COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

GREGORY GALLANT,
Appellant

v.

CITY OF METHUEN,
Respondent

Docket Number: D1-22-084

DECISION

Summary of Decision

After its own careful independent examination of the evidentiary record and applicable law, and notwithstanding a different recommendation from a DALA Administrative Magistrate, the Commission determined that the City of Methuen had established just cause to discharge a former Police Captain in the Methuen Police Department (MPD) for untruthfulness and conduct unbecoming a senior member of the MPD command staff. The Commission concluded that Captain Gregory Gallant did not act in good faith in attempting to consummate a collective bargaining agreement with city officials that would have resulted in exorbitant pay increases for himself, a select group of senior Methuen police officers, and the now-indicted former Methuen police chief, Joseph Solomon. Additionally, the Appellant was neither straightforward nor honest in all aspects of sworn testimony he gave to the state Office of Inspector General. The Commission further held that, as a matter of law, the adverse inferences that the City drew from Captain Gallant's invocation of his Fifth Amendment privilege during an internal affairs investigation could properly form a partial basis for the Respondent to discipline the Appellant for conduct unbecoming.

Procedural Background

In June 2022, the City of Methuen (City or Respondent) terminated the employment of police captain Gregory Gallant (Capt. Gallant or Appellant) after a local disciplinary hearing into charges of conduct unbecoming, untruthfulness, and failure to cooperate fully with investigations

into suspected misconduct. Pursuant to G.L. c. 7, § 4H, and G.L. c. 31, § 43, the Division of Administrative Law Appeals (DALA) assigned an Administrative Magistrate to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

DALA's Administrative Magistrate heard the case over the course of four days in March and April of 2023. In accordance with standard adjudicatory rules codified at 801 C.M.R. § 1.01(11)(c), the Magistrate issued a Tentative Decision on August 4, 2023, in which he recommended that the Commission allow the Appellant's appeal and reverse his discharge. The parties had the opportunity to file comments and objections to the Tentative Decision pursuant to 801 C.M.R. § 1.01(11)(c)(1). The Respondent filed its objections on September 5, 2023, and the Appellant filed his response to those objections on September 11, 2023. Having perceived in the Tentative Decision explicit analysis of only two of the three charges asserted as a basis for the Appellant's discharge, the Commission recommitted the case to DALA for further fact-finding and analysis in January 2024—specifically, to explore whether the Appellant had failed to cooperate with internal investigators.

On remand, the Administrative Magistrate who had presided over the initial DALA hearing accepted a joint memorandum of the parties, received into evidence a dozen supplemental exhibits, and conducted a hearing (in late April 2024). On May 3, 2024, DALA issued a Supplemental Tentative Decision that, while informative, did not have the effect of disturbing the Magistrate's earlier recommendation. The Respondent filed an Objection thereto on May 20, 2024, and the Appellant filed a Reply on May 31, 2024.

Summary of the Facts and Issues Central to this Appeal[1]

Between May and August of 2017, the City and the union representing superior officers employed by the Methuen Police Department (MPD) negotiated a new three-year collective bargaining agreement (CBA). Capt. Gallant led the union's bargaining team and Mayor Stephen Zanni was the City's lead negotiator. On August 29, after six bargaining sessions, the parties reached an agreement in principle. At Mayor Zanni's request, Capt. Gallant took charge of memorializing the parties' agreement in the form of a new CBA document. Capt. Gallant secured ratification of the agreement from his fellow union members at a special union meeting the next day.

On August 31, Capt. Gallant delivered a signed, clean copy of the new CBA to Mayor Zanni. He later testified that he considered this to be a "final" contract – a "done deal."[2] Shortly thereafter, MPD Police Chief Joseph Solomon, who also had served as a member of the City's bargaining team, advised Capt. Gallant that the mayor was insisting that the new CBA's compensation article include a statement reflecting agreement that the superior officers' base pay would not itself be subject to a percentage increase in that fiscal year (FY '18) but that two percent annual increases would follow in FY '19 and FY '20. Initially, this flummoxed Capt. Gallant as the parties had agreed at the bargaining table to "roll into" base pay several fairly generous stipends (e.g., annual uniform purchase and cleaning reimbursements) and certain not-insignificant ancillary forms of pay (e.g., 13 paid holidays at a time-and-a-half wage rate and

[1] Although based on an independent examination of the entirety of this voluminous case record, the following summary seeks to complement the DALA Magistrate's concise recitation of the essential backdrop to this appeal.

[2] See the transcript of Capt. Gallant's sworn testimony at a later arbitration concerning this contract (vol. 8 at pp. 201, 256 and vol. 9 at pp. 12, 112). References to the arbitration transcripts will be abbreviated as "Arb. Tr. [vol.] : [page number]."

hazardous duty pay) but had never discussed an across-the-board cost-of-living adjustment.[3] Rather than asking to return to the bargaining table, Capt. Gallant and Chief Solomon discussed revisions that would advance the fiction that superior officers were not being given any pay raise until July 2018 and would only see a two-percent increase thereafter while still, in fact, preserving lucrative gains that the union believed it had secured at the bargaining table.

Under a personal services contract he had signed with the City six months earlier, Chief Solomon had a strong pecuniary interest in maximizing the value of ancillary benefits afforded the superior officers under the new CBA and an even more direct financial interest in how the base pay of the best-remunerated MPD patrol officer would be calculated under another new CBA simultaneously being negotiated. Over the next several days, Capt. Gallant drafted and Chief Solomon approved some 20 revisions to the August 31 "final" contract that Capt. Gallant had executed. The new text that Capt. Gallant unilaterally inserted into his September version of the CBA had major ramifications for how the superior officers' compensation would be calculated in 2018. But when Capt. Gallant hand-delivered the revised contract to Mayor Zanni in his office around September 4, Capt. Gallant only advised the mayor that he had made the one change the mayor had requested – relating to the purported zero percent, followed by 2% and 2%, pay increases over the three-year term of the new CBA.

Despite being well aware of how detail-oriented Mayor Zanni was and how he had insisted on examining in fine detail in bargaining sessions (with the City's Solicitor and HR Director always in attendance) every contract provision that would constitute a departure from

[3] When directed to insert into the CBA document he had signed on August 31 a "0%, 2%, 2%" wage increase provision, Capt. Gallant testified that he "was a little bit flabbergasted because I didn't know how I was going to do that without adding a COLA *that we didn't negotiate*." Transcript of DALA's evidentiary hearing ("DALA Tr.") at 169, line 23 to 170, line 4 (March 22, 2023) (emphasis added).

the CBA in effect from 2014 until 2017, Capt. Gallant never prepared, nor communicated orally, any synopsis of the many elements of or substantive amendments to the parties' agreement in principle. On not one of the several emails Capt. Gallant exchanged with Chief Solomon about the new CBA, in the ten days following the last bargaining session, did Capt. Gallant copy any of the other three members of the City's bargaining team. Neither the City Solicitor nor the mayor's legal advisor had any knowledge that Capt. Gallant had unilaterally revised the first CBA document he executed. Nor did Mayor Zanni scrutinize the final CBA before signing it.[4] None of the city council members who approved the executed CBA on September 18 (including one who would take office as the City's next mayor less than four months later) were made aware of the last-minute changes that Capt. Gallant authored.

Toward the end of 2017, incoming mayor James Jajuga learned from a neighboring city's mayor that the recently approved CBA, if fully implemented as written, would entitle MPD police captains, including Capt. Gallant, to exorbitant pay increases. The City's Auditor soon confirmed for Mayor Jajuga that a literal interpretation of the CBA compensation provisions that Capt. Gallant overhauled would yield compensation for police captains well in excess of $400,000 per year, representing pay raises for some of up to 224%. The Office of the Inspector General (OIG) commenced a state-level investigation of potential waste of public funds (or even fraud) in 2018. Captain Gallant testified under oath before two OIG investigators in February 2020. The OIG issued its final report in December 2020, finding wrongdoing by Capt. Gallant and other individuals, and recommending disciplinary action.

[4] Both Mayor Zanni and City Solicitor Rick D'Agostino later testified that they trusted Capt. Gallant and assumed that he would apprise them of any substantive changes to the CBA that had not been discussed at the bargaining table. Arb. Tr. 5: 67; 6: 63. Events showed this trust to have been misplaced.

The City challenged the enforceability of the 2017 CBA in labor arbitration proceedings. Capt. Gallant again gave sworn testimony in those proceedings during May 2021. In January 2022, the Arbitrator agreed with the City and declared the CBA unenforceable. She concluded that there had been no "meeting of the minds" over key CBA compensation provisions. A pay calculation formula that Capt. Gallant unilaterally inserted into the September 2017 CBA document caused the so-called "Quinn Bill/Education Incentive" pay afforded sworn MPD officers—worth as much as 25% of base pay for senior officers with advanced degrees—to be rolled into superior officers' pay for other pay calculation purposes. The DALA Magistrate later deemed preclusive this particular conclusion plus the Arbitrator's other essential findings of fact.

In early 2022, the MPD opened an internal affairs investigation into Capt. Gallant's conduct. In February 2022, Capt. Gallant received a letter from the U.S. Department of Justice advising him that he had become "a target of a federal grand jury investigation in the District of Massachusetts regarding possible violations of the United States Code, including wire fraud . . . and obstruction of justice[.]" This target letter continued: "This means the investigation being conducted has uncovered substantial evidence of your involvement in criminal activity and that this office may recommend to the grand jury that it indict."[5]

In March 2022, Capt. Gallant attended a two-hour investigative interview convened at the request of the MPD's new police chief, Scott McNamara. Citing the privilege against self-incrimination, Capt. Gallant declined to answer any substantive questions about his role in the negotiation, formation, or execution of the 2017 CBA. In an April 2022 report, Chief McNamara found Capt. Gallant guilty of misconduct.

[5] Suppl. Exh. F ("Grand Jury Target" letter to Capt. Gallant signed by Assistant U.S. Attorney Neil Gallagher, Jr., and dated February 8, 2022).

The City convened a disciplinary hearing before a neutral hearing officer in May 2022. Capt. Gallant again answered preliminary questions only and otherwise asserted his privilege against self-incrimination, including with respect to questions about his interactions with Chief Solomon regarding the CBA in the summer of 2017. In a June 2022 decision, after drawing certain negative inferences from Capt. Gallant's insistent silence, the hearing officer found that he had behaved dishonestly and engaged in conduct unbecoming in connection with his last-minute revisions to the 2017 CBA. She also found that Capt. Gallant had testified untruthfully before the OIG, the Arbitrator, or both. The City promptly terminated Capt. Gallant's employment.

True and accurate copies of both the August 2023 and May 2024 (supplemental) tentative decisions issued by the DALA Magistrate are appended to this Decision. In short, after hearing from six witnesses, the Magistrate made a number of essential findings not referenced above:

- "The [A]ppellant's negotiation tactics were aggressive; but he did not engage in any dishonest, untrustworthy, or improper conduct, either during the negotiations or in his ensuing testimony."[6]
- Although the Arbitrator conclusively determined that Capt. Gallant's unique pay calculation formula caused educational incentives to be rolled into officers' base pay,[7] and the salary of each rank of superior officers is calculated as an upward percentage (ranging from 116% to 136%) of the next lower rank's base pay,[8] the Magistrate credited Capt. Gallant's testimony that he did not believe that his formula would in fact cause higher ranking officers to benefit from the educational incentive stipends paid to lower ranking officers.[9]

[6] Summary of Tentative Decision issued on August 4, 2023 (page 1). As discussed *infra*, this Commission deems Capt. Gallant's actions *after* negotiations at the bargaining table concluded to have been untrustworthy and improper. He also gave false testimony to the OIG.

[7] See Tent. Dec'n (2023) Finding of Fact (FF) 10 (deemed a preclusive finding).

[8] *Id.*, FF 4-5 (referring to these rank pay differentials as "the splits").

[9] *Id.*, FF 11.

- Other elements of Capt. Gallant's pay calculation formula were never discussed among members of the two bargaining teams (other than between Chief Solomon and Capt. Gallant) and, educational incentives aside, the rank pay differential scheme compounded the effects of formula implementation in a fashion guaranteed to substantially increase the compensation of high-ranking officers.[10]
- Capt. Gallant did not consciously intend to conceal his pay calculation formula, or its impacts, from the City's bargaining team as he expected the Mayor and the two lawyers on this team to read and consider his last-minute revisions.[11]
- Certain formatting adjustments Capt. Gallant made so that the Sept. 2017 CBA would mirror in appearance the August 31 CBA document "were intended not to obscure his edits but to avert additional formatting glitches."[12]
- Capt. Gallant "failed to worry about" Chief Solomon's conflict of interest because he "trusted" the Chief, as did other members of the City's bargaining team.[13]
- The city councilors who voted to approve the Sept. CBA did not understand the financial implications of its new terms, received no analysis of the CBA's financial impact, and failed to engage in inquiry.[14]
- Sworn testimony Capt. Gallant later offered in the arbitration hearing and before OIG investigators showed fundamental consistency—but on certain points his accounts "differed in their nuances or in their degrees of certainty and circumspection."[15] His two accounts regarding Chief Solomon's role in the CBA negotiations "were identical in substance."[16]
- On the key question of whether Capt. Gallant intended for his formula to roll educational incentives into base pay (which, if true, with the resulting sum then subject to the compounding effects of the rank differential pay scheme, would have solidified a purported agreement for pay increases ranging from 77% to 224%), Capt. Gallant "consistently pivoted" to the intentions of a *non*member of the City's bargaining team, the City Auditor, thereby deflecting at least three pointed OIG questions and failing to

[10] *Id.*, FF 12.

[11] *Id.*, FF 16.

[12] *Id*., FF 17.

[13] *Id.*, FF 18. As discussed *infra*, the Commission deems this finding problematic.

[14] *Id*., FF 19.

[15] *Id*., FF 24. As discussed *infra*, the Commission discerns material inconsistencies between Capt. Gallant's testimonies at arbitration and before the OIG on at least one important point.

[16] *Id*., FF 27.

provide direct responses. Capt. Gallant's "insistent circumspection was ill-conceived."[17]

- Even given Capt. Gallant's lack of forthrightness in the OIG interview, the Magistrate concluded: "I do not find that Captain Gallant crossed the line from reticence into dishonesty. He neither intended to mislead the OIG's investigators nor in fact misled them."[18]
- In the course of the MPD's (winter/spring of 2022) internal affairs investigation, the Respondent's agents advised the Appellant that he would not be required to provide self-incriminating answers to investigators' questions about his actions surrounding the 2017 CBA.[19] Accordingly, by invoking the privilege against self-incrimination, and in the absence of transactional immunity, Capt. Gallant was not failing to cooperate with the internal investigation or violating his obligations as an officer.[20]

The Commission's Partial Acceptance of DALA Submissions and Incorporation of Inspector General and Labor Arbitrator Findings

The Commission accepts with gratitude both the August 2023 and May 2024 (supplemental) tentative decisions issued by the DALA Magistrate. It hereby adopts all but three of the Magistrate's 41 detailed findings of fact. As discussed in greater detail below, the findings or statements (included mainly in paragraphs 15 and 18 of the 2023 tentative decision) that the Commission cannot accept, based on its own careful independent examination of the record evidence, do not hinge on the Magistrate's assessments of the credibility of witnesses. Most significantly, the Commission declines to endorse the Magistrate's discounting of key adverse

[17] *Id.*, FF 28-29.

[18] *Id.*, FF 29. This Commission accepts the credibility assessment inherent in the DALA Magistrate's conclusion that, through his nonresponsive answers to certain investigator questions, Capt. Gallant did not intend to mislead OIG investigators. But as to whether the OIG investigators in fact were misled, the transcript of the Gallant interview and the OIG's final investigative report permit a different conclusion. In any event, those documents speak for themselves.

[19] Suppl. Tent. Dec'n (2024) Finding of Fact 35. As will be discussed below, however, the Respondent reserved the right to draw adverse inferences from Capt. Gallant's invocation of the privilege against self-incrimination and his refusal to answer questions targeted at revealing his actions, intentions, and interactions surrounding the CBA negotiations, formation, execution, and re-negotiation.

[20] *Id.* at pp. 10-11.

inferences the appointing authority was entitled to draw from Capt. Gallant's repeated invocation of a privilege under the Fifth Amendment to the U.S. Constitution and Art. XII of the Massachusetts Constitution, on two separate occasions, not to incriminate himself in criminal activity through responses to numerous pointed questions narrowly focused on the matters at the heart of this case.

As did the DALA Magistrate, the Commission gives preclusive weight to the key findings of Arbitrator Loretta Attardo, who conducted ten days of hearings in 2020 and 2021, hearing testimony under oath from 15 witnesses, and who reviewed over 150 exhibits—all pertaining to the negotiation, formation, execution, and implementation or renegotiation of the 2017 CBA.[21] Findings not already broached above include:

- Under Capt. Gallant's leadership, the union rescinded (on August 30, 2017) a prior vote to engage an accountant to cost out the contract and calculate the precise compensation each member would receive under the new CBA—and Capt. Gallant then ignored union counsel's advice (delivered in early September) to attach a wage schedule to the CBA document. Arb. Dec'n at 7-8.
- "The plain language" of Capt. Gallant's base pay calculation methodology called for Quinn bill (or educational incentive) pay to be factored into an individual superior officer's final salary twice—once in calculating holiday pay and then "again on top of all add-ons." The union's "belated[]" claim ("in the face of the financially absurd results when Quinn [pay] is added to base") that "Quinn Bill amounts were never intended to be included in the compounding calculations" simply "defies the very language Gallant drafted." Arb. Dec'n at 20.
- "The Union in fact knew that the multipliers resulting from the 'stacking' of additions to base pay [under the Gallant formula] significantly increased all Superior officers' base pay, even without Quinn bill additions." Arb. Dec'n at 21 (emphasis in original).

The DALA Magistrate also accepted in evidence for the truth of facts asserted therein the extensive report on the same topic issued by the state Inspector General in January of 2022.

[21] See Decision and Award in *Methuen Police Super. Officers' Ass'n (Local 17) v. City of Methuen*, no. 01-19-0001-3281 (Am. Arb. Ass'n Jan. 7, 2022) ("Arb. Dec'n").

Accordingly, this Commission incorporates by reference the findings of wrongdoing by Capt. Gallant that the Inspector General articulated after a two-year investigation. A headline finding in that report states that Capt. Gallant "acted in bad faith when he added contract language that had not been agreed to by City officials during negotiations."[22] Moreover, when in the first half of 2018 a new mayoral administration tried to revise the 2017 CBA compensation language through a memorandum of understanding (MOU) with Capt. Gallant's union to yield a more sustainable pay package, "[a]t no time during the MOU discussions did Captain Gallant or Chief Solomon inform the City that the former administration had never agreed to the Gallant Formula." OIG Report at 17. The OIG also determined that implementation of the 2017 CBA would have made Chief Solomon one of the highest-paid police chiefs in the country, earning more than the Massachusetts State Police Colonel and the Boston Police Commissioner. OIG Report at 2, 20.

Commission Analysis

Central to this appeal is whether the City's then-incumbent mayor, Neil Perry, was reasonably justified in concluding, in June of 2022, that enough evidence pointed to serious wrongdoing on the Appellant's part, in connection with the 2017 CBA debacle, to sustain the adverse inferences he and the City's hearing officer drew from Capt. Gallant's repeated unwillingness to answer questions about his actions, his intentions, and his interactions with Chief Solomon. A reasonable inference that the Appointing Authority could draw, based on other established facts and Capt. Gallant's broad invocation of the privilege against self-incrimination on two separate occasions, is that, in the days following Capt. Gallant's August 31,

[22] Office of the Inspector General, *Leadership Failures in Methuen Police Contracts* (2020) at 2 ("OIG Report").

2017 execution of a completed draft CBA document, Capt. Gallant and Chief Solomon conspired to secure for themselves (and other high-ranking MPD officers) extraordinary and unwarranted compensation increases, antithetical to the public interest, through last-minute, un-bargained-for, stealth revisions to the CBA document.

A. The Obligation to Bargain in Good Faith

The Commission concurs with a key Respondent objection to the Tentative Decision's recommendation of reinstatement: a claim that the last-minute revisions Capt. Gallant inserted were so significant that he had an *obligation* under G.L. c. 150E, § 6E to meet at the bargaining table with city representatives to discuss his proposed new compensation formula—and his failure to do so led to conduct unbecoming of a superior officer. The DALA Magistrate deemed preclusive, as do we, the Arbitrator's finding that "[Capt.] Gallant's edits would have rolled into the officers' base pay not only the holiday pay, the cleaning allowance, and the hazardous duty pay, but also the educational incentives." Order of March 9, 2023, Add. ¶ 5. Also binding on us is the Arbitrator's finding that Gallant's unilateral insertion of new compounding language in Art. XXIV would yield "average 77%-224% increases" in compensation for different superior officer ranks. *Id.*; Arb. Dec'n at 13, ¶ 26. In view of this enormous impact, the Magistrate's later finding, even accepted as a binding credibility determination, that "Captain Gallant did not *believe* that his edits would roll educational incentives into base pay"[23] cannot be given much weight.

Of far greater significance are the equally binding findings that "none of [Appellant's unilateral CBA additions other than the 0%, 2%, 2% provision] were expressly brought to the attention of the full bargaining team, the Mayor or the City Council, and there is no credible

[23] Tent. Dec'n (2023) FF 11 (emphasis added).

evidence to the contrary."[24] The Magistrate likewise deemed preclusive the Arbitrator's finding that, despite speaking to Chief Solomon about his revisions, Capt. Gallant "did not consult other members of the city's bargaining team. Chief Solomon did not update them either."[25] In testimony before DALA, Anne Randazzo (a bargaining team member functioning as the Mayor's attorney) testified that she received only a copy of the August 31 CBA document that Capt. Gallant had executed and that she would have had no reason to think that any changes had been made to the CBA that the Mayor ultimately signed.[26] Similarly, the City Solicitor testified that he "positively" would have scrutinized the compensation formula Capt. Gallant had inserted had he been aware or notified that revisions to the August CBA document had been introduced in September.[27] During his arbitration testimony, despite being well aware that Mayor Zanni was the ultimate negotiator for the City, Capt. Gallant could offer no reason for not copying him, or any of the other City bargainers, when he emailed CBA drafts to Chief Solomon.[28]

Adding to the contemporaneous indicators of improper conduct on Capt. Gallant's part:

(1) Despite signing the final CBA no earlier than September 4, Capt. Gallant handwrote in "8/31" as the date of his signature—the same date as appeared on the contract he had earlier signed and turned in to Mayor Zanni.[29]

(2) Capt. Gallant conveyed misleading information to the union's attorney, Gary Nolan, writing to him that "we made some changes at the last minute, added a paragraph in [the CBA's] compensation [article] in which we break down the order of calculations

[24] Arb. Dec'n at 20.

[25] DALA's March 9, 2023 Order, Addendum ¶ 7.

[26] DALA Tr. 1:97. No one ever shared a copy of the revised Sept. CBA document with Attorney Randazzo. Arb. Tr. 6:196.

[27] Arb. Tr. 6:196. Apparently unfamiliar with the "trust but verify" adage, Solicitor D'Agostino took "on trust" that no "sworn officer of the law" would slip in language that had never been discussed at the bargaining table. Arb. Tr. 6:63.

[28] Arb. Tr. 9:125. See also transcript of OIG's interview of Gallant ("OIG Tr.") at 322.

[29] DALA Tr. 168 (Gallant testimony).

to be made"—which Attorney Nolan took to mean that Gallant had discussed with, and obtained the approval of, the City's bargaining team for his pay calculation formula.[30]

(3) Attorney Nolan's response that he hoped city councilors would not have access to calculators when the final CBA came up for an approval vote later in September.[31]

B. Capt. Gallant Breached a Duty Not to Take Unfair Advantage

Subsequently, Capt. Gallant should have acknowledged his unilateral revisions of the 2017 CBA when in 2018 the new mayor, James Jajuga, announced concerns about the exorbitant compensation increases that superior officers would enjoy if the executed CBA were implemented as written.[32] Methuen's then-retired City Auditor, Thomas Kelly, testified in the arbitration proceedings that funding a literal interpretation of Capt. Gallant's pay calculation formulas "would bankrupt the city" (or at the very least its pension fund). Arb. Tr. 7:61; Arb. Dec'n 12 n.10. Capt. Gallant's unilaterally inserted revisions ended up substantially harming other MPD officers when the city council refused to fund any salary increase at all for superior officers and many officers no doubt suffered considerable stress anticipating major layoffs.[33] Ironically, Gallant never obtained ratification of his last-minute changes from union members.

[30] See City's Exh. 26 at 1 (Gallant to Nolan email) and Arb. Tr. 2:263 at lines 8-9 (Nolan testimony). See also Arb. Tr. 9:118-120 (Gallant testimony, conceding that he only ever shared the revisions with Chief Solomon). Capt. Gallant did not even share a finalized copy of the Sept. CBA document with the union's attorney prior to contract execution. Arb. Tr. 2:263-264; Arb. Tr. 8:294.

[31] Appellant's Exh. 22 (Attorney Nolan in an email to Capt. Gallant: "Hopefully they don't have calculators at the [Sept. 18 city council] meeting.")

[32] See City Exh. 2 (MPD Internal Affairs report) at 12-13; DALA Tr. 44-45; 49-50; 107, line 14 to 108, line 1 (McNamara testimony).

[33] Arb. Dec'n at 13, ¶ 29; OIG Report at 17 ("Notwithstanding the threatened layoff of over half of the Methuen Police Department, Chief Solomon and Captain Gallant remained silent.")

Even after Mayor Jajuga invited new negotiations with the union, Capt. Gallant remained silent or cryptic.[34] The record evidence convincingly establishes that instead he leveraged the impact of his revisions now embedded in the CBA to try to obtain more compensation for superior officers than they would have received if the agreement actually reached by the bargaining team in late August 2017 had been faithfully implemented.[35] Capt. Gallant candidly spoke of the leverage he believed his language afforded the union. OIG Tr. at 234-235; Arb. Tr. 9:141-142. The secretary of the superior officers' union testified in arbitration that union leadership intended in late spring 2018 to negotiate hard for "the higher numbers" that the City

[34] Arb. Tr. 7:235 (Kelly testimony). For example, the City Auditor, whom the Mayor charged with costing out implementation of the 2017 CBA, testified that neither Capt. Gallant nor any other superior officer counterpart ever attempted to clarify through direct communication how the Gallant pay calculation formula should be construed. Arb. Tr. 8:26. Likewise, despite conceding that nothing in the CBA provisions he authored states definitively that Quinn Bill/educational incentives should *not* be rolled into base pay and extended up the ranks per the rank pay differential scheme (Arb. Tr. 9:120), Capt. Gallant never disabused the state-appointed fiscal stability officer overseeing Methuen finances, Sean Cronin, of the latter's conclusion that the 2017 CBA mandated exorbitant salary increases. Arb. Tr. 9:75; Arb. Dec'n 14, ¶ 31. The Commission acknowledges that Capt. Gallant had received advice from counsel to say little about the CBA's formation as some city councilors were threatening to defund the whole deal (and Gallant also believed that Mayor Jajuga was trying to "throw the whole contract"). OIG Tr. 213, 265, 271; DALA Tr. 177, 180. But Capt. Gallant had a choice to make: He could come clean about the unilateral nature of the last-minute revisions he introduced and potentially jeopardize the agreement, or he could play coy and jeopardize any reputation he may have possessed for trustworthiness. Having chosen the latter course, he must accept the consequences.

[35] City Exh. 3 (OIG Report) at 17-18, 29; DALA Tr. 43, lines 11-21; 44, line 25 to 45, line 23 (McNamara testimony). Calculations that Chief Solomon and City Auditor Kelly collaborated on in the first half of 2018 showed that implementation of the deal Mayor Zanni offered at the bargaining table in August 2017 would have resulted in average pay increases of 18.7 % to MPD superior officers. City Exh. 11; Public Education Letter issued to Methuen City Council Chair James Atkinson, *2020 State Ethics Comm'n Public Resolutions*, 2020 SEC 2693. Capt. Gallant later erroneously testified at arbitration that under a renegotiated deal with Mayor Jajuga (embodied in a memorandum of understanding never funded by city council) his union members would have received less than this—but in fact the MOU would have *boosted* every superior officer's pay by some $2,000 to $4,000 above the bargaining table deal. City Exh. 2 (IA Report) at 12-13; Arb. Dec'n at 13, ¶ 26.

Auditor had calculated earlier in 2018.[36] Mayor Jajuga's chief of staff testified in arbitration that Capt. Gallant told him in the spring of 2018 that his union members would insist upon pay increases in excess of 24 percent.[37] Whatever else one might label it, this was not merely "aggressive" tactics; Capt. Gallant's conduct cannot be viewed as honorable.[38]

Chief McNamara's opinion that an upstanding police officer has an obligation to be fair and trustworthy towards fellow public servants with whom one is bargaining or contracting (DALA Tr. 24) finds considerable support in the law. Every contract, including a collective bargaining agreement, contains an implied covenant of good faith and fair dealing. See, e.g., "Good faith and fair dealing," 14 Mass. Prac., *Summary of Basic Law* § 5:69 (5th ed.); *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 599 (9th Cir. 1996). Indeed, one arbitrator has referred to the covenant as "form[ing] the heart of any successful collective bargaining relationship." *Indianapolis Pub. Transp. Corp.*, 94 Lab. Arb. 1299, 1303 (1990) (Volz, Arb.). The concept of "good faith and fair dealing" emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Here, City officials owe a fiduciary duty to Methuen's taxpayers. Case law applying the concept makes clear that good faith means that a party to a contract must be forthright in dealings with the other party. *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 238 (1st Cir. 2013) (applying Mass. law). Bad faith conduct can consist of an unfair leveraging of the contract terms to secure an undue

[36] Arb. Tr. 8:122 (Lt. Gunter recounting leadership's attitude that if the union had to litigate the wording of the CBA compensation provision, "then let's go for the gusto" and fight for inflated salaries); see also Tr. 8: 140-141 (Lt. Gunter acknowledging on cross-examination that that posture was not fair to Methuen's taxpayers).

[37] Arb. Tr. 2:38 (Fahey testimony).

[38] Nothing in this Decision should be construed as questioning the right of union negotiators to drive a hard bargain when negotiations and contract formation/finalization are unfolding in a transparent fashion.

economic advantage. *Christensen v. Kingston School Committee*, 360 F. Supp. 2d 212, 226 (D. Mass. 2005) (applying Mass. law).

The good-faith requirement of G.L. c. 150E, § 10(a)(6), "generally contemplates a reasonableness, integrity, [and] honesty of purpose" in the course of the negotiating, forming, and drafting of a new CBA. Public Employee Collective Bargaining, *Mass. Mun. Law* ch. 9, § 9.6 (MA-CLE 2024), quoting *Framingham Sch. Comm.*, 4 MLC 1809, MUP-2428 (Feb. 27, 1978). "The parties must . . . seek[] an agreement which is fair and mutually satisfactory." *Cty. of Norfolk*, 11 MLC 1346, 1348 (1985). "The duty to bargain in good faith extends to finalizing the negotiated agreement." *Mass. Mun. Law*, *supra*, at § 9.6.2. The National Labor Relations Board's webpage entitled "Employer/Union Rights and Obligations" concurs that conduct away from the bargaining table may also implicate the duty to bargain in good faith. "For instance, if an Employer were to make a unilateral change in the terms and conditions of employees' employment without bargaining, that would be an indication of bad faith." *Id.* Under the unusual circumstances of this case, where contract-drafting was left to the union president, the City's Auditor and lawyers were kept out of the loop, and the mayor did not check the CBA document he was asked to sign against the earlier draft he had reviewed, an unannounced unilateral and material revision of a core CBA provision could readily be viewed as an indication of bad faith on the part of the drafter. Indeed, this Commission endorses the state Inspector General's finding that Capt. Gallant "acted in bad faith when he added contract language that had not been agreed to by City officials during negotiations." OIG Report at 2.

C. A Proper Adverse Inference Must Not Be Unduly Discounted.

As previewed, based on its own independent review of the entire record, the Commission does not endorse a handful of the Magistrate's findings.

The DALA Magistrate's finding no. 15, to the effect that Capt. Gallant did not deliberately try to hoodwink City officials through his revision of the CBA, and thus did not commit misconduct, is problematic because it was not necessary for the Respondent to prove, in the words of the tentative decision, that Capt. Gallant "intended to trick the city's bargaining team by *concealing* his edits" to the CBA he had signed. Tent. Dec'n (2023) at 9. In the Commission's view, Capt. Gallant's bad faith is established simply through unilateral contract insertions that he never brought to the attention of the city's lead negotiator (or the two lawyers who also constituted part of the City's bargaining team and yet were never apprised (at any point in 2017) of any revisions to the agreement finalized on August 31). Although outright trickery might not have been Gallant's intention, the city could not have known what his true intentions were with respect to the so-called Gallant Formula because he remained largely silent about it during the MOU negotiations in 2018, he failed to give straightforward answers about his intentions to the OIG investigators in 2020, he sought to maintain the leverage generated by his nonmutual pay calculation directive through to the end of the arbitration proceedings in 2021, and then he asserted the Fifth Amendment during the MPD's internal affairs investigation and at his local disciplinary hearing in 2022.

The Commission declines to endorse Finding no. 15's statement that the adverse inferences the city could draw from Capt. Gallant's repeated invocation of the privilege against self-incrimination are outweighed by any countervailing considerations.[39] The Magistrate's

[39] The considerations the DALA Magistrate appears to have had in mind are:

(1) In retaining the same signature page and minimizing the ways in which his September CBA document differed from the CBA that he signed on August 31, Capt. Gallant was not trying to conceal his unilateral edits but only trying to avert formatting glitches.

(2) Based on post-discharge 2023 testimony, Capt. Gallant expected Mayor Zanni, the

treatment of the adverse inference issue turns on inapposite case law[40] and runs afoul of the Supreme Judicial Court's teaching in *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 826-27 (2006). In *Falmouth*, the SJC held that this Commission may not ignore a police officer's silence in official proceedings conducted by his employer or his appointing authority's designee but must instead "account for" that silence even if the employee has since testified post-discharge. 447 Mass. at 827. In *Labor Relations Comm'n v. Fall River Educators Ass'n*, the

---

City Solicitor, and others to read and consider his contract revisions before the City Council approved the CBA.

(3) Based on similar self-serving testimony only offered after his discharge took effect, Capt. Gallant trusted Chief Solomon's integrity and ability to stand in for Mayor Zanni as an arms'-length negotiating partner.

See Tent. Dec'n at 9-12. For the reason stated above, the first two considerations do not suffice to dispel the conclusion that Capt. Gallant had nonetheless acted in bad faith. Uncontested record evidence establishes that half of the City's bargaining team (the two lawyers) never saw—and had no knowledge of—Capt. Gallant's substantive revisions of the agreement reached in August 2017 until sometime in 2018. Even if unwittingly, it appears that Capt. Gallant also lulled Mayor Zanni into thinking that little had changed between the August and September CBA documents. The Commission also rejects as a basis for overcoming the City's decision the third consideration above for reasons elaborated upon below.

[40] The DALA Magistrate cites four federal court decisions that reflect divergent treatment of adverse inferences that flowed from a party's testimonial silence (two of which are from jurisdictions outside of the First Circuit). Tent. Dec'n at 9 and n.13. In none of those cases, however, had the ultimate decision-maker (here, Mayor Perry as Capt. Gallant's appointing authority) already issued a final decision. And none of these decisions involved a police officer who, as here, repeatedly refused to answer basic and narrowly-drawn questions about his actions on the job while not dispelling the specter of work-connected criminal activity. The first case the Magistrate cited, *U.S. v. Stein*, actually supports the City's reliance on adverse inferences drawn from Capt. Gallant's dogged silence while under internal investigation in that the First Circuit therein reiterated "the prevailing rule that the Fifth Amendment does not forbid allowing adverse inferences to be drawn against parties to civil actions from their refusal to testify in response to probative evidence offered against them." *Id.*, 233 F.3d 6, 15 (1st Cir. 2000), citing *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976). As spelled out in this Decision, much of the probative evidence implicating Capt. Gallant in wrongdoing (and with which the City was confronting him in 2022) had been derived from the OIG investigation and the arbitration proceedings. By maintaining silence, Capt. Gallant chose not to refute that evidence (e.g., of bad faith behavior) and, instead, permitted an implied admission to arise that truthful answers to the City's questions would likely have proved that he had committed misconduct.

SJC wrote: "In a civil action, a reasonable inference adverse to a party may be drawn from the refusal of that party to testify on grounds of self-incrimination." 382 Mass. 465, 471 (1981).

Especially when silence is accompanied by a police officer's invocation of the privilege against self-incrimination during an internal affairs investigation, only if the inferences being drawn by the appointing authority were wholly unreasonable, entirely attenuated, or devoid of any supportive corroborating evidence would this Commission cast aside the inference of wrongdoing occasioned by repeated refusals to answer questions that are not, on their face, designed to implicate the subject in a crime. Here, the Commission is well aware that the MPD investigators gave Capt. Gallant permission not to answer questions that would be self-incriminating. The Commission concurs with the Magistrate's conclusion that Capt. Gallant's dogged silence (even in the face of benign questions) did not constitute a violation of MPD rules itself warranting discipline. But much in the same way that our state's highest court has endorsed the concept that a police officer who refuses to account for his actions may be terminated notwithstanding the privilege against self-incrimination, here Capt. Gallant's silence lent great weight to the record evidence indicative of serious wrongdoing on his part. See *Broderick v. Police Comm'r of Boston*, 368 Mass. 33, 38 (1975), *cert. denied,* 423 U.S. 1048 (1976); *Silverio v. Mun. Ct. of Boston,* 355 Mass. 623, *cert. denied,* 396 U.S. 878 (1969).[41] Under these unusual circumstances, we will not second-guess the appointing authority's reliance on the reputational stain that Capt. Gallant himself occasioned.

[41] Although making use in criminal prosecutions of statements compelled by threat of discharge will be barred if the coerced statements are incriminatory, heavy employment discipline—even in the absence of an explicit immunity offer—for a "blanket refusal to answer all questions" may be perfectly acceptable. See *Mass. Parole Bd. v. Civil Serv. Comm'n,* 47 Mass. App. Ct. 760, 764 (1999). See also *Bellin v. Kelley,* 435 Mass. 261, 271 n.14 and 272 (2001).

For similar reasons, this Commission declines to adopt the Magistrate's finding no. 18, to the effect that Capt. Gallant was blameless in placing trust in Chief Solomon's integrity and loyalty to the citizens of Methuen. This finding depends on the Appellant's self-serving, post-discharge testimony axiomatically unavailable to the City at the time it made its disciplinary decision. The Magistrate writes that no record evidence suggests that Capt. Gallant "doubted Chief Solomon's fidelity to the city or zeal on its behalf." Tent. Dec'n at 11. But Capt. Gallant was well aware of the conflict of interest Chief Solomon was laboring under (even as Gallant testified that he didn't consider it his business to concern himself with that problem).[42] As the chief's key deputy, he knew that Chief Solomon had already negotiated for himself an exceptionally generous personal services contract. OIG Tr. 303. As the Inspector General pointed out, the fact that Chief Solomon and Capt. Gallant together were urging the president of the MPD patrol officers' union to incorporate the Gallant Formula into the patrol officers' CBA, to their mutual benefit, undermines any notion that Chief Solomon was acting in a selfless fashion. When both Chief Solomon *and* Capt. Gallant later invoked the Fifth Amendment, the adverse inference the city could draw from Capt. Gallant's refusal to testify outweighs any notion that Gallant could have safely assumed that Solomon was acting in the city's best interest in collaborating with him on last-minute material contract revisions that just happened to benefit both men tremendously.

[42] Arb. Tr. 9: 139-140 (Gallant testimony) (Chief's conflict not "a concern of mine"). Years ago, the Supreme Judicial Court spotlighted the very conflict of interest that Chief Solomon faced in *Lab. Rels. Comm'n v. Town of Natick*, a case in which the Court cautioned against police chiefs serving as a city's "designated representative" during negotiations with police unions because chiefs "might have a conflict of interest because their own salaries may be affected by the salaries negotiated in the bargaining process". 369 Mass. 431, 439 (1976). Capt. Gallant also knew very well that Mayor Zanni was the lead negotiator and ultimate decision-maker for the City, not Chief Solomon. OIG Tr. 322 (Gallant testimony).

In assessing the existence of just cause for Capt. Gallant's discharge, this Commission must pay close attention to the information available to the Mayor of Methuen at the time of the discharge decision. See *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824-825 (2006) (proper Commission review of a tenured officer's discipline requires determining "whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed *when the appointing authority made its decision*'") (quoting *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983)) (emphasis supplied). Importantly, although he certainly could have, Capt. Gallant did not contest *any* of the highly damaging OIG or arbitrator findings summarized above at his pre-discharge disciplinary hearing.

Alternatively, if the Commission were to weigh in the balance as heavily as the DALA Magistrate did those findings favorable to Capt. Gallant that are grounded in post-discharge testimony (and thus constituted evidence not available to the appointing authority), then it would also be inclined to take into account recent troublesome developments such as the Order to Show Cause issued by the State Ethics Commission's Enforcement Division in which that division asserts that Chief Solomon violated the conflict of interest law by instigating revisions to draft CBAs that would have "increase[d] his salary [by some $90,000] without notifying the Mayor or any other city officials of the changes or their financial impacts." Holding a university degree in accounting, Chief Solomon well understood the financial impacts of the Gallant Formula revisions. *Id*. The Commission might also then elect to take administrative notice of court documents establishing that, in September 2023, a statewide grand jury indicted Chief Solomon on several different criminal charges, including perjury and violation of the state's civil service laws.

D. The Lack of Truthfulness in Capt. Gallant's OIG Testimony

Finally, the Commission concludes, in contrast to the Magistrate's finding no. 24 in particular (but also certain statements in surrounding findings), that Capt. Gallant's sworn testimony before OIG investigators was not accurate, forthcoming, or wholly truthful in all respects. An example of Capt. Gallant's evasiveness arose when an OIG investigator asked him repeatedly whether he had brought to Mayor Zanni's attention the pay calculation formula he had unilaterally added to the CBA's Article XXIV after he had signed the August 31 CBA document. Capt. Gallant repeatedly ducked the question until finally responding: "I told him that I added the 0-2-2 in there." OIG Tr. 183-184. By negative implication, this is a tacit admission that Capt. Gallant did *not* advise the City's lead negotiator of any of the score of other changes he made to the CBA document. As a superior officer, Capt. Gallant should have been much more of a straight shooter with Mayor Zanni (and then later with Mayor Jajuga). As noted in the Tentative Decision, Capt. Gallant also was serially evasive toward OIG investigators about whether, in slipping in at the last minute a new pay calculation formula, he actually *did* intend for educational incentive payments to factor into base pay for all compensation-related purposes—an issue of enormous import (and not just to the investigation). See OIG Tr. 268, 271, 283-284, 290.

An area *not* explored in the Tentative Decisions at all is the veracity of Capt. Gallant's sworn testimony regarding his own calculations (or alleged lack thereof) of pay increases that would be due under the September CBA if fully implemented. As OIG investigators repeatedly pressed Capt. Gallant on the financial impact of the pay calculation formula he introduced into the September CBA document, he insisted that only the City Auditor had (much later) undertaken any calculations of what superior officers would earn if the executed CBA were fully

funded. However, the record clearly establishes that Capt. Gallant's answers on this topic were at best misleading—or, much more likely, untruthful.

In his OIG interview, Capt. Gallant stated: "[E]ven when I presented the contract to my members, I never told them the amounts" they could expect to see in their future paychecks. OIG Tr. 286.[43] Capt. Gallant also denied ever calculating how the new language he inserted would affect his own bottom-line compensation increases.[44] But later testimony from fellow superior officers (and even Capt. Gallant himself) seriously calls into question the truthfulness of Capt. Gallant's OIG testimony. In the arbitration hearing Capt. Gallant testified that he *did* estimate his "own numbers." Arb. Tr. 8: 233.[45] Moreover, MPD Captain McCarthy testified

---

[43] Contrast Capt. Gallant's statement at OIG Tr. 222 ("I've never gone back to my union members and said, 'You're going to make $150,000. You're going to make $175,000.'") with his arbitration testimony and that of Lt. Gunter summarized in the next paragraph and footnotes 46 and 48, *infra*.

[44] OIG Tr. 81-82 (Q: "[A]fter this contract comes out [and] before it goes public, did you know what you stood to make?" Gallant: "We never did the math. . . . But we knew it was going to be high." Q: "How high[?]" Gallant: [lengthy non-responsive answer refers first to compensation figure Auditor Kelly calculated in January 2018 followed by:] "We never came up with that number." Q: "But what was the number?" Gallant: "I never had a number."); see also OIG Tr. 83-84 (Gallant: "I never came up with a number. . . . [W]e never discussed numbers at [union] meetings. . . . [Fellow union members] didn't need to hear a number. I told them the language . . . [and] they knew what that meant. They knew it was going to be a very significant raise. . . . [But] I never worked on [calculating anyone's pay increase].") Later, OIG investigators returned to this same topic. OIG Tr. 230 (Q: "Have you ever run your numbers[?]" Gallant: "No, I didn't."); OIG Tr. 293 (Gallant (after referencing the lack of a wage schedule, which the union's attorney had recommended in September 2017): "I keep getting asked again and again what is the number. Still haven't done my own [as of February 2020]."). Then later in the OIG interview Capt. Gallant acknowledges that in May or June of 2018, after Auditor Kelly produced spreadsheets showing MPD captains could earn in excess of $400,000 per year through a literal interpretation of the executed 2017 CBA, he "started playing with the numbers" and "I kind of see where he got there." OIG Tr. 294, 296.

[45] See also Arb. Dec'n at 22 (Gallant "estimated his own 2017 compensation of $150,000 would increase to $200,000 or $210,000 under the new CBA"). Actually, Capt. Gallant testified that the base pay for captain that he started with "was in the ballpark of $130,000" before estimating that his pay would rise to between $200,000 and $210,000 under the new contract. Arb. Tr. 8: 233, 235. The OIG calculated the base pay of MPD captains at just $107,505. OIG Report at 15.

before DALA: "[W]e discussed roughly what those numbers would be" prior to the ratification vote the union took on August 30, 2017 and at the September union meeting. DALA Tr. 291, 298.

Union secretary Lt. James Gunter testified in arbitration about notes he took during a September 29, 2017 union meeting during which Capt. Gallant "discusse[d] how Quinn Bill is being used in determining base pay" under the "new contract". App. Exh. 5 at pg. 2. He testified that Capt. Gallant had calculated some new pay figures under the September CBA.[46] Pointing to certain pay calculations in those minutes, Lt. Gunter responded affirmatively to whether Capt. Gallant walked members through the process of calculating their pay under the new contract's provisions. Arb. Tr. 8: 152. Lt. Gunter testified that Capt. Gallant helped him calculate a "rough but . . . close" estimate that his total earnings in the third year of the new contract would approximate $170,000.[47] Arb. Tr. 8: 98-99, 154. In his own arbitration testimony, Capt. Gallant acknowledged having performed these calculations in September 2017.

Whatever the true figure, the OIG also reported that the base pay of police captains in the adjoining cities of Haverhill and Lawrence averaged only $86,675 in 2018. OIG Reprt App'x 7.

[46] Arb. Tr. 8: 95 (Gunter: "He had done some numbers [and] he'd given those numbers out . . . he added all that stuff up [all of the "add-in" components such as patrol officer COLA increases, clothing allowances, holiday pay, night differential pay, and hazardous duty pay that "would go into the salary build in order to figure out the sergeant's pay"] and then crunched the numbers and then provided these numbers to everyone.") According to Lt. Gunter, Capt. Gallant had calculated a specific patrol officer compensation figure ($71,191) that would serve as the base for calculating sergeant's pay under the new contract. Arb. Tr. 8: 97. By applying the "split" or rank differential formula—sergeants would be paid, as a new base, anywhere from 132% to 137% of the highest-paid patrol officer's salary—Capt. Gallant arrived at a new base pay figure for sergeants of $97,158, according to Lt. Gunter's notes. *Id.* and App. Exh. 5 at 2.

[47] As a point of reference, the OIG reported an average base lieutenant salary in 2018 in five cities comparable to Methuen that amounted to only *half* the Gunter figure, or $85,051. OIG Report App'x 7.

Arb. Tr. 8: 222.[48] And he confirmed helping Lt. Gunter (and Lt. Aiello as well) in calculating their own new annual compensation figures (of between $170,000 to $175,000) during that late September meeting. Arb. Tr. 8: 231. In short, it seems impossible to square Capt. Gallant's arbitration testimony with his earlier sworn statements on this topic to the OIG investigators.

Relatedly, Capt. Gallant told OIG investigators that (1) he didn't know Chief Solomon was "running the numbers" or consulting Auditor Kelly about the compensation increases; and (2) he wasn't sure if he had discussed with Chief Solomon how rolling holiday and hazardous pay into base pay would benefit superior officers. OIG Tr. 27, 245, 260. But Capt. Gallant admitted to the Arbitrator knowing that Solomon and Kelly were discussing wage scales and salaries and the Arbitrator found that Gallant and Solomon *had* discussed the "rolling in" language—and then Chief Solomon insisted that similar language be added to the patrol officers' contract. Arb. Dec'n at 19, 21. These are not minor discrepancies this Commission can overlook.

All in all, this Commission concludes that Capt. Gallant was not straightforward and honest in all aspects of his sworn testimony given to the OIG investigators. Together with the adverse inferences the appointing authority was entitled to draw from Capt. Gallant's refusal to respond to MPD investigators' questions on the same topics, the Commission now determines that the Respondent had just cause to discharge Capt. Gallant in 2022.[49] At a minimum, Capt.

[48] Speaking of what transpired at the September 29, 2017 union meeting, Capt. Gallant testified: "[N]ow we're having the discussion about how each individual is going to have their base pay calculated." Arb. Tr. 8: 227. He went on to explain how he calculated "the new jump-off point for a sergeant" ($71,181) and then the "split" calculation to achieve an estimate of the new base pay figure ($97,158) for sergeants. Arb. Tr. 8: 229, 232. "If I'm off by a few dollars, it's possible," he added. Id. at 229.

[49] As the Magistrate observed, police officers "are required to remain scrupulously honest and trustworthy." Tent. Dec'n (2023) at 17. Intentional material deviations from this standard often will justify severe disciplinary sanctions. See *id.*, citing cases.

Gallant stands guilty of conduct unbecoming (not acting in good faith) and failure to testify truthfully. Accordingly, the Commission affirms the decision of the appointing authority, former Methuen mayor Neil Perry, to terminate Capt. Gallant's employment with the City.

Conclusion

For the foregoing reasons, the appeal of Gregory Gallant, docketed as CSC no. D1-22-084, is hereby ***dismissed.***

Civil Service Commission[50]

/s/ Christopher C. Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein, Commissioners) on October 31, 2024.

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 C.M.R. § 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
James W. Simpson, Jr. (for Appellant)
Kenneth J. Rossetti, Esq. (for Respondent)
Paul T. O'Neill, Esq. (for Respondent)
Susanne M. O'Neil, Esq. (Office of the Inspector General)
James Rooney, Esq. (Senior Administrative Magistrate, DALA)

[50] The Commission acknowledges the assistance of General Counsel Robert Quinan, Jr., in the preparation of this Decision.

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Gregory Gallant,
Appellant,

v.

City of Methuen,
Respondent.

No. CS-22-388 (D1-22-84)

Dated: August 4, 2023

Appearance for Appellant:
James W. Simpson, Jr., Esq.
Framingham, MA 01702

Appearance for Respondent:
Kenneth J. Rossetti, Esq.
Peter J. McQuillan, Esq.
Methuen, MA 01844

Appearance for Office of the Inspector General:
Susanne M. O'Neil, Esq.
Boston, MA 02108

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF TENTATIVE DECISION

The appellant negotiated a collective bargaining agreement on behalf of his labor union. Very late in the bargaining process, the appellant made revisions to the evolving draft agreement. He disclosed his revisions to a member of the employer-city's bargaining team. He expected that the other members of the city's team would also review the new draft. The city and its council executed the agreement without understanding its financial implications. An arbitrator later deemed the agreement unenforceable. The appellant's negotiation tactics were aggressive; but he did not engage in any dishonest, untrustworthy, or improper conduct, either during the negotiations or in his ensuing testimony. The city therefore lacked just cause to terminate the appellant's employment.

TENTATIVE DECISION

Police Captain Gregory Gallant appeals from the City of Methuen's decision to terminate his employment. The Civil Service Commission referred the appeal to DALA. An evidentiary hearing took place over the course of four days during March-April 2023. The witnesses were

current Chief of Police Scott McNamara, retired Chief of Police Joseph Solomon, Captain Kristopher McCarthy, Officer David Gardner, Attorney Gary Nolan, and Captain Gallant himself. I admitted into evidence stipulations marked 1-9 and exhibits marked G1-G16, C1-C3, C6-C8, C11-C27, and A1-A10.[51] The record closed upon the submission of hearing briefs.

I. Procedural History

The case originated with collective bargaining negotiations between the city and the union representing its police superior officers, i.e., its sergeants, lieutenants, and captains. Captain Gallant led the union's bargaining team. The negotiations resulted in a CBA executed in September 2017.

At some point, reports began to circulate that the 2017 CBA entitled the city's superior officers to salaries much higher than those paid in other localities. The Office of the Inspector General investigated, issuing a final report in December 2020. The report found wrongdoing by Captain Gallant and various other individuals. *See* Office of the Inspector General, *Leadership Failures in Methuen Police Contracts* (2020).

During an overlapping timeframe, the city and the union litigated a class-action labor arbitration focused on the 2017 CBA's enforceability. In January 2022, the arbitrator deemed the CBA unenforceable, concluding that the city and the union had reached no "meeting of the minds" on material terms. *Methuen Police Super. Officers' Ass'n L. 17 v. City of Methuen*, No. 01-19-0001-3281 (Am. Arb. Ass'n Jan. 7, 2022). The arbitral award has become final.

In June 2022, the city terminated Captain Gallant's employment, citing "untrustworthiness" and related grounds. Captain Gallant appealed. A series of prehearing

[51] Captain Gallant offered Exhibits G1-G16. The city offered Exhibits C1-C27, of which nos. C4, C5, C9, and C10 were excluded as duplicative. Exhibits A1-A10 are the transcripts of the arbitration proceeding discussed *infra*. Exhibit C3 is cited as the "OIG report." Exhibit C15 is cited as the "arbitral award." The testimony at the evidentiary hearing, which was transcribed in consecutively numbered volumes, is cited by page number.

orders addressed the impacts of the OIG investigation and the labor arbitration on the appeal. Those orders deemed the OIG report admissible for its truth; they deemed the essential findings of the arbitral award preclusive.[52] Transcripts of the arbitration testimony were admitted into evidence, and the parties were not permitted to retread that testimony at the hearing.[53] *See generally* G.L. c. 30A, § 11(2).

II. Findings of Fact

The following findings are drawn from the testimony, the exhibits, and the essential determinations of the arbitral award.

A. CBA Negotiations

1. Captain Gallant began his career as a Methuen police officer in approximately 1993. He achieved the rank of captain in approximately 2017. (Exhibits C16, A8; Tr. 139-140.)

2. During May-August 2017, the city and the superior officers' union negotiated a new CBA. Captain Gallant led the union's bargaining team, which also included another police captain (Joseph Aiello). The city's bargaining team consisted of Mayor Stephen Zanni, Chief Solomon, City Solicitor Richard D'Agostino, and Assistant City Solicitor Anne Randazzo. (Arbitral award 5; Exhibits C16, A4-A6, A8; Tr. 140-142, 202, 314-316.)

[52] Issue preclusion applies where "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; . . . (3) [an] issue in the prior adjudication was identical to [an] issue in the current adjudication . . . [(4)] the issue . . . [was] essential to the earlier judgment." *Duross v. Scudder Bay Cap., LLC*, 96 Mass. App. Ct. 833, 836-37 (2020). Captain Gallant maintains that the arbitration involved different parties and different issues. But for preclusion purposes, "union members [are] in privity with their union," at least where "a class action . . . was filed on behalf of the entire bargaining unit." *DaLuz v. Department of Correction*, 434 Mass. 40, 42 & n.8, 44, 45 (2001). And issue preclusion may arise as to specific facts even where the earlier and later cases overlap only in part. *See Finnegan v. Baker*, 95 Mass. App. Ct. 1104 (2019) (unpublished memorandum opinion). Issue preclusion also does not depend on the prior judgment's correctness: it focuses on advancing "finality, efficiency, consistency, and fairness." *Bar Couns. v. Board of Bar Overseers*, 420 Mass. 6, 10-11 (1995).

[53] The parties were permitted to elicit non-repetitive testimony from witnesses who previously testified at the arbitration (such as Captain Gallant).

3. Around August 29, 2017, the bargaining teams reached a tentative agreement. Among other things, they agreed that holiday pay, a cleaning allowance, and hazardous duty pay[54] would be "rolled into" the officers' base pay. The bargaining teams did not agree that educational incentives[55] would be rolled into base pay. (Arbitral award 6, 8; Exhibits C16, G4, A4, A6, A8, A9; Tr. 146, 343-345.)

4. Base pay was the starting point for calculations of the officers' overtime pay, vacation pay, and other compensation amounts. In addition, the salary of each rank of officers was calculated as a percentage of the next lower rank's base pay. As of 2017, the salary for sergeants was set at 132% of the maximum patrolman's base pay; the salary for lieutenants was set at 116% of the maximum sergeant's base pay; and the salary for captains was set at 116% of the maximum lieutenant's base pay. These percentage differentials were commonly referred to as the "splits." (Arbitral award 5, 9, 21; Exhibits C16, A5, A8; Tr. 1:146-147, 324-325.)

5. Among the items agreed upon at the bargaining table was a gradual increase of the splits. Each percentage number would remain unchanged in 2017, rise by 2% in 2018, and rise by another 2% in 2019. For example, the splits for sergeants were scheduled to remain 132% of maximum patrolman base pay in 2017, with increases to 134% in 2018 and 136% in 2019. The bargaining teams referred to this agreement as "0,2,2."[56] (Arbitral award 7-8, 19; Exhibits C16, G12, A4-A6, A8; Tr. 145, 232-236, 320, 326-327.)

[54] Also called "protective vest" or "technology" pay.
[55] Also called "Quinn Bill" pay, even as to officers whose educational incentives were not prescribed by G.L. c. 41, § 108L.
[56] The "0,2,2" label apparently reflected Mayor Zanni's aspiration to grant consistent, modest raises to the city's various unions. (Exhibit A2.) As applied to the superior officers' CBA, this label was predestined to mislead. Even standing alone, the anticipated changes to the splits would not have yielded 2% pay increases in 2018 or 2019. For purposes of illustration, in 2018, sergeant pay would have risen from 132% of patrolman pay to 134% of patrolman pay—a total pay raise of about 1.5%. Lieutenant pay would have risen that year from 116%-of-132% of patrolman pay to 118%-of-134% of patrolman pay—a total raise of about 3.3%. (Exhibits C7, C16, A8.)

6. The city's bargaining team asked Captain Gallant to prepare a clean draft of the CBA. Captain Gallant delivered his draft to Chief Solomon, leaving another copy in Mayor Zanni's office. The draft was dated August 31, 2017. Through Chief Solomon, Mayor Zanni asked Captain Gallant for certain changes: principally, the mayor wanted the CBA to expressly mention the "0,2,2" raises. (Arbitral award 7; Exhibits C16, C19, G6, A4-A6, A8, A9; Tr. 148-156, 331, 338-339.)

B. Captain Gallant's Revisions: Their Substance

7. Captain Gallant accommodated Mayor Zanni by adding the following language into the CBA's article XXIV:

> The cost of living increases are as follows:
> July 1, 2017—zero percent increase
> July 1, 2018—two percent increase
> July 1, 2019—two percent increase

Simultaneously, Captain Gallant inserted more than twenty other pieces of new, pay-related language into several sections of the CBA. He made these revisions partly in the hope of preventing miscalculations. But he also understood that the revisions would be beneficial to the union's members. (Arbitral award 7-9, 19; Exhibits C7, C19, A8.)

8. The great majority of Captain Gallant's insertions reiterated agreements that the previous draft had already reflected. The previous draft had stated that holiday pay (article XII), the cleaning allowance (article XVII), and hazardous duty pay (article XXIX, § 25) would be "considered base pay for all purposes." Captain Gallant repeatedly added, ". . . including determination of total compensation under article [XXIV]."[57] The previous draft had enumerated a long list of splits, stating each time that a particular rank of officers would receive

[57] This edit was Attorney Nolan's idea. (Exhibit C24.)

a specified percentage of the next lower rank's "salary." Captain Gallant repeatedly added, ". . . including all base pay calculations." (Exhibits C7, C19, G13, A8; Tr. 164-165.)[58]

9. At the heart of the dispute is Captain Gallant's most substantive edit: a calculation formula appearing in the CBA's article XXIV, immediately after the new "0,2,2" language. It reads as follows:

> Base pay and added base pay calculations are to be calculated in the following order and manner to arrive at base pay for all purposes; Base pay, then add cleaning allowance, subtotal, then calculate and add Holiday compensation under Article XII, then add calculated Protective Vest/Hazardous Duty and Technology Compensation percentage, calculate Quinn Bill/Education Incentive.

(Exhibits C7, C16, C19, G14, A8.)

10. The OIG report and the arbitral award devoted substantial attention to the calculation formula's final clause, "calculate Quinn Bill/Education Incentive." The OIG and the arbitrator both concluded that this clause caused educational incentives to be rolled into base pay. The arbitrator's ruling on this point is preclusive. The educational incentives available to Methuen's officers were substantial, and the splits would have compounded the impact of this revision with each successive rank of officers. (Arbitral award 5, 20-22; Exhibits C7, A8.)

11. The arbitrator wrote that "[i]t is not . . . clear . . . that Captain Gallant understood the full ramifications of the words he drafted." A preponderance of the evidence supports the conclusion that Captain Gallant did not believe that his edits would roll educational incentives into base pay. At the same time that he inserted roll-into-base-pay language into the CBA's provisions about holiday pay, the cleaning allowance, and hazardous duty pay, Captain Gallant made no such changes to the provision about educational incentives (article XXIX, § 19). He

[58] At the labor arbitration, the city suggested that the insertions described in paragraph 8 may have altered the CBA's practical implications. (Exhibits A1-A9 *passim*.) The arbitrator apparently did not adopt this unconvincing view. (Arbitral award *passim*.)

also did not indicate that educational incentives would be rolled into base pay in contemporaneous conversations with union members and other individuals. (Arbitral award 18; Exhibits C7, G4, G14, A8; Tr. 162-163, 215-217, 299-300, 346.)[59]

12. The rest of Captain Gallant's calculation formula relates to a conundrum posed by the bargaining teams' agreement that base pay would include three new components, i.e., holiday pay, the cleaning allowance, and hazardous duty pay. Two of these items—holiday pay and hazardous duty pay—were themselves derived from base pay.[60] The bargaining teams did not discuss whether, for purposes of calculating these two items, base pay would include any of its three new components. The approach reflected in Captain Gallant's formula was that, for purposes of calculating holiday pay, the cleaning allowance would count as base pay; and for purposes of calculating hazardous duty pay, both the cleaning allowance and holiday pay would count. These choices were favorable to the union,[61] and the splits would have compounded their impacts on the compensation of high-ranking officers. (Exhibits C7, G14, A6, A8.)

13. While planning and composing his edits, Captain Gallant consulted with the union's attorney, Mr. Nolan, writing: "[T]here are some big changes to the splits . . . . There is also an increase given to us with a percentage [sic] and hazardous duty pay. I foresee, [b]ecause of the large increases in pay, having to litigate the wording." In his next message, Captain Gallant added that the union had obtained "great increases, and it all compounds."[62] Some days

[59] Captain Gallant *did* hope to ensure that the city would include various "base pay" items within the basis for its calculations of officers' educational incentives. (Exhibits C16, A8; Tr. 162-163, 203-204, 237-238.)
[60] Holiday pay equaled thirteen days' worth of base pay; hazardous duty pay equaled 1-2% of annual base pay. The cleaning allowance was a flat annual sum. (Exhibits C7, C19.)
[61] An alternative implementation of the parties' bargaining-table agreements could have used base pay without *any* of its new elements (holiday pay, the cleaning allowance, and hazardous duty pay) to calculate holiday pay and hazardous duty pay. It is not clear whether this option occurred to Captain Gallant.
[62] It appears that Captain Gallant sent the first two emails quoted in paragraph 13 before introducing his calculation formula into the draft agreement. (Exhibit C22 (5:21 pm email); Exhibit C8 (5:34 pm email); Exhibit C23 (5:38 pm email and attached non-final draft).) The parties had agreed to "changes to the splits," "large increases," and "compound[ing]" pay terms by the time they rose from the bargaining table. *See* paragraphs 3-5 *supra*.

later, Captain Gallant updated Attorney Nolan: "We made some language changes at the last minute, added a paragraph in compensation, in which we break down the order of calculations to be made . . . . It makes a little difference. We also . . . firmed up the definition of base pay in each section." (Exhibits C8, C22-C27, G12-14.)

14. Captain Gallant left the signature page from his first draft of the CBA unchanged, including the execution date. He brought the new draft to Chief Solomon. The two men then discussed Captain Gallant's edits. Chief Solomon specifically commented on the new calculation formula. Thereafter, Captain Gallant delivered copies of the CBA to Mayor Zanni. During the ensuing days, Mayor Zanni signed the CBA without posing further questions or requests. (Arbitral award 10-11; Exhibits C7, C16, C19, G10, A8; Tr. 163-170, 339-347.)

C. Captain Gallant's Revisions: His Expectations

15. The primary theory underlying the city's termination of Captain Gallant is that his eleventh-hour revisions to the CBA were dishonest. The crux of the accusation is that Captain Gallant intended to trick the city's bargaining team by concealing his edits—really, his calculation formula—from them. I find that this was not Captain Gallant's intention. Although he made his edits very late in the day, Captain Gallant anticipated that the city's bargaining team would see and consider those edits. Paragraphs 16-18 expand on this pivotal finding. They recognize that adverse inferences may be drawn against Captain Gallant from his refusal to answer substantive questions during the city's disciplinary hearing (as discussed *infra*). *See Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 826-27 (2006). Those inferences are outweighed by the countervailing considerations that paragraphs 16-18 describe. *See United*

States v. Stein, 233 F.3d 6, 16, 17 n.6 (1st Cir. 2000); *Selfridge v. Jama*, 172 F. Supp. 3d 397, 415 n.16 (D. Mass. 2016); *Parham v. Stewart*, 839 S.E.2d 605, 610 & n.8 (Ga. 2020).[63]

16. Captain Gallant testified credibly that he expected the city's bargaining team to read and consider his revised draft of the CBA. That expectation was natural. The mayor and the city solicitor were duty-bound to review the final copy of the CBA before its execution. Captain Gallant also placed his calculation formula where the mayor was *most* likely to see it—on the same page as, and immediately after, the new "0,2,2" language that the mayor had requested. (Exhibits C7, A7-A9; Tr. 171.)[64]

17. It is true that Captain Gallant removed several line breaks from the page containing his new formula. This adjustment caused the CBA's pagination to remain mostly unchanged. But throughout the drafting process, Captain Gallant struggled to produce a readable document. He was especially stymied by page numbering, at some point even hand-pasting numbers onto a draft's printed pages. I find that Captain Gallant's spacing adjustments were

[63] The city's hearing officer drew the following adverse inferences from Captain Gallant's invocation of the Fifth Amendment: that he inserted edits into the draft CBA without first consulting the city's bargainers (see paragraph 7 *supra*); that he manipulated the CBA's formatting in order to conceal his new insertions (see paragraph 17 *infra*); and that he used the CBA's new provisions as "leverage" during the city-union negotiations of 2018 (see paragraph 21 *infra*); and that he provided "conflicting testimony" to the OIG and the arbitrator (see paragraphs 24-29 *infra*). (Exhibit C20.) The general rule that adverse inferences may be drawn from a party's invocation of a privilege rests on the commonsense insight that the party's reticence may "indicat[e] his opinion that the evidence, if received, would be prejudicial to him." *Phillips v. Chase*, 201 Mass. 444, 450 (1909). *See Lentz v. Metro. Prop. & Cas. Ins. Co.*, 437 Mass. 23, 26 (2002). With this premise in mind, an adverse inference becomes much less compelling when the party has eventually supplied the missing evidence. *See generally In re 650 Fifth Ave. & Related Properties*, 934 F.3d 147, 169 (2d Cir. 2019) (courts must take a "liberal view" of applications to withdraw invocations of the Fifth Amendment). Nonetheless, the Supreme Judicial Court has held that the commission is not permitted to ignore an employee's prior silence before the appointing authority, and must "account for" that silence even if the employee has since testified. *Town of Falmouth*, 447 Mass. at 826-27. *See also Singh v. Capuano*, 468 Mass. 328, 333 (2014) (a factfinder's obligation is to "entertain the possibility" of drawing an adverse inference).

[64] Captain Gallant and Chief Solomon testified that Captain Gallant gave the city copies of the revised CBA with tabs marking the revised pages. A photograph of a "yellow tabbed copy" was in evidence at the arbitration hearing. (Arbitral award 20 n.16; Exhibit G7; Tr. 163-170, 340, 350-355.) I find that Captain Gallant's testimony on this point reflected his best recollection. I do not find further that the city's bargainers (other than Chief Solomon) in fact received tabbed copies of the agreement, because the arbitrator found "no credible evidence" that Captain Gallant's edits "were expressly brought to the attention of the full bargaining team." (Arbitral Award 19-20.) *See Alba v. Raytheon Co.*, 441 Mass. 836, 843-44 (2004) (a non-essential finding may be preclusive when it results from "full litigation and careful decision").

intended not to obscure his edits but to avert additional formatting glitches. (Arbitral award 7; OIG report 12; Exhibits C7, C16, C19, G10, A8, A9; Tr. 149, 167-168, 230, 335.)[65]

18. The charge that Captain Gallant attempted to hide his edits from the city's bargaining team runs aground on the reality that, in Captain Gallant's presence, city negotiator Chief Solomon *in fact* examined those edits. By way of a fallback argument, the city suggests that Captain Gallant hoped to obscure his revisions from *other* city bargainers; the city posits that Captain Gallant suspected that Chief Solomon would not zealously defend the city's interests, because Chief Solomon's own compensation was derived from the superior officers' pay.[66] This fallback theory is not supported by a preponderance of the record evidence. No testimony, real-time emails, or meeting notes suggest that Captain Gallant doubted Chief Solomon's fidelity to the city or zeal on its behalf. No evidence discloses any extra-professional relationship between the two men. Captain Gallant testified credibly that he "trusted" Chief Solomon and "took his word" with respect to discussions within the city's bargaining team. With the benefit of 20/20 hindsight, this testimony is an easy target for skepticism: but it is important to recall that the mayor, the city solicitor, the assistant city solicitor, and the city councilors all trusted Chief Solomon's integrity and advice. These individuals were responsible for safeguarding the city's interests. Taking them as points of comparison, it becomes very plausible that Captain Gallant—

[65] Mayor Zanni testified at the arbitration proceeding that he did not read any version of the CBA before signing it. City Solicitor D'Agostino testified that he never saw any pre-execution draft of the CBA. Assistant City Solicitor Randazzo testified that she received a pre-execution draft but did not read it. (Exhibits A4, A5, A6.) In these circumstances, the theory that Captain Gallant's formatting adjustments were designed to impede the city's contract-review process relies on a measure of imagination. Both Chief Solomon and City Auditor Thomas Kelly, who did review the CBA around the time of its execution, promptly became concerned about its various new provisions. (Exhibit A7; Tr. 339-347.)

[66] Chief Solomon retired in January 2021. A recent commission investigation found misconduct on his part unrelated to the instant appeal. Civil Service Commission, *Investigation Regarding the Prior Use of Non-Civil Service Intermittent Police Officers in the Methuen Police Department*, No. I-20-182 (2023). Still more recently, the State Ethics Commission commenced disciplinary proceedings against Chief Solomon, making allegations that *are* based in part on the events at issue here. *See* Order to Show Cause, *In the Matter of Solomon*, No. 23-0010 (Ethics Comm'n June 30, 2023). The current decision does not rely on any extra-record information that the commission, the State Ethics Commission, or any other agency may have gathered. *See* G.L. c. 30A, § 11(4).

a member of an adverse bargaining team—failed to worry about Chief Solomon's apparent conflict of interest. Finally, Captain Gallant's choice to place his new calculation formula right next to Mayor Zanni's newly requested "0,2,2" language undercuts the theory that he meant to hide his edits from *anyone*. (Arbitral award 18-19, 22; OIG report 24, 26; Exhibits C7, C16, A6, A9; Tr. 137-138, 181.)

D. Approval, Renegotiation, OIG Investigation, and Labor Arbitration

19. Methuen's city councilors voted to approve the CBA on September 13, 2017. Before the vote, the councilors received no analysis of the CBA's financial impact. They did not hear details about the CBA's divergences from its predecessor agreement. They did not ask questions. At least some of them did not read the CBA. They did not understand the implications of its new terms. They believed that the CBA would increase the superior officers' compensation by small amounts. (Arbitral award 10-11, 18-19; Exhibits C7, C16, G16, A1-A7.)

20. A new mayor took office around early 2018. City personnel then computed the CBA's financial consequences. They concluded that, by the last year of the CBA, the superior officers would be earning annual base salaries of $200,000 to $500,000. These figures would have represented pay raises of between 77% and 224% compared to the prior CBA. The arbitrator found preclusively that the city made these computations in good faith. (Arbitral award 12, 14; OIG report 16-17; Exhibits C16, A1, A2, A7, A8.)[67]

21. The city and the union conducted a series of negotiations designed to clarify or amend the CBA's pay provisions. During those negotiations, the union was represented by Attorney Nolan. Neither Captain Gallant nor the other participants in the negotiations contended

[67] Captain Gallant himself believed that the city had intentionally inflated its computations. He related this belief to Mayor Zanni. (Exhibit C3.) Captain Gallant's perception was not without support. (*E.g.*, Exhibit A7.)

that the CBA, properly construed, rolled educational incentives into base pay. The negotiating teams reached an agreement, which they memorialized in a signed memorandum of understanding; but the city council declined to approve that agreement. (Exhibits C13, C16, A1, A2, A6-A8; Tr. 172-180, 242-252, 360-366.)

22. The OIG commenced its investigation during 2018, responding to complaints that the new CBA reflected "a waste of public funds" and possibly fraud. The OIG issued a preliminary letter in February 2019 and a final report in December 2020. It found "a failure of leadership at all levels" of Methuen's government, including the mayor, the city solicitor, the city council, and Chief Solomon. With respect to Captain Gallant, the OIG wrote that he acted in "bad faith" by drafting terms into the CBA that the bargaining teams had not agreed upon. (OIG report 1-4, 23, 28-29, and *passim*.)

23. In March 2019, the superior officers' union brought a class-action grievance against the city to arbitration. The essence of the grievance was that the city was failing to honor its obligations under the CBA. The arbitrator heard ten days of testimony. She then denied the grievance, deeming the CBA unenforceable. The arbitrator explained that the CBA negotiations had not yielded a "meeting of the minds between the City and the Union as to the costs and meaning of the [CBA's] compensation provisions." That determination is preclusive. The arbitrator's essential subsidiary findings are reflected throughout the current decision. (Arbitral award 17-22, 31, and *passim*; Tr. 260.)

E. Captain Gallant's Testimonies

24. Captain Gallant testified under oath both before OIG investigators and in the arbitration hearing. His testimonies on those occasions were fundamentally consistent with each other and with the findings of the instant decision. As to certain details, Captain Gallant's

accounts differed in their nuances or in their degrees of certainty and circumspection. Paragraphs 25-29 elaborate.

25. With respect to his course of action upon completing a first draft of the CBA, Captain Gallant told the OIG's investigators: "I believe I dropped it off with the mayor's office. Or you know, this one I'm not sure. I may have given this one to the chief . . . ." At the arbitration hearing, Captain Gallant's account was less tentative: "I brought it to the chief to review . . . He told me to bring it to the mayor's office. I brought it to the mayor's . . . ." (Exhibits C16, A8.)

26. As for his actions when he had completed his revised draft, Captain Gallant at first told the OIG: "[M]y recollection is I went up to the mayor's office . . . and he signed it." Later in the interview, Captain Gallant qualified: "I don't recall if he signed it and then got it back to me." At the arbitration hearing, Captain Gallant's memory was firmer: "My recollection is . . . I brought [the contracts] up to the mayor's office. . . . I left them in the mayor's office . . . . [Eventually] the chief gave me a signed copy." (Exhibits C16, A8.)

27. The city maintains that Captain Gallant told different stories to the OIG and the arbitrator about Chief Solomon's role in the CBA negotiations—minimizing that role to the OIG, accentuating it to the arbitrator. On this score, Captain Gallant's two accounts were identical in substance. He said on both occasions that Chief Solomon's role was the same as it had been during other negotiations, focusing on "management rights." (Exhibits C16, A8; Tr. 362.)[68]

[68] Relatedly, the city takes issue with Captain Gallant's statement to the OIG that he "gave" his calculation formula to Officer Gardner, so that Methuen's patrolmen could mimic the formula in their own CBA. (Exhibits C2, C16.) The city points out that it was Chief Solomon who emailed Officer Gardner a copy of the superior officers' new CBA. (Exhibits C6, G15.) But what Captain Gallant conveyed to the OIG in substance was that he had spoken to Officer Gardner orally about the superior officers' new contractual terms. (Exhibit C16; Tr. 203-205.) Lastly in this vein, Captain Gallant's testimonies about the handwriting appearing on a draft of the CBA also do not reflect dishonesty. Captain Gallant told the OIG that he did not recognize the handwriting; the OIG indicated that the handwriting belonged to Chief Solomon; and that is the information that Captain Gallant provided when he was asked about the handwriting's owner at the arbitration hearing. (Exhibits C16, A8.)

28. At the arbitration proceeding, Captain Gallant testified that he did not intend for his calculation formula to roll educational incentives into base pay. As discussed in paragraph 11, I conclude that this testimony was true. This conclusion casts an unflattering light on the corresponding portion of Captain Gallant's testimony to the OIG. The OIG's investigators asked Captain Gallant repeatedly whether he meant for his formula to roll educational incentives into base pay. Instead of disclosing his own intentions, Captain Gallant consistently pivoted, stating instead that he "didn't believe they were going to roll it through." (Exhibits C16, A8.)

29. At the time of the OIG interview, the arbitration proceeding loomed. Captain Gallant was accompanied by Attorney Nolan. Apparently Captain Gallant worried that direct, complete responses to the investigators' questions on this particular topic might harm the union's case. The tenor of the interview, which drifted at times into bluff bravado, also may have played a part in Captain Gallant's attitude. In any event, his insistent circumspection was ill-conceived. A sworn interview with authorized investigators was an occasion for directness, not tactical maneuvering. Even so, I do not find that Captain Gallant crossed the line from reticence into dishonesty. He neither intended to mislead the OIG's investigators nor in fact misled them. (Exhibit C16.)

F. Disciplinary Proceedings

30. In early 2022, the police department commenced an investigation into Captain Gallant's conduct. In an April 2022 report, Chief McNamara concluded that Captain Gallant had committed conduct unbecoming a department employee, had behaved dishonestly, and had provided untruthful testimony to the OIG, the arbitrator, or both. (Stipulations 3, 4; Exhibit C2; Tr. 38-50.)

31. In May 2022, the city convened a disciplinary hearing before a hearing officer. Captain Gallant took the stand, answered preliminary questions, but otherwise remained silent. In June 2022, the hearing officer recommended discipline, and the city terminated Captain Gallant's employment. He timely appealed. (Stipulations 1, 2, 5-9; Exhibits C1, C18, C20, C21; Tr. 50-53.)

III. Analysis

As a "tenured employee" within the meaning of the civil service law, Captain Gallant may be discharged only for "just cause." G.L. c. 31, §§ 1, 41. Just cause exists when an employee has committed "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *Town of Brookline v. Alston*, 487 Mass. 278, 292-93 (2021) (quoting *Doherty v. Civil Serv. Comm'n*, 486 Mass. 487, 493 (2020)). The commission's review of disciplinary decisions is required to "focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." *Boston Police Dep't v. Collins*, 48 Mass. App. Ct. 408, 412 (2000) (quoting *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997)).

It is the appointing authority's burden to prove just cause by a preponderance of the evidence. *Collins*, 48 Mass. App. Ct. at 411. The appointing authority's decision is judged by "the circumstances . . . [that] existed when [it] made its decision." *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 824 (2006). But those circumstances must be "found by the commission" based on a "de novo hearing." *Id.* at 823-24. At that hearing, "[t]here is no limitation of the evidence to that which was before the appointing officer." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727 (2003) (quoting *Sullivan v. Municipal Ct. of the Roxbury*

Dist., 322 Mass. 566, 572 (1948)). *See also Boston Police Dep't v. Civil Serv. Comm'n*, 483 Mass. 461, 477-78 (2019).

Police officers are held to exacting standards of behavior. *See McIsaac v. Civil Serv. Comm'n*, 38 Mass. App. Ct. 473, 474 (1995). Among other things, they are required to remain scrupulously honest and trustworthy. Without this demand, police departments would struggle to preserve their public legitimacy. Plus, day-to-day police work "frequently calls upon officers to speak the truth." *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 801 (2004). *See Keating v. Town of Marblehead*, 24 MCSR 334, 339 (2011); *Kinnas v. Town of Shrewsbury*, 24 MCSR 67, 73-74 (2011). *See also City of Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 821 (2005). Accordingly, any dishonest conduct by Captain Gallant would have justified disciplinary action against him.

But the facts do not reflect such conduct. The pertinent events took place within the context of a bargaining relationship. The interests of the union and the city diverged. Captain Gallant's primary fiduciary duties were toward the union. Even so, he did not mislead or try to trick the city's bargainers. The gist of what he did was to propose late-in-the-day revisions to a non-final draft agreement. He disclosed those revisions to Chief Solomon, expected the city's other bargainers to review them, and did not impede their opportunity to do so. Contrast *Axalta Coating Sys., LLC v. Midwest II, Inc.*, 217 F. Supp. 3d 813, 822-25 (E.D. Pa. 2016); *In re Decade, S.A.C., LLC*, 635 B.R. 735, 767-68 (Bankr. D. Del. 2021). *See generally Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666, 676-77 (Tenn. Ct. App. 2007).

The iterative exchange of evolving drafts is a commonplace phase of the bargaining process. "The final governing documents are generally complex . . . . These papers are far from being just another 'wheel in the machinery.' Until the documents are signed and delivered the

game is not over." *Tull v. Mister Donut Dev. Corp.*, 7 Mass. App. Ct. 626, 631-32 (1979). *See Community Builders, Inc. v. Indian Motocycle Assocs., Inc.*, 44 Mass. App. Ct. 537, 556 (1998); *Goren v. Royal Invs. Inc.*, 25 Mass. App. Ct. 137, 142-43 (1987). *Cf. Qureshi v. Fiske Cap. Mgmt., Inc.*, 59 Mass. App. Ct. 463, 467 (2003). This dynamic is a major reason why—as the OIG emphasized in its report—the mayor, the city solicitor, and the city council were obligated to review the agreement's final version.[69] Captain Gallant negotiated aggressively on his union's behalf, but he did not cross the line into dishonesty or unscrupulousness.

The city's remaining theories for discipline against Captain Gallant are resolved by the foregoing observations and the findings of fact stated *supra*. The law imposes certain duties of good faith among parties to collective bargaining negotiations. *See* G.L. c. 150E, § 6. *See also School Comm. of Newton v. Labor Rels. Comm'n*, 388 Mass. 557, 572 (1983). *Cf. Schwanbeck v. Fed.-Mogul Corp.*, 412 Mass. 703, 705-07 (1992); *Sisneros v. Citadel Broadcasting Co.*, 142 P.3d 34, 39-41 (Ct. App. N.M. 2006). There might arise circumstances in which violations of those duties are egregious enough to demonstrate an employee's untrustworthiness. But no such circumstances are present here.

It is true that collective bargaining parties are required to "meet at reasonable times . . . and . . . negotiate in good faith" about various terms of employment. G.L. c. 150E, § 6. But it is reasonably clear that no "meeting" or further "negotiations" are necessary when one party makes a proposal and the other party accepts. *Cf. School Comm. of Newton*, 388 Mass. at 570 (even a bargaining party's inaction may establish its acquiescence to a change of employment terms). *See generally* Douglas A. Randall & Douglas E. Franklin, *Municipal Law and Practice* § 12.5

[69] The arbitrator saw an exception here to the usual rule, which holds that a sophisticated party's failure to read a contract does not detract from the contract's force. *See Cohen v. Santoianni*, 330 Mass. 187, 193 (1953); *Brown v. Grow*, 249 Mass. 495 (1924); *Ruane v. Jancsics*, 2001 Mass. App. Div. 103 (Dist. Ct. App. Div. 2001); 7 *Corbin on Contracts* § 29.8 (rev. ed. 2002).

(5th ed. 2006). In real time, that is what seemed to have happened here, from the union's perspective: Captain Gallant proposed new contractual terms, which the city promptly accepted by executing his draft.

As discussed in the findings of fact, no dishonesty or untrustworthiness emerges from Captain Gallant's series of testimonial accounts. The commission has cautioned that accusations of untruthfulness must be analyzed with care: "[S]ubjective hair-splitting cannot be the basis for the serious charge of untruthfulness, nor can the inability . . . to remember every specific detail of a tumultuous event." *Grasso v. Town of Agawam*, 30 MCSR 347, 369 (2017). Civil servants must not be branded dishonest based on misunderstandings or errors. *Marchionda v. Boston Police Dep't*, 32 MCSR 303, 308 (2019); *Owens v. Boston Police Dep't*, 31 MCSR 14, 17 (2018).

Captain Gallant gave his testimonies in response to several hours of cross-examination. Such circumstances are not conducive to meticulous narratives. A witness on the stand cannot plot out the testimony or proofread it for mistakes. The transcripts must be read realistically, commonsensically, and with a focus on substance. The arguable variations among Captain Gallant's accounts revolve around points of nuance, emphasis, and (in one instance) misplaced reticence. The charge that he testified untruthfully is not established by a preponderance of the evidence.

To be clear, Captain Gallant's elusiveness about his original aspirations for the "calculate Quinn Bill/Education Incentive" language was not model behavior. But that conduct also was not so deficient as to meet the "substantial misconduct" test. *Town of Brookline*, 487 Mass. at 292-93. Its degree of honesty or dishonesty did not differ qualitatively from the honesty or dishonesty of any witness's stubbornly guarded testimony in the face of vigorous cross-

examination. Needless to say, the multiplicity of unmeritorious charges brought against Captain Gallant does not diminish the city's burdens as to each charge. In this context, quantity is no substitute for quality, and each accusation must be measured against the usual governing standards. *See Desmond v. Town of W. Bridgewater*, 33 Mass. L. Rptr. 364, 366 (Suffolk Super. 2016); *Bliss v. Town of Wareham*, 24 MCSR 246, 258 (2011).

The 2017 CBA was a disaster. Enforced as written, the CBA would have overstretched Methuen's finances to the disproportionate benefit of the city's superior officers. A confluence of errors allowed this harmful agreement to be executed. The city's negotiators and councilors fell down on the job. Neither of the bargaining parties computed the CBA's likely costs. Captain Gallant pursued and achieved concessions that the city could not realistically honor. He also drafted imprecise language preordained to generate disputes. Still, it was the city's representatives who were mainly responsible for defending the city's interests. Captain Gallant's performance of his own duties did not involve "substantial misconduct" meriting disciplinary action. *Town of Brookline*, 487 Mass. at 292-93.

IV. Conclusion and Order

Subject to review by the commission, Captain Gallant's appeal is ALLOWED and the city's decision is REVERSED. Captain Gallant is entitled to be reinstated to his position in accordance with any additional directives the commission may issue.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Gregory Gallant,
Appellant,

v.

City of Methuen,
Respondent.

No. CS-22-388 (D1-22-84)

Dated: May 3, 2024

Appearances:
For Appellant: James W. Simpson, Jr., Esq.
For Respondent: Kenneth J. Rossetti, Esq., Paul T. O'Neill, Esq.

Administrative Magistrate:
Yakov Malkiel

SUMMARY OF SUPPLEMENTAL TENTATIVE DECISION

The respondent city terminated the appellant's employment on the basis of his labor-negotiation tactics and related testimonies. After an initial tentative decision in the appellant's favor, the matter was recommitted to DALA for additional fact finding. The essential question on recommittal was whether the city instructed the appellant that his refusal to answer questions at an internal affairs investigative interview would subject him to discipline. The answer is no. The city instead told the appellant that he was not required to provide self-incriminating answers to the interviewers' questions.

SUPPLEMENTAL TENTATIVE DECISION

In June 2022, the city of Methuen terminated Captain Gregory Gallant's employment. He appealed to the Civil Service Commission, which referred the appeal to DALA. An August 2023 tentative decision called for the termination to be reversed. In January 2024, the commission recommitted the appeal to DALA for further proceedings. The parties filed a joint memorandum and proposed exhibits. On April 30, 2024, I heard oral argument and admitted into evidence exhibits marked S1-S9, SB, SD, and SF.[70]

[70] Exhibits SA, SC, and SE were excluded by agreement as duplicative.

I. Recap

The purpose of this recap is to offer context for the findings and discussion that follow. No part of this supplemental tentative decision is intended to replace or revise the August 2023 tentative decision or the January 2024 recommittal order.

A. Essential Background

The case originates from collective bargaining negotiations between the city and its superior officers' union. Captain Gallant led the union's bargaining team. Very late in the bargaining process, he made revisions to the parties' evolving draft agreement. The parties executed a new CBA in September 2017.

Reports soon began to circulate that the 2017 CBA entitled the superior officers to exorbitant salaries. The Office of the Inspector General commenced an investigation in 2018. Captain Gallant testified before the OIG's investigators in February 2020. The OIG issued its final report in December 2020, finding wrongdoing by Captain Gallant and other individuals, and recommending disciplinary action.

The city challenged the enforceability of the 2017 CBA in labor arbitration proceedings. Captain Gallant testified in those proceedings during May 2021. In January 2022, the arbitrator agreed with the city and declared the CBA unenforceable.

In early 2022, the city's police department opened an internal affairs investigation into Captain Gallant's conduct. In March 2022, Captain Gallant attended an investigative interview. Citing the privilege against self-incrimination, he declined to answer substantive questions. In an April 2022 report, the department found Captain Gallant guilty of misconduct.

The city convened a disciplinary hearing before a hearing officer in May 2022. Captain Gallant again answered preliminary questions but otherwise remained silent. In a June 2022 decision, the hearing officer found that Captain Gallant had behaved dishonestly in connection

with his late-breaking revisions to the 2017 CBA. She also found that Captain Gallant had testified untruthfully before the OIG, the arbitrator, or both. The city promptly terminated Captain Gallant's employment.

The commission referred Captain Gallant's subsequent appeal to DALA. An evidentiary hearing took place during March-April 2023. In August 2023, the undersigned magistrate issued a tentative decision, concluding in summary as follows: "The appellant's negotiation tactics were aggressive; but he did not engage in any dishonest, untrustworthy, or improper conduct, either during the negotiations or in his ensuing testimony. The city therefore lacked just cause to terminate the appellant's employment."

B. Recommittal Order

In January 2024, the commission recommitted the appeal to DALA for supplemental proceedings. In its recommittal order, the commission outlined potential "alternate grounds" for disciplining Captain Gallant. Specifically, the commission observed that a rule of the police department obligated officers to "cooperate fully" with departmental investigations. The commission suggested that Captain Gallant may have violated that obligation by refusing to answer questions at his internal affairs interview.

In a thoughtful analysis, the commission explained that constitutional considerations do not necessarily shield an officer from being disciplined for invoking the privilege against self-incrimination. Rather, a public employer is permitted to instruct its employees that they must answer job-related questions and may be terminated for refusing to do so. Such an instruction triggers the following analytical chain reaction: (a) The public employer's threat of termination means that the employee's testimony would count as government-compelled. (b) Prosecutors are not permitted to use government-compelled statements against a defendant. (c) The employee's answers to the employer's questions thus would not be capable of "incriminating" the employee.

(d) It follows that the employee's refusal to answer the employer's questions would not be a proper exercise of the privilege against self-incrimination. (e) As a result, if the employee *does* insist on remaining silent, then he or she may be disciplined for doing so. This line of reasoning flows from *Garrity v. New Jersey*, 385 U.S. 493 (1967), along with other authorities cited in the recommittal order. A nuance of Massachusetts law is discussed later on.

The commission observed that the applicability of the foregoing analysis to Captain Gallant's case hinges on a key point of fact. The analytical machinery that subjects an employee to discipline for remaining silent is set in motion only if the employer instructs the employee that he or she must answer questions and may be disciplined for declining to do so.[71] In the words of the recommittal order, the pivotal question is whether the city "place[d] Captain Gallant on notice prior to, or at the start of, the . . . internal affairs . . . interview that his failure to testify . . . could result in an adverse employment action, including possible dismissal."[72]

The commission therefore directed DALA to "ascertain[] the precise factual circumstances surrounding the . . . internal affairs investigative interview and Captain Gallant's invocation of the privilege against self-incrimination on both that occasion and subsequently during the . . . local disciplinary hearing." The commission identified several key pieces of evidence and enumerated six specific questions reproduced in part III *infra*.

II. Supplemental Findings

The numbering of the following findings picks up where those of the August 2023 tentative decision left off.

[71] On this point, see especially *United States v. Palmquist*, 712 F.3d 640, 645 (1st Cir. 2013); *United States v. Indorato*, 628 F.2d 711, 716 (1st Cir. 1980); *Aguilera v. Baca*, 510 F.3d 1161, 1173 (9th Cir. 2007).

[72] This passage of the recommittal order also wondered whether Captain Gallant was advised that he could be disciplined for failure to "cooperate fully." On this point, see *infra* p. 12.

32. Policy number 4.01 of the Methuen police department is titled "Professional Standards." In section VI(C)(e)(i), the policy says:

> All department employees . . . [must] respond fully and truthfully to all questions regarding their performance of official duties . . . (that they do not reasonably believe would tend to incriminate themselves for an alleged violation of the law), and any failure to answer completely and truthfully to such inquiries may be punished by appropriate disciplinary action, including separation from the department if appropriate.

(Exhibit SB.)

33. During January-February 2022, Chief of Police Scott McNamara sent Captain Gallant three letters about the department's internal affairs investigation. The first letter announced the investigation's pendency. The second letter reported that the investigation would take more than thirty days; it added that the investigation "has expanded to include . . . conspiracy to commit uttering." The third letter scheduled the investigative interview of Captain Gallant. Each of the three letters quoted section VI(C)(e)(i) of the professional standards policy. Each letter added:

> "You have the right to remain silent" about any of your actions that involve criminal conduct, although you may be subject to disciplinary action by the City of Methuen in the form of discharge for your failure to answer material and relevant questions relating to the performance of your duties as an employee of the Methuen Police Department.

(Exhibits S1-S2.)

34. Upon receiving Chief McNamara's third letter, Captain Gallant responded through his attorney. He indicated that he was likely to invoke the privilege against self-incrimination in response to substantive questions at the interview, explaining:

> [T]he United States Attorney is conducting a grand jury probe into possible violations of State and Federal law within the Methuen Police Department. Captain Gallant has received a target letter . . . regarding possible violations of State and Federal Law . . . .

Captain Gallant's counsel also noted his understanding that the police department was conducting "a potential criminal probe." He observed that "while a public employer has the power to compel the testimony of a public employee . . . such testimony cannot be compelled under threat of discharge absent a grant of immunity." (Exhibits SD, SF.)

35. The internal affairs interview took place on March 22, 2022. The interviewer assigned by Chief McNamara was a civilian investigator, Lawrence Smith. The interview's procedural aspects were led by Lieutenant Eric Ferreira. At the beginning of the interview, Lieutenant Ferreira read from a preprinted document titled "Internal Investigation Rights Form," which stated in part:

> You are hereby ordered . . . to participate in this investigative interview by appearing for the interview and answering each question . . . ; and your failure to comply with this requirement shall subject you to discipline, up to and including termination . . . . If you are compelled to answer any questions during the interview, and you answer, your answers cannot be used against you in a subsequent criminal prosecution.
>
> You are entitled to exercise your right against self-incrimination . . . . You will not be disciplined for invoking your right against self-incrimination under the 5th Amendment and under Article 12 at any time during this investigation . . . .
>
> Your failure to answer questions in the interview shall be considered failure to obey and comply with an order and could result in your receiving disciplinary action . . . unless you opted not to answer based on your assertion of your right against self-incrimination.

(Exhibits S2, S3.)

36. Lieutenant Ferreira asked Captain Gallant to sign a copy of the internal investigation rights form. After a short break, Captain Gallant's attorney sought and obtained further clarity:

> MR. CORMIER: There's a sentence at the end of the first paragraph that says, "If you are compelled to answer any questions during the interview, and you answer, your [answers] cannot be used against you in a subsequent criminal prosecution." Now, I don't understand that you've

> granted him immunity, so I don't understand what that sentence means. My understanding is that if he were to answer questions during this interview, they *could* be used against him in a subsequent criminal prosecution.
>
> LT. FEREIRA: When we say "compelled," that would be . . . if we were to grant you immunity, if we were to get it granted by the [district attorney] and the [Attorney General], and come back to you . . . . That would be the compulsion, at that point, once you have immunity. . . . At this point there is no immunity, and anything you answer voluntarily can still be used.

Mr. Gallant then signed the form. (Exhibits S2, S3.)

37. In response to Mr. Smith's questioning, Mr. Gallant provided basic information about his name, rank, and years of experience. Mr. Smith moved on to a nonlinear array of questions about roughly the following topics: Mr. Gallant's training; the compensation of Methuen's superior officers; the negotiations surrounding the 2017 CBA; and Mr. Gallant's testimonies before the OIG and the arbitrator. Mr. Gallant declined to answer each question, invoking his privilege against self-incrimination each time.[73] After a break, Mr. Smith turned to questions about allegations not presented in these proceedings.[74] Mr. Gallant continued to

[73] Mr. Gallant's first invocation explained his essential position: "Because I am accused of behavior that could form the basis of a criminal action against me, and . . . my responses could tend to implicate me in criminal action, I assert my right . . . to remain silent . . . unless and until I receive transactional immunity." (Exhibit S3.) The recommittal order did not train the spotlight on the seriousness or unseriousness of the risk to Captain Gallant that any or all of his substantive answers would incriminate him. The case law is forgiving to suspects in this regard. The privilege against self-incrimination protects not only guilty people, but also those whose testimony would be principally exculpatory. *See Ohio v. Reiner*, 532 U.S. 17, 21 (2001). The privilege covers statements that would "furnish a link in the chain of evidence needed to prosecute the claimant." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). A suspect's statements also are protected if they "could . . . lead to other evidence that could be used in a criminal prosecution." *Attorney Gen. v. Colleton*, 387 Mass. 790, 794 (1982). A witness invoking the privilege cannot be compelled to testify unless it is "perfectly clear, from a careful consideration of all the circumstances . . . that the answer(s) cannot possibly have [a] tendency to incriminate." *Malloy v. Hogan*, 378 U.S. 1, 12 (1964). *See Commonwealth v. Leclair*, 469 Mass. 777, 782 (2014); *Commonwealth v. Borans*, 388 Mass. 453, 456 (1983); *Powers v. Commonwealth*, 387 Mass. 563, 564-65 (1982). It is also worth noting that the city in these proceedings vigorously opposed any probing of the specific worries that animated Captain Gallant's invocations. The city noted in part that Captain Gallant was advised by his attorneys at the interview; it reasoned that testimony about Captain Gallant's reasons for declining to answer particular questions would tend to tread on his attorney-client privilege.

[74] *See* Civil Service Commission, *Investigation Regarding the Prior Use of Non-Civil Service Intermittent Police Officers in the Methuen Police Department*, No. I-20-182 (2023).

invoke the privilege on a question-by-question basis for the remainder of the interview. (Exhibit S3.)

38. Chief McNamara issued an internal affairs investigative report on April 14, 2022. Thereafter, the city's mayor notified Captain Gallant that a hearing would take place to determine whether discipline was warranted against him. The mayor described the forms of wrongdoing attributed to Captain Gallant, focusing on Captain Gallant's negotiating tactics on the union's behalf, his testimony to the OIG, and his testimony to the arbitrator. The mayor wrote that, at the disciplinary hearing, Captain Gallant would be permitted to present evidence and to be represented by counsel. The mayor did not indicate that Captain Gallant would be asked to testify. (Exhibit SE.)

39. The disciplinary hearing took place before a hearing officer on May 18, 2022. After opening statements and testimony from Chief McNamara, the city solicitor called Captain Gallant to testify. The city solicitor explained that he had prepared a list of "subject areas that . . . we believe may be covered under the pending federal investigation." He stated that his intention was to enable Captain Gallant to "assert[] his privilege without having to delve into every subsidiary question within each subject." The city solicitor proposed to read each of the items on the list into the record, adding that Captain Gallant would be "free to assert his privilege . . . as to those subject areas." The hearing officer and Captain Gallant's counsel assented. (Exhibit S4.)

40. The city solicitor asked Captain Gallant a few background questions, which Captain Gallant answered. The city solicitor then asked: "Are you currently a target of a federal criminal investigation?" In response, Captain Gallant's counsel stipulated "that there is a grand jury investigation going on." Thereafter, the city solicitor read through each of the topics on his

list; he asked Captain Gallant whether he was asserting his privilege against self-incrimination as to questions about each topic. Captain Gallant said yes. In the first iteration of these proceedings, the city solicitor's list was admitted as exhibit C18. (Exhibit S4.)

41. In a June 2022 report, the hearing officer found that just cause existed to discipline Captain Gallant. The mayor promptly adopted that recommendation and terminated Captain Gallant's employment. The termination letter outlined the findings of wrongdoing on which the termination was based: it discussed Captain Gallant's negotiation tactics at multiple junctures, his testimonies to the OIG and the arbitrator, and the OIG's recommendations. The letter did not suggest that Captain Gallant's refusal to answer questions at the interview and hearing had been improper. The city also has not so suggested since. (Exhibit S8.)

III. Supplemental Discussion

The discussion that follows tracks the six questions enumerated by the commission in its recommittal order.

> *1. Did Chief McNamara or another City representative place Captain Gallant on notice prior to, or at the start of, the March 22, 2022 internal affairs (IA) interview that his failure to testify or cooperate fully could result in an adverse employment action, including possible dismissal?*

The city communicated with Captain Gallant on multiple occasions about his obligations at the internal affairs interview. Arguably, a number of the city's statements were ambiguous.[75] But as a whole, in context, and in sequence, the city's communications left no room for doubt. The police department's professional standards allowed officers to be disciplined for remaining silent only in the case of "questions . . . that they do not reasonably believe would tend to

[75] In particular, the police chief's three letters stated: "[Y]ou may be subject to disciplinary action . . . for your failure to answer material and relevant questions . . . ." And the portion of the internal investigation rights form that perplexed Captain Gallant's attorney indicated that he might be "compelled to answer . . . questions during the interview."

incriminate them[].” Chief McNamara’s letters acknowledged that provision. The internal investigation rights form stated unmistakably: “You will not be disciplined for invoking your right against self-incrimination under the 5th Amendment and under Article 12.” To the extent that any confusion could have persisted, Lieutenant Ferreira dispelled it by announcing that Captain Gallant was not being “compelled” to answer questions and was receiving no “immunity.”

All in all, the city informed Captain Gallant clearly that its investigative process did not require him to answer incriminating questions. That message entailed several concurrent consequences. By invoking the privilege against self-incrimination, Captain Gallant was not “failing to cooperate” with the internal investigation. He was not violating his obligations as an officer. And the imposition of discipline on him for his invocation of the privilege would be impermissible as a constitutional matter. *See supra* pp. 3-4.[76]

It may be useful to observe that the city’s course of action was sensible. In an important respect, Massachusetts constitutional law has departed from the *Garrity* analysis described earlier. Under the *Garrity* cases, when public employees are forced to answer questions, they are entitled only to “use” immunity, meaning that prosecutors cannot use the employees’ answers as evidence. But in Massachusetts, public employees have the right to refrain from answering incriminating questions unless they are awarded “transactional” immunity. Such immunity forecloses any prosecution based on the offenses that an employee is compelled to speak about, whatever the evidence supporting the prosecution may be. *See Furtado v. Town of Plymouth*, 451 Mass. 529 (2008); *Massachusetts Parole Bd. v. Civil Serv. Comm’n*, 47 Mass. App. Ct. 760

[76] To spell out the chain of reasoning that leads to the latter conclusion: because the city did not require Captain Gallant to answer incriminating questions, his answers to such questions would *not* have been government-compelled; they *could* have been used against him at a criminal trial; so his refusal to provide such answers *was* a proper exercise of the privilege.

(1999); *Carney v. City of Springfield*, 403 Mass. 604 (1988). It is not entirely clear whether the city even had the authority to grant Captain Gallant transactional immunity and thus to compel him to testify. *See Commonwealth v. Dormady*, 423 Mass. 190, 198 (1996). If the city had that authority, a grant of transactional immunity would have entailed an obvious downside.[77]

As it turns out, the police department was attuned to this issue. Section VI(C)(e)(ii) of its professional standards policy stated:

> When a department employee . . . is ordered . . . to answer questions . . . under a threat of the penalty of discipline . . . that employee may be entitled to transactional immunity from criminal prosecution by operation of law for any criminal offenses to which the compelled testimony relates.
>
> Therefore, investigators must be extremely cautious when interviewing employees when there is a potential crime involved . . . in order to stay clear of this unintended consequence of coercing statements which may trigger transactional immunity for the subject of the coerced statements.

Presumably the same considerations prompted Lieutenant Ferreira to say that the police department would need to confer with county and state prosecutors before Captain Gallant could receive immunity. In short, the city's choice to refrain from requiring Captain Gallant to answer incriminating questions was both intentional and well-reasoned.

The recommittal order's first question asks in part whether Captain Gallant was notified "that his failure to . . . cooperate fully" would warrant discipline. The answer to this element of the question is yes. But the city made clear to Captain Gallant that his invocation of the privilege against self-incrimination would not be considered a "failure to . . . cooperate fully." And the city acknowledges that Captain Gallant's cooperation was satisfactory in all other ways. The

[77] Apparently, even employers operating under *Garrity* may choose to instruct employee interviewees "that they may remain silent, that they will not be fired solely because they exercise their right to remain silent, and that any statements they make can be used in a criminal proceeding." *Jackson v. District of Columbia*, 327 F. Supp. 3d 52, 62 n.4 (D.D.C. 2018). *See also Evangelou v. District of Columbia*, 63 F. Supp. 3d 96, 100-01 (D.D.C. 2014), *aff'd*, 639 F. App'x 1 (D.C. Cir. 2016). It is also conceivable that the city may have viewed the option of pursuing negative inferences from Captain Gallant's invocations as preferable to the prospect of him actually testifying. *See generally Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 826-27 (2006).

warning to Captain Gallant that his failure to cooperate would be disciplinable is therefore immaterial to the issues presented here.

> *2. During the attempted IA interview, did an agent of the City attempt to follow the same, or a substantially similar, outline of questions as that introduced as City Exh. 18 during the DALA proceedings?*

No.

> *3. Did any representative of the City or MPD advise Capt. Gallant that anything he stated during the interview could, or could not, be used against his interest in a subsequent criminal prosecution of him?*

The city advised Captain Gallant that his statements at the interview *could* be used against him in a subsequent criminal prosecution. That was a necessary corollary of the city's decision to refrain from requiring Captain Gallant to answer incriminating questions.

> *4. Did any representative or agent of the City or MPD demand that Gallant relinquish or waive immunity from prosecution for statements he might make in the context of a compelled investigative interview?* See Commonwealth v. Dormady*, 423 Mass. 190, 193 (1996);* Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982).*

No. However, the city did not require Captain Gallant to answer incriminating questions. As a result, if he *had* answered such questions, his answers would *not* have been immune from being used against him in a criminal prosecution.

> *5. Did Capt. Gallant or his representative explicitly request any form of immunity as a condition of Capt. Gallant's participation in the investigative interview?*

In his letter in advance of the internal affairs interview, Captain Gallant's attorney expressed the understanding that incriminating testimony could not be compelled from Captain Gallant "absent a grant of immunity." At the interview itself, Captain Gallant stated that he would invoke the privilege against self-incrimination "unless and until I receive transactional immunity." It would be a stretch to view these statements as explicit requests for immunity.

6. Is there any evidence that Capt. Gallant might have been misled about either the content or consequences of the Garrity *immunity he likely enjoyed upon commencement of the March 22 investigative interview?*

The city informed Captain Gallant that he was not required to incriminate himself and that he would *not* enjoy *Garrity* immunity. Captain Gallant was not misled about these matters.

IV. Conclusion

The matter is returned to the commission with this supplemental tentative decision and an accompanying supplemental case file.

Division of Administrative Law Appeals

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate