,

Frederick did not the possibility of an implied offer to help her. This possibility should have been considered by Frederick at the time of Jane Doe's arrest. The arrest therefore should have prompted him to immediately disclose the details of his relationship with her to his superior, Detective-Sergeant Linskey. Frederick also should have been alert to the possibility of some sort of manipulation by Doe, especially during the time leading up to the court date, on the motion hearing on December 10, 2004.This is another example of Frederick's poor judgment or naiveté, but not an example of an intentional wrong act. (Testimony, demeanor and exhibits)

48. Frederick did not consider the possibility of this implied offer and did not consider the possibility that his relationship with Jane Doe could be construed by others as a potential conflict of interest on his part, regarding her arrest and prosecution. Therefore he did not believe that it required any reporting or disclosure by him.(Testimony, demeanor and exhibits)

49. To most police officers, the requirement to disclose the relationship and avoid contact with Doe after her arrest would seem to be obvious. Therefore the violation of relevant BPD and court rules and practice would also seem to be obvious. For Frederick as a member of the DCU squad that arrested Jane Doe, it was improper for him to have any communication with her, while the matter was still pending in court, except through her attorney by way of the District Attorney's office. However these requirements were not obvious to Frederick. He seems to

have been blinded to this violation by his continuous long term family friendship with Doe. (Exhibits, demeanor and testimony)

50. Frederick acted so utterly unaware of this potential conflict of interest that he offered to drive her home to Randolph a mere two weeks before a scheduled court hearing, in this matter(December 10, 2004), on a Motion to Suppress Evidence. During this ride Frederick admitted to becoming sexually involved with Jane Doe, by petting and foreplay, before he broke it off. This is another example of Frederick's poor judgment, poor comprehension or naiveté. (Testimony of Frederick)

51. Frederick's utter failure to consider the appearance of a potential conflict of interest on his part regarding the arrest and prosecution of Jane Doe is further evidenced by his failure to warn his family to stay away from Jane Doe after her arrest in this matter. He did not caution his family to prevent Jane Doe from regularly visiting his mother's house. Frederick did not make any effort to stay away from his mother's house when Jane Doe was present there.(Testimony of Frederick)

52. Frederick mistakenly believed that Detective-Sergeant Linskey knew about his relationship with Jane Doe. However, Linskey did not know about the true nature of their relationship. That relationship being a long term family friendship with some recent sexual involvement. (Frederick and Linskey testimony)

53. Frederick made somewhat of a disclosure of his relationship with Jane Doe when he made an entry in the police arrest incident report in this

matter as follows: "...It should be noted that the Suspect (Jane Doe) is familiar with Det. Frederick's vehicle and observed Sgt. Det. Linskey and Det. Frederick ride past her, at that point she began to slouch down in the front seat area, as if she was trying to avoid being seen." However none of the other DCU squad members treated this as a disclosure. They did not know of the nature of his relationship with Jane Doe, at that time.(Exhibit 3, 10 and testimony of Linskey)

54. I find Frederick to be a credible witness based on his presentation on the stand. His answers were delivered in a uniform way that was consistent with his other interviews on this subject matter. He answered questions immediately, almost before he has had an opportunity to digest and fully understand the question. He seems to be reluctant to ask for a definition or a clarification of a term used in a question. He answers spontaneously and then goes on to try to explain his answer because he senses that he is not being understood. His answers are not understood because he has a confusing way of answering questions. This seems to be his style. An example of this is contained in the transcript of his interview of February 17, 2005, at page 11, It reads as follows (Exhibit 13):

Q. How long have you known Jane Doe?

A. A couple of years.

Q. How many is a couple?

A. I'd say two or three years.

Q. Did you ever date Jane Doe?

A. I would say yes.

Q. You were intimate at some stage. When did the intimacy between you and Ms. Doe begin?

A. I really couldn't tell. It was sometime before that.

The Interviewer then goes on to other subject matters without Frederick having to explain his confusing answers above. He obviously could not have been intimate with Jane Doe before he met her or before he dated her but that is what he seems to be saying here. There was no evidence that Frederick ever dated Doe. Frederick has also stated numerous times when asked, that he has known Jane Doe since childhood so that his answer to the question, (Q.-"How long have you known Jane Doe? A. - "A couple of years.") is obviously based on a very different understanding of the word "known".

This confusion is again evident and again left unresolved, on page 12 of the transcript of the February 17, 2005 interview (Exhibit 13)

Q. Following her indictment on September 18, 2003, did you continue a relationship with Jane Doe?

A. No.

Q. You did not?

A. No, not a physical type relationship and a very, very vague verbal type of relationship.

55. It is found that Frederick did not intentionally conceal the nature of his relationship with Jane Doe from the time that she was arrested on July 24, 2003 until he was asked about it for the first time, by ADA Amy

McNamee, on December 8, 2004, at the motion preparation meeting. He had not previously been asked about his relationship with her. During the motor vehicle stop, subsequent arrest, booking and report writing, Frederick made no effort to hide his familiarity with Jane Doe. On the contrary he seems to have exhibited his familiarity with her. (Exhibits, testimony demeanor)

56. It is found however; that Frederick's failure to disclose the extent and nature of his relationship with Jane Doe from her arrest on July 24, 2003 until he was first asked about it on December 8, 2004 was not intentionally deceptive. His failure is a continuous omission due to his misappraisal of the situation he was in. He exhibited very poor judgment, poor comprehension or naiveté. He did not act as if he were in a quandary. His thoughts about the situation never rose to the level of concern. He never actively tried to hide the nature of his relationship and erroneously believed that others were generally aware of it. He did not believe that his relationship, even though some (recent) sex was involved, constituted a conflict of interest or other impropriety necessary of reporting. He certainly did not consider the appearance of a conflict or impropriety. (Exhibits, testimony and demeanor)

57. Frederick told ADA McNamee, (approx. Dec 8th to Dec 10th) that "he had saved some phone messages from Jane Doe from the day of the arrest to prove that there was no bad blood between them." This is an indication of Frederick's misappraisal or way of thinking. He is actually offering

McNamee evidence of his contact with Doe, thereby indicating that he does not believe that the contact is improper. There is no consciousness of guilt on his part. He is saying there is no problem here because she is not mad at me for the arrest. He is obviously unaware, even at this late date, that he should not be having contact with a person arrested by his DCU squad, who is now a criminal defendant in court.(Exhibit 5 and testimony of McNamee and Frederick)

58. In at least one telephone conversation with Frederick, Jane Doe alluded to her arrest and upcoming trial. She indicated that another named Boston police officer had offered her leniency on her pending, criminal charges were she to provide information about other criminal activity in unrelated matters. (Testimony of Frederick)

59. The Appellant told Jane Doe that this is something she should pursue as this is done all the time, i.e., leniency on a cooperating defendant's criminal case in exchange for criminal information in unrelated matters. (Testimony of Frederick).

60. On December 8, 2004, a preparation meeting was held with the DCU squad by Assistant District Attorney Amy McNamee, for a criminal Motion to Suppress hearing. This was the first meeting that ADA McNamee had ever had with this DCU squad. All of the squad members attended except Linskey. A few days before that prepatory meeting, ADA McNamee received a telephone call from Jane Doe's attorney, inquiring whether Frederick would be at the Motion Hearing scheduled for

December 10, 2004. This was highly unusual and ADA McNamee became alarmed. McNamee asked Frederick at the December 8th prep meeting if he had a relationship with any of the three women co-defendants. He admitted that Jane Doe was a long-time family friend. McNamee later in the meeting asked him if he had an "intimate relationship" with her. Frederick admitted that he had. At that point the prep meeting continued. McNamee felt "awkward" and uncomfortable because of the subject matter and that this was her first meeting with the DCU squad. McNamee did not ask Frederick whether the intimate relationship was over, she just assumed that it was over. After the prep meeting McNamee did not feel that the investigation and arrest had been compromised (Exhibit 12, Frederick Testimony; McNamee Testimony)

61. In late November of 2004, approximately two weeks before the motion preparation meeting held by ADA McNamee with the DCU squad, the Appellant had a second but first post-arrest sexual contact with Jane Doe. This sexual contact occurred after the Appellant, upon Jane Doe's request, agreed to give her a ride home to Randolph Mass. from the Appellant's mother's house. Sometime during the ride there was kissing and sexual foreplay until the Appellant broke it off. (Frederick Testimony)

62. If Frederick believed that this contact with a criminal defendant arrested by his DCU squad was improper, as being in violation of BPD and Court rules and practice, he would not have so readily admitted it to McNamee when asked. He would have exhibited some consciousness of guilt not

embarrassment. If he thought it was improper, he would have been silent, vague, equivocal, evasive, hesitant, objecting or disavowing. (Exhibit 5 and testimony of McNamee and Frederick)

63. Officers Hearns and Shaw who were at the prep meeting were shocked to learn that Frederick had a long-term, family friendship with Jane Doe. (Exhibit 12, McNamee Testimony)

64. In the early morning of December 10th before the Motion hearing, McNamee was telephoned by Frederick. During the conversation she asked him when was the last time that he saw Jane Doe and McNamee stated that "…it became clear that he had seen her [Doe] within two weeks of [that] date". However McNamee said "it wasn't discussed if it was intimate." McNamee also sensed during that telephone conversation that Frederick had been too embarrassed to discuss the situation in front of the squad members at the prep meeting on December 8th. I find that McNamee was also too embarrassed to discuss the circumstances more fully at that time. (Exhibit 12, Frederick and McNamee Testimony)

65. During that early morning telephone conversation of December 10th Frederick admitted to McNamee that Jane Doe had telephoned him after the arrest and she informed him that an "Officer Steeb" and other officers had been to her house looking for her regarding information on the location of someone who committed a homicide. The Officer whom she identified as Officer Steeb, turned out to be another officer, she had the wrong name. Jane Doe had extensive conversation with this Boston Police

Officer. Jane Doe said that this Officer knew she had been arrested and this Officer offered to help her if she could help him arrest the person wanted for the homicide. Frederick had only discussed the case with Jane Doe in the context of saying that by her offering information or cooperation on other people's criminal matters in exchange for favorable treatment on her own case is done all the time with the Boston Police. Frederick therefore advised her to cooperate with the other officer to help herself out. He again informed McNamee that she was "a close family friend, she knows all of his family members and that he had … seen her as recently as two weeks ago." He also stated that "he had saved phone messages from Doe, from the day of her arrest to prove there was no bad blood between the parties." (Exhibits 5, 13 and testimony of McNamee and Frederick)

66. Frederick's state of mind during his conversations with Doe was that it did not involve him and her arrest. He was just a family friend, someone she trusted, giving her advice. He was not involved in the negotiations or the relaying of information. He did not make any promises. He did not act as an intermediary in any way. He thought he was acting in the general good, to get "this guy who killed this person" off of the streets. (Exhibit 13 and testimony of Frederick)

67. McNamee had a conversation with Doe's attorney at the Court House on December 10th before the Motion hearing. The attorney claimed that Frederick's relationship with Doe was ongoing and that he had proof of it,

including: telephone records, Frederick's cell phone number, photographs, a recent semen sample and detailed knowledge of the inside of Frederick's DCU van. The attorney also threatened to call Frederick as a witness and embarrass him on the witness stand. He said he would have his client telephone Frederick, while he was on the stand. The attorney stated that Doe had observed Frederick drive by in his DCU van, on the day of her arrest, when she was kissing her boyfriend in front of 248-250 Warren Street. The attorney claimed that Doe then left the area because she was afraid, (apparently of Frederick's reaction to the kissing). The attorney also informed McNamee of Doe's mental health history, of which he claimed Frederick was aware. The attorney also threatened to call the newspapers with his accusations. The attorney's pressure and strategy was effective. ADA McNamee said she "panicked" at this point. She wanted to "protect her officers" from any embarrassing publicity. The claims and assertions by Doe's attorney, which are stated here, are not taken to be truthful or accurate. (Exhibits 5,12, Testimony of McNamee)

68. ADA McNamee then spoke with Det.-Sgt. Linskey and relayed the information she had received from Doe's attorney. Linskey's reaction was incredulity and shock, followed by feelings of betrayal. McNamee relayed to Linskey that "…Frederick had an intimate relationship with her [Doe] and I [McNamee] thought Daniel Linskey was going to pass out because he lost all the color in his face." It is noted here that Linskey exhibited a florid complexion when he testified. Linskey's reaction to this information

was as he testified: “shocked, pissed, upset and hurt.” Linskey was still visibly upset when he recalled the experience during his testimony at this hearing. Linskey telephoned Frederick immediately upon receiving the information from McNamee about the intimate relationship. Linskey was in a highly emotional state of mind when he telephone Frederick and he translated the operative word “intimate” used by McNamee into the street language “f---ing”, when he spoke with Frederick. It is unlikely that Frederick was willing to parse words of phrases with Linskey, his boss, under these highly charged circumstances. Frederick simply gave generally affirmative or negative answers to Linskey’s questions, knowing that he had already answered McNamee’s questions in detail about this and that she had spoken to Linskey. It is likely that if Frederick had then asked Linskey for the definition of the words or phrases he was using, Linskey would not have reacted positively. Emotion colored this telephone exchange between Frederick and Linskey. Each participant in this conversation had certain ideas in his own mind but the emotion and language didn’t allow an accurate and detailed exchange of those ideas. Frederick testified that he did not admit to Linskey during this conversation that he was “f---ing” Doe after the arrest.(Exhibits 5,12, Demeanor and Testimony of Linskey, Frederick and McNamee)

69. The Department’s lack of clarity in determining the conduct or behavior of Frederick is partially attributed to the failure of the BPD to conduct an effective investigation and its resulting failure to define the operative

words “intimate” and “on-going” relationship and the broad time frame of the charges, “On or about 2003 and 2004”. Everyone associated with this investigation seems to have danced around the pivotal issues. Neither the BPD nor the District Attorney’s Office made a serious attempt to determine the factual details of the relationship between Frederick and Doe. They avoided asking questions about the time, place, nature, frequency and such facts as any on-duty encounters between them. For example ADA Amy McNamee was asked during her Department recorded interview, transcript at page 6 line 12, Q. “When did the troubling issues first arise regarding this case?” Amy McNamee went on to answer without identifying or defining the “troubling issues”. McNamee later answered during that interview, at page 7, line 11, A. “…and I asked him later during the interview if he [Frederick] had an intimate relationship with her [Doe]”. “… He said he had and at that point we continued the trial prep.” Further on McNamee was asked at page 7, line24 Q. “Did Detective Frederick say that the relationship was over?” She answered, A. “I didn’t ask him that, I assumed that. I had asked him - - you know, this was something that, you know, would impact and, you know, the indication was neither way but he didn’t outright state it but I drew - - based on, you know, his body language and the way things were going, I assumed it was in the past and that’s why, in review of the facts, I felt that the investigation and the arrest hadn’t been compromised.” (Exhibits 5,12, Demeanor and Testimony of Linskey, Frederick and McNamee)

70. However, after her conversation with Doe's attorney at the Court House on December 10th, McNamee changed her position and formed the opinion that the case had been seriously compromised and that it was not in the interest of justice to go forward with the case against Doe. McNamee's change of mind was partially due to the unsubstantiated claims, threats of embarrassment to Frederick and newspaper notoriety made by Doe's attorney. McNamee also believed that Doe's "mental health issues" made the prosecution undesirable. McNamee later on, after consultation with her supervisors did enter in court, a *nolle prosequi* or discontinuance of prosecution of these criminal matters. A nolle prosequi or nolle pros of a criminal case is equivalent to a dismissal (Exhibits 5,12, Testimony of Linskey and McNamee)

71. The strong spontaneous reaction of shock and disbelief by all of the members of the DCU squad to the information about the Doe-Frederick relationship corroborates their prior ignorance of it. (Exhibits 5,12, Testimony and Demeanor of Linskey and McNamee)

72. Frederick also had a strong reaction when he learned that the criminal charges against Jane Doe and the two women co-defendants were to be nolle prossed. Officers Hearns and Shaw, while entering the Suffolk Superior Court House in the early morning of December 10, 2004, met Detective Frederick, who was exiting. Hearns and Shaw were alarmed to see Frederick leaving, since the motion hearing could not have begun by that time. They asked Frederick if the matter has been dismissed. They

described Frederick's reaction as: "He was kind of upset. He was upset. He said go ask the D.A." I find that this is another indication of Frederick's state of mind. He did not feel that he had done anything wrong. He didn't act sheepish or contrite but acted upset. He didn't exhibit any consciousness of guilt. This demeanor comports with his claimed belief, that there was no conflict of interest on his part.(Exhibit 10, testimony of Frederick and McNamee)

73. Although Doe's attorney alleged that physical evidence existed of Doe's recent sexual involvement with Frederick. However, the only evidence McNamee viewed were photographs of Frederick and Doe taken by Doe on her cell phone. These photos were undated. Frederick vigorously denied the recent semen sample and pushed McNamee to go forward on the motion hearing and the prosecution, if only to prove himself innocent of those charges. He also denied any sexual interchange with Doe in the DCU van. McNamee admitted in her testimony that she was reluctant to believe anything a defense attorney claimed as a fact and that defense attorneys generally would say anything to obtain an advantage. (Testimony of Frederick and McNamee)

74. Frederick admitted to McNamee that he had given his cell phone number to Doe for the sake of obtaining information from her on crimes and criminal investigations that Doe had not been involved in. He also admitted that Doe was a long-time family friend and that he saw her sporadically at his mother's house. Therefore the evidence (except for the

alleged recent semen sample) of a relationship which Doe's attorney claimed to have is also corroborated by Frederick's testimony. (Testimony of Frederick and McNamee)

75. On December 10, 2004, the Appellant again spoke with ADA McNamee, while at the Suffolk Superior Court House before the hearing on the Motion to Suppress Evidence. He reiterated what he had told her on December 8th and ADA McNamee directed Frederick to stay out of sight and away from the hearing courtroom. She did not intend to call him as a witness as he was unneeded and she did not want him to be seen by Jane Doe's attorney. McNamee believed that Doe's attorney wanted to call Frederick as a witness and try to embarrass him on the witness stand. (Testimony of Frederick, Linskey and McNamee).

76. Later in the day on December 10, 2004, after speaking with Det.-Sergeant Linskey and explaining the situation, the Appellant met with Lieutenant Stephen Meade, Commander of DCU. Meade, in the Appellant's presence, telephoned ADA McNamee, who reiterated her earlier conversation with the Appellant and what Jane Doe's attorney had alleged about physical evidence. The Appellant also presented Meade with tapes of telephone messages he had recorded when Jane Doe had tried to contact him. (Frederick testimony)

77. At the meeting with Lieutenant Meade, Meade determined that the Appellant would be transferred from the Drug Control Unit to Area 7 of the Boston Police Department, a much less prestigious position. The

Appellant asked Lieutenant Meade if this transfer was going to be all of his discipline and Meade responded affirmatively. (Exhibit 16 and Frederick testimony)

78. After speaking with the Appellant on December 10, 2004, ADA McNamee met with her supervisors on or about December 13, 2004, at which time it was decided that a *nolle prosequi* would be entered, and thereby Jane Doe would not be prosecuted for the charges. (McNamee testimony; Exhibits 4, 5)

79. Even after ADA McNamee's conversation with the Appellant on December 10, 2004, McNamee did not feel that the case had been compromised because of the Appellant's actions but due to the totality of circumstances of the case. McNamee considered the risk of negative newspaper coverage and embarrassment to the DCU squad was not worth proceeding, since Jane Doe had "mental health issues". McNamee weighed everything taken together and felt that it was "not in the interest of justice" to prosecute. McNamee then decided to enter a *nolle prosequi* on the cases (McNamee, Frederick Testimony; Exhibit 5)

80. On or about January 19, 2005, a Complaint control form was filled out by BPD-IAD Detective Adrian Troy in which he stated: "it is alleged by First Assistant DA Josh Wall that prior and subsequent to the arrest of [Jane Doe] . . . Det. Roy Frederick, maintained an intimate relationship with [Jane Doe]. DA Wall further maintains that Det. Frederick also made implied promises of favorable treatment to [Jane Doe] in the absence of

her counsel." This Complaint control form was the formal initiation of a disciplinary investigation action by the BPD against the Appellant. (Exhibit 2 and testimony)

81. Apparently, the basis for the Complaint control form was an undated letter, allegedly from First Assistant DA Josh Wall to Superintendent Paul F. Joyce of the Boston Police Department, making allegations that the criminal prosecution of Jane Doe had been compromised due to the Appellant's failure to divulge his sexual history with Jane Doe and because he had made implied promises to Jane Doe. (Exhibit 1)

82. This undated letter, had the signature of First Assistant District Attorney Josh Wall, but Josh Wall himself never signed the letter, as the letter was authored and signed by Second Assistant District Attorney for Suffolk County Gerard Stewart, without Wall's knowledge, permission or knowledge of its contents. (Exhibit 1, 17 and Stewart Testimony)

83. Wall testified on May 1, 2006 at the Boston Police Department disciplinary hearing of the Appellant, that he had never seen this letter, nor had he authorized Stewart to prepare it, or sign or use Wall's signature. The first time Wall ever saw this undated letter with his name as Signatory was in March of 2006. (Exhibits 1, 17)

84. Despite Stewart's letter, that indicated that "the Suffolk County District Attorney's Office . . . <u>has completed a comprehensive and thorough investigation of the matter</u> . . ." (Joint Exhibit 1), Stewart himself testified that there was no comprehensive and thorough investigation of the matter.

(Stewart Testimony) Stewart testified that he simply had approximately two conversations with ADA McNamee about her December 8 and December 10, 2004 meeting and conversation with the Appellant and that at no time did Stewart contact anybody else in the District Attorney's Office or the Boston Police Investigation Affairs Division regarding this matter. (Exhibit 1,Stewart Testimony)

85. ADA Stewart's letter was very strongly worded and contained alleged substantive statements of fact, accusations, conclusions and other determinations which were not supported by the findings of fact and conclusions of this Commission decision. This letter was undated and unauthorized and unknown by the alleged author, First Assistant DA Josh Wall. This letter is clearly troublesome in its form, substance and consequences. This letter contributed substantively, if it was not the determinative force in the decision by the BPD, to bring disciplinary charges against the Appellant. ADA Stewart testified at this hearing that he would change the word "investigation" to the word "review" in that part of his letter where it is stated "The Suffolk County District Attorney's Office[SCDAO] has completed a comprehensive and thorough investigation of the matter and the facts are determined to be as follows . . ." (Exhibit 1 and Stewart testimony)

86. The BPD-IAD section did not do a thorough and complete investigation into this matter. They did not collect physical evidence such as: the cell phone photos, telephone records or the alleged semen sample. The

interviews they conducted were clearly incomplete. They did not interview Jane Doe, her attorney, or First Assistant DA Joshua Wall (Exhibits, testimony, demeanor and Exhibit 1).

87. There was some evidence presented by the Appellant regarding two other police officers in the Boston Police Department who had been disciplined for failure to divulge relationships with: a women defendant and a woman being transported in a police cruiser. This evidence was offered to show disparate treatment of the Appellant in comparison to the two other officers. However there is insufficient evidence presented to show sufficient similarity here to the circumstances of the charges against the two other officers. I do not find that the Appellant received disparate treatment in this case based on the limited evidence presented on the other two officers. (Exhibits, testimony Exhibit 14, 15).

88. The Appellant did receive some treatment in the nature of punishment, by his transfer to police station Area-7, prior to his formal discipline, which formal discipline is on appeal here. Prior to his one year suspension without pay, the Appellant was transferred by Lieutenant Meade on December 10, 2004 from the DCU to Area 7 in East Boston. This transfer or reassignment was entirely within the prerogative of the BPD under the circumstances here. However as Police Superintendent Linskey testified here that "a transfer from DCU is disciplinary in nature" due to the stature and income potential associated with the DCU. It is not clear from the record whether the BPD weighed and considered this transfer as a factor

when it issued the one year suspension. I find no disparate treatment and no vindictiveness by the BPD and no political overtones in this case. (Exhibits, testimony and testimony of Linskey)

89. Frederick did suffer a heavy loss in his personal and professional relationship with Linskey, the other members of the DCU squad and possibly other officers in the Department. His reputation in the Department and elsewhere was possibly damaged primarily due to the assumption that his acts or omissions were intentional and not due to poor judgment or naiveté. However I have found here that his acts and omissions were due to continuous poor judgment or naiveté and not done intentionally. I do not find a justification for his state of mind but I do discern a possible explanation. He grew up in the same neighborhood as Jane Doe and possibly became inured to her type of personality and accepted it. His experience as a police officer put him in regular contact with others of similar ilk to Jane Doe. Contact with potential informants, drug addicts, and street people were a normal part of the job. An actual conflict of interest, such as taking a monetary bribe in exchange for an official favorable act, would be clear to him. However avoiding the appearance of impropriety or a conflict of interest is more difficult for him to discern. He testified at this hearing that he did not believe that he had a conflict of interest, despite the 2001 sexual encounter, (described by Frederick as “ships passing in the night”) and the November, 2004 sexual touching encounter. He, and only he, knew what was in his own mind and

he did not believe that what he had done was a conflict of interest because he did not intend to provide an official benefit to Jane Doe in exchange for a benefit received by him. He treated her like a long time family friend while at the same time he believed he was treating her properly as a criminal defendant.(Exhibits, demeanor and testimony)

90. The Department brought five charges against Detective Roy Frederick at an internal disciplinary hearing for violations of Rule 102, § 3 (Conduct), Rule 102, § 4 (Unreasonable Judgment), Rule 102, § 39 (Association with Criminals), Rule 113, Cannon 6 (Public Integrity), and Rule 113, Cannon 8 (Public Integrity) of the Rules and Procedures of the Boston Police Department. The five charges, (Specifications I –V) and the corresponding rule violation for each charge, are as follows(emphasis added):

Specification I "On or about 2003 and 2004, Roy Frederick did have an on-going personal intimate relationship with a criminal defendant that his Drug Unit Squad has arrested for trafficking in cocaine. Such behavior constitutes conduct which reflects negatively upon the department, tends to indicate that the employee is unable or unfit to continue as a member of the Department, and tends to impair the operation of the Department. Such conduct is in violation of Rule 102 § 3 (conduct)" (Exhibit 6)

Rule 102, § 3 (Conduct) provides that "[E]mployees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. **Conduct unbecoming an employee shall include that which** tends to

indicate that the employee is unable or unfit to continue as a member of the Department, or **tends to impair the operation of the Department or its employees**. (Exhibit 7).

Specification II "On or about 2003 and 2004, Roy Frederick did have an on-going personal intimate relationship with a criminal defendant that his Drug Unit Squad has arrested for trafficking in cocaine. Such behavior constitutes conduct which is not in accordance with established duties or procedures, or which constitutes the use of unreasonable judgment in the exercising of any discretion granted to Detective Frederick. Such conduct is in violation of Rule 102, § 4 (Neglect of Duty)". (Exhibit 6)

Rule 102, § 4 (Unreasonable Judgment) states that "[T]his includes any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees or which constitutes **the use or unreasonable judgment** in the exercising of any discretion granted to an employee." (Exhibit 7).

Specification III "On or about 2003 and 2004, Roy Frederick did have an on-going personal intimate relationship with a criminal defendant that his Drug Unit Squad has arrested for trafficking in cocaine. Such conduct is in violation of Rule 113, Canon Six (Public Integrity)." (Exhibit 6)

Rule 113, § 5,Canon 6 (Public Integrity) states that "[E]mployees shall **avoid all conflicts of interests and appearances of impropriety.** They shall never seek or accept gratuities when it can be construed to involve their official position within the Department." Rule 113, § 5, Canon Six (Public Integrity). (Exhibit 8).

Specification IV "On or about 2003 and 2004, Roy Frederick did have an on-going personal intimate relationship with a criminal defendant that his Drug Unit Squad

has arrested for trafficking in cocaine. Such conduct is in violation of Rule 113, §5, Canon Eight (Public Integrity)." (Exhibit 6)

Rule 113, § 5,Canon 8 (Public Integrity) states that "[E]mployees shall **conduct their private affairs so as not to reflect unfavorably on the Boston Police Department**; or in such a manner as to affect their ability to perform their duties honestly, effectively, fairly, and without impairment. (Exhibit 8).

Specification V "On or about 2003 and 2004, Roy Frederick did have an on-going personal intimate relationship with a criminal defendant that his Drug Unit Squad has arrested for trafficking in cocaine. Such conduct is in violation of Rule 102, § 39 (Association with Criminals)." (Exhibit 6)

Rule 102, § 39 (Association with Criminals) states that "[D]epartment employees shall not associate with persons whom they know, or should know, are persons under criminal investigation, or who have a reputation in the community or in the Department for recent or present involvement in felonious or criminal activities. This rule shall not apply where said associations are necessary in the performance of official duties, or where said associations are unavoidable due to familial relationships of employees. (Exhibit 7).

APPLICABLE LAW

It is well settled under civil service law that a suspension must be upheld if the Appointing Authority proves by a preponderance of the credible evidence that there was just cause for the suspension. Gloucester v. Civil Service Commission, 408 Mass. 292 (1990). Moreover, the Commission has held in numerous decisions, supported by

appellate caselaw, that its function is not one of substituting judgment for that of the Appointing Authority. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997); School Committee of Salem v. Civil Service Commission, 348 Mass. 696, 699 (1965). The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge, at 304; *See* Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 411 (2000); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003).

An action is "justified" when "done upon adequate reasons sufficiently supported by credible evidence, when weighted by an unprejudiced mind, guided by common sense and by correct rules of law." City of Cambridge, 43 Mass. App. Ct. at 304, quoting Selectman of Wakefield v. Judge of First Dist. Court of Eastern Middlesex, 262 Mass. 477, 482 (1928); Commissioner of Civil Service v. Municipal Court of City of Boston, 359 Mass. 211, 214 (1971).

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." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983); School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). The issue for the Commission is not "whether it would have acted as the appointing authority acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the

appointing authority in the circumstances found by the commission to have existed when the Appointing Authority made its decision." Town of Watertown v. Arria, 16 Mass. App. Ct. at 334; *See* Commissioners of Civil Service v. Municipal Court of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass. App. Ct. at 727-28. If the Commission finds by a preponderance of the evidence that there was just cause for an action taken against an Appellant, the Commission shall affirm the action of the Appointing Authority. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). It is well established that police are held to a higher standard of conduct even when they are off duty because of the role they play in our society. Attorney General v. Leo McHatton, Jr., 428 Mass. 790, 793 (1999), *citing* Police Comm'r of Boston v. Civil Service Commission, 22 Mass. App. Ct. 364, 371 (1986) and cases cited therein.

CONCLUSION OF THE MINORITY (Henderson and Taylor, Commissioners)

We, the Minority, conclude as follows:

The Boston Police Department charged the Appellant with five charges of misconduct, (Specifications I-V). The claimed facts which are the basis for the five charges or specifications are alleged to have occurred as here stated; "On or about 2003 and 2004 Roy Frederick did have an on-going personal intimate relationship with a criminal defendant that his Drug Unit Squad has arrested for trafficking in cocaine." This is the factual allegation for each of the five charges. The Appellant had a sexual encounter with Jane Doe in 2001, long before her arrest. The Appellant did have a one-time sexual encounter with Jane Doe after her arrest of June 23, 2003. That voluntary,

sexual encounter involving petting and foreplay did occur in late November of 2004. That encounter occurred spontaneously some time during the drive from the Appellant's mother's home to Jane Doe's home in Randolph. Jane Doe had asked the Appellant for a ride home and the Appellant agreed and did drive her home. The Appellant broke off that sexual encounter before it escalated beyond petting.

The Appellant did have an on-going personal or family friendship with Jane Doe from childhood. Jane Doe was friendlier with the Appellant's mother, sister and brother. Jane Doe would regularly visit his mother's house during this relevant 2003 – 2004 time frame. His brother and sister lived with his mother. The Appellant would visit his mother's house regularly and would encounter Jane Doe there sporadically. Additionally the Appellant did have some telephone contact with Jane Doe during this time period, as outlined in the findings of fact.

During the time period of the five charges, the Appellant did have an on-going personal relationship with Jane Doe. This long term family friendship was modified only once after Doe's arrest, with the sexual encounter of late November, 2004. This one-time sexual encounter did not transform the nature of the long-term, family friendship relationship into the on-going intimate relationship which is also alleged as part of each of the five Specifications charged.

Factually, the Appellant did have an on-going personal relationship during the relevant period of the five Specifications, charged, with a one-time spontaneous sexual encounter. The Appellant admitted the nature of his relationship with Doe every time he was asked about it. He was first asked about it on December 8, 2004, by ADA McNamee. He never was deceptive and made no attempt to hide his relationship when asked by

McNamee. He did not disclose the relationship prior to that because he did not believe that the relationship required any type of disclosure. All of his actions were consistent with that state of mind. He never committed any act or made any statement that could be construed to exhibit a consciousness of guilt on his part. He told McNamee that he had audio tapes of telephone messages left for him by Doe to prove that Doe was not mad at him. If he thought the telephone contact with Doe was improper, he would not have volunteered that information to McNamee. By volunteering these telephone tapes to McNamee, Frederick showed that he believed that Doe's state of mind, (anger at him) was the issue and not his own state of mind.

Frederick did have an unusual way of answering questions during his BPD-IAD interview and his testimony at this hearing. His unusual verbal style might be an indication that his thought process is also unusual. Frederick did not commit an intentional act that he believed at the time to be in violation of any Department Rule or Regulation. Any errors he made were errors of omission due to his bad judgment and were actually tantamount to one continuing act of omission. These were omissions for which he had not been previously warned or counseled by the BPD. The circumstances of the disciplinary charges here may have been his first experience with such circumstances. The errors were, as stated above, errors of application. His state of mind was such that he did not seem to be able to apply this type of rule to himself. The concept of appearance of impropriety or conflict of interest, at least in this case of an old family friend, seems to be beyond his comprehension. He believed that you are punished for your wrongful acts, like taking a money bribe for an official favor, and not for the appearance you convey.

Frederick is a 19-year veteran with no prior disciplinary record. Both ADA McNamee and Dep. Superintendent Linskey described Frederick as a good Detective and one of the best Detectives Linskey ever worked with. The BPD–DCU squad routinely dealt with people like Jane Doe, as informants, subjects of investigations or arrestees. It is noted that Frederick's effectiveness as a Detective could be partially attributed to his inner city experience while growing up in the Orchard Park neighborhood. However, conversely, this experience also might have influenced his judgment in matters of appearance when dealing with a friend.

The five Specifications charged have not been substantiated in part. Specifically, the factual element of each charge; the on-going intimate relationship, has not been proven by a preponderance of the credible evidence in the record. There is a fundamental requirement that each charge in a group of disciplinary charges requires the proof of an additional fact, a fact separate and distinct from the facts alleged in the other charges, for each charge to be sustained. This fundamental requirement has not been met. Even if all of the elements of the factual charge had been met, it would suffice as proof for only one of the five Specifications since the identical factual charge is alleged for each Specification. In other words, the five Specifications are factually identical and duplicative of the first charge. The only difference among the five Specifications is the alleged effect of the alleged conduct or behavior. Indeed, each Specification uses the word "conduct" and then goes on to describe the various effects of the conduct. The five Specifications are factually redundant as no additional fact has been alleged or proven for each of the four subsequent Specifications (II-V). The Department has merely alleged

different consequential effects of the Appellant's conduct or, as we find, his single act of continuing negligent omission.

It is apparent from the Department's hearing presentation and post-hearing brief that the Department believed and argued a different theory from the Findings of Fact and conclusions made in this decision. The Department proposed that the Appellant's conduct, as charged, was intentional and that his failure to disclose his relationship with Doe, at various junctures from the arrest onward, was intentional concealment.

The Minority has determined that the Department's (Specifications I-V), charges against the Appellant were not substantiated in substantive part. However, the Minority believes that the Appellant's errors of judgment or omissions as found and stated above are serious and deserving of some lesser discipline and/or remedial treatment.

For all of the above stated reasons, the Minority determined that the Department alleged the same factual elements for all five Specifications charged. The Department has failed to prove each separate and distinct elemental fact of each of the five charges of misconduct, (Specifications I-V) by a preponderance of the credible and reliable evidence in the record. Specifications II-V are also factually redundant of Specification I.

Therefore, the Minority concludes that the Department was not justified in suspending him for a period of one (1) year. Under the circumstances, we would propose that this appeal be allowed in part, such that the amount of discipline would be modified. Specifically, we would order that the Department would have thirty (30) days to reconsider the length of suspension imposed on the Appellant as discipline. If the parties were able to agree on the amount of discipline to be imposed, they would file a written stipulation regarding that amount. If the parties were unable to agree on the amount of

discipline to be imposed under this decision, they would have been required to each file a proposal for discipline and supporting argument for same, all within that same thirty (30) - day period. Following that period of time, the Commission would have issued a final decision stating the amount of modified discipline and appropriate conditions stated therein.

For the Minority,

_____
Daniel M. Henderson, Esq.,
Commissioner

CONCLUSION OF THE MAJORITY (Bowman, Chairman; Guerin and Marquis, Commissioners)

We, the Majority of the Commission, adopt the Findings of Fact of Commissioner Henderson, who served as hearing officer in this matter, but respectfully disagree regarding the Conclusion of the Minority, which we believe is not supported by the Findings of Fact.

There is little dispute regarding the underlying facts that resulted in the above-referenced discipline against the Appellant. A long-time member of the Department's Drug Control Unit, the Appellant was involved with the arrest of a female citizen (hereafter "Jane Doe") on July 24, 2003. It is difficult to overstate the seriousness of the offenses with which Jane Doe was charged: trafficking cocaine; inducing a minor to sell cocaine; and assault and battery on a Police Officer. Finding of Fact #32. Her prior criminal history is lengthy and includes both felony and misdemeanor convictions.

Finding of Fact #28. During her arrest on July 24, 2003, Jane Doe bit a Police Officer on his hand and on his finger. Finding of Fact #21. The Appellant was present while Jane Doe was being arrested and he prepared the arrest report. Findings of Fact #22 and #25.

According to Finding of Fact #31, the Appellant knew Jane Doe from the Orchard Park neighborhood of Boston where they both had grown up. Again according to Finding of Fact #31, after 2001, the Appellant knew Jane Doe as someone he would meet sporadically at his mother's house. Finding of Fact #36, however, provides a more illuminating description of the relationship between the Appellant and Jane Doe, including what the Appellant describes as a "one-time sexual encounter" between the two of them in 2001, prior to the arrest. Then-Sergeant Detective Daniel Linskey was the commanding officer of the Drug Control Unit on July 24, 2003. While Linskey knew at the time of the arrest that the Appellant was familiar with Jane Doe, he did *not* know at the time of Jane Doe's arrest that she had been a long-time close family friend of the Appellant and that the Appellant had a sexual encounter with her in 2001. Findings of Fact #35 and 37. Even *after* the arrest of Jane Doe in 2003, and while charges for drug trafficking and other offenses were still pending against her, the Appellant continued to associate with her, including having another sexual encounter with her as late as December 10, 2004, as far as he has admitted.

The Minority concludes that, "The five Specifications have not been substantiated in part. The element of each charge, the on-going intimate relationship, has not been proven by a preponderance of the credible evidence in the record." We disagree. The "on-going intimate relationship," which the Appointing Authority found violated five Department rules, was proven by the admission in the Appellant's own testimony. Indeed, the

Appellant's admission to inappropriate contact with Jane Doe was found by the Minority to be forthcoming and an indication that the Appellant was not concealing the information. Moreover, the Minority acknowledges the Appellant's admission but concludes that he failed to reveal the relationship with Jane Doe because of "poor judgment and naïveté." In support of this analysis, the minority concludes, in Finding of Fact #57, that "He (the Appellant) is obviously unaware, even at this late date, that he should not be having contact with a person arrested by his DCU squad, who is now a criminal defendant in court." However, the Majority concludes that an officer who has been on the force, and the DCU in particular, for as many years as the Appellant and lauded by his superiors, is not likely to be incapable of appreciating the effect of such behavior on the work of his Department. The Appellant's actions clearly required corrective action by the Appointing Authority; we hold that the action it took was both appropriate and warranted, considering the fact that the BPD had decided not to terminate him therefor.

In Finding of Fact #71, it is found that, "The strong, spontaneous reaction of shock and disbelief by all of the members of the DCU squad to the information about the Doe-Frederick relationship corroborates their prior ignorance of it." We agree. However, we conclude that this reaction was due to the fact that the Appellant never revealed this relationship until specifically asked to do so during a felony drug investigation directly involving Ms. Doe. Finding of Fact #72 states that the Appellant "did not feel that he had done anything wrong. He believed that there was no conflict of interest on his part." However, his ignorance cannot be exculpatory in this instance.

Willingly or unwillingly failing to recognize that one's actions are wrong does not, therefore, make them acceptable.

We are hard-pressed to accept that the Appellant's actions did not play a major role in the decision of the District Attorney's Office to enter a *nolle prosequi* in the cases against the three defendants, including Ms. Doe. It was primarily the Appellant's ultimate revelation of his inappropriate relationship – and, of course, the relationship itself - with Ms. Doe that led to all the cases becoming so severely compromised that it was determined not to prosecute them. Adhering to the usual standards of review employed by the Commission in matters of disciplinary appeals, we find that the Appellant's actions, which clearly played a significant role in causing felony drug charges to be dropped against three defendants, render him "guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." Murray, (1983) *supra*.

We turn our attention to the Minority's proposal regarding modification of the discipline here. It has been long held that it is not the function of the Commission to substitute its judgment for that of the Appointing Authority. City of Cambridge, *supra*. The Commission may modify an Appointing Authority decision in certain instances, as when it finds that an Appellant has received disparate treatment. Police Commissioner of Boston v. Civil Service Commission, et al, 39 Mass. App. Ct. 594, 600 (1996). In its conclusion, the Minority speculates about the role of the Appellant's state of mind and concludes that "any errors [the Appellant] made were errors of omission due to his bad judgment and actually tantamount to one continuing action of omission." However, we can not disregard the grave result of the Appellant's egregious actions and/or inactions.

The Appellant failed to inform the Boston Police Department that he had a personal relationship with Jane Doe, including the fact that he had a sexual encounter with her both before *and after* she was arrested for charges, including drug trafficking, by the Drug Control Unit to which the Appellant was assigned; his actions so severely compromised the criminal cases that they were not prosecuted. Moreover, in Finding of Fact #88, it was explicitly found that there was, "… no disparate treatment and no vindictiveness by the BPD and no political overtones in this case." Under these circumstances, we conclude that it is inappropriate to consider modification of the discipline administered here and we can find no reason therefor.

The Majority concludes that there is just cause, by a preponderance of the credible evidence submitted at hearing, to suspend the Appellant for one (1) year without pay, which was the subject of this appeal. By a 2 – 3 vote of the Commission on September 27, 2007, the Commission rejected the Minority's recommendation to allow the Appellant's appeal, in part, by considering modification of the amount of discipline and, instead, adopted the Findings of Fact and the Conclusion of the Majority to deny the appeal (Bowman, Chairman – NO; Guerin, Commissioner – NO; Marquis, Commissioner – NO; Henderson, Commissioner – YES; Taylor, Commissioner – YES). As a result of the vote, the appeal on Docket No. D-06-235 is hereby ***dismissed***.

For the Majority

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Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (3 Commissioners voting to dismiss the appeal: Bowman, Chairman, Guerin and Marquis, Commissioners; 2 Commissioners voting to allow the appeal, in part: Henderson and Taylor, Commissioners) on September 27, 2007.

A true record. Attest:

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Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice:
Stephen C. Pfaff, Esq.
Tara L. Chisholm, Esq.